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# "WITH A VERY GREAT BLAME ON OUR HEARTS": REPARATIONS, RECONCILIATION, AND AN AMERICAN INDIAN PLEA FOR PEACE WITH JUSTICE

*William Bradford*

## *I. Introduction*

In a post-September 11th era riven by ethno-nationalism, territorial revanchism, and religious terror, the United States has assumed the mantle of leadership in articulating the moral, political, and legal norms that will inform reconstruction of global security architecture.<sup>2</sup> Defense of human rights,<sup>3</sup> whether motivated by its contribution to the calculus of national

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1. The Lakota Indian, "American Horse," commented on the December 29, 1890, Massacre at Wounded Knee where U.S. Army troops of the 7th Cavalry slaughtered over 300 peaceful Indian women and children after a fruitless search for weapons in their encampment:

The women as they were fleeing with their babes were killed together, shot right through, and the women who were very heavy with child were also killed. All the Indians fled in these three directions, and after most all of them had been killed a cry was made that all those who were not killed or wounded should come forth and they would be safe. Little boys who were not wounded came out of their places of refuge, and as soon as they came in sight a number of soldiers surrounded them and butchered them there. Of course we all feel very sad about this affair. I stood very loyal to the government all through those troublesome days, and . . . being so loyal to it, my disappointment was very strong, and I have come to Washington with a very great blame on my heart . . . .

WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 253 (Roy L. Brooks ed., 1999) [hereinafter BROOKS].

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2. Whereas bipolarity rendered forcible humanitarian intervention practically moot, with every major post-Cold War deployment the United States has proclaimed defense of human rights a moral and legal imperative. See, e.g., David Hoffman, *Crisis in the Gulf, Iraq's Invasion of Kuwait*, WASH. POST, Aug. 8, 1990, at A1; Ann Devroy, *Clinton Lobbies for Troops*, WASH. POST, Nov. 26, 1995, at A29.

3. A precise definition of "human rights" is elusive. However, the "International Bill of Rights" is a term informally employed to denote the various instruments that recognize a series of rights legally enforceable against state and, arguably, non-state actors. The core components are the U.N. Charter, which commits member-states to promote "economic and social . . . development . . . without distinction as to race, sex, language or religion," U.N. CHARTER art.

interests or as an independent ethical objective,<sup>4</sup> is invoked by the United States and its allies as a basis for ever-more frequent forcible interventions in the affairs of sovereign states,<sup>5</sup> and although the world remains beset with a multitude of oppressions, with intervention by intervention the United States gives agents of tyranny pause while reinforcing its claim as moral, as well as political and military, hegemony.<sup>6</sup>

Ironically, by virtue of its self-anointment as Global Lord Protector of the oppressed,<sup>7</sup> the United States has fashioned itself an increasingly appropriate

55, 56; Universal Declaration of Human Rights, G.A. Res. 217(111)(A), U.N. Doc. A/810 (1948) [hereinafter UDHR], which amplifies the Charter; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR], which prohibits states from denying ethnic, religious, or linguistic minorities the "right . . . to enjoy their own culture, to . . . practice their own religion, or to use their own language," *id.* art. 27; International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49-52, U.N. Doc. A16316. 993 U.N.T.S. 3, 6 I.L.M. 360 (1966) [hereinafter ICESCR], which recognizes that "(a)ll peoples have the right . . . to freely pursue their economic, social and cultural development," *id.* art. 1.

4. The history of U.S. interventionism is marked by brief periods of messianic zeal calculated to radically reshape the geopolitical landscape on the premise that "right is more precious than peace," separated by long stretches of isolationism and aloofness that comport with the warning, delivered by President George Washington in his Farewell Address, to steer clear of "entangling alliances." *THE LIMITS OF MILITARY INTERVENTION*, 19 (Ellen P. Stern, ed., 1977).

5. The U.N. Charter explicitly provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state" and that nothing authorizes the U.N. "to intervene in matters which are essentially within the domestic jurisdiction of any state[.]" U.N. CHARTER, art. 2, para. 4, 7. However, Articles 1, 55, and 56, read together, establish a primary purpose to promote, protect, and defend human rights. U.N. CHARTER, art. 1 (stating, in preamble paragraph, the purpose of the U.N. to "reaffirm faith in fundamental human rights"); U.N. CHARTER, art. 55 (stating the U.N. "shall promote . . . universal respect for, and observance of, human rights"); U.N. CHARTER, art. 56 (pledging members to act "for the achievement of the purposes set forth in Article 55."). Given the freedom of maneuver the text presents, arguments defending and criticizing humanitarian intervention abound. *See, e.g.,* Marc Weller, *The Rambouillet Conference on Kosovo*, 75 INT'L AFF. 211 (1999) (positing arguments for and against intervention); FERNANDO R. TESON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1988) (same).

6. *See generally* ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984) (discussing the concept of "hegemony," or systemic dominance, in international relations).

7. U.S. intervention can be framed as building nations in its own divine image inasmuch as American missionaries of the secular faith of liberalism are dispatched to Bosnia and Kosovo to save heathen ethnonationalists with the blessed sacraments of democratic institutions, legal regimes, and free markets. William Bradford, *What America Has Written: Washing Our Hands in the Balkans With Dayton and the Kosovo Peace Plan*, 7 COLUM. J. E. EUR. L. 350 (2002).

subject for scrutiny.<sup>8</sup> Even as the progressive development and codification of human rights norms keeps pace with the increasing frequency of its humanitarian interventions, the United States clings tenaciously to a cabined interpretation of the rights inhering in individuals and groups.<sup>9</sup> Even more challenging to its elevated moral posture is the dawning sense that, rather than auto-immunizing treatment of its own domestic ethnic, racial, and political groups, each successive intervention raises the bar of expectations<sup>10</sup>

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Linkages between aid and improvement in human rights protection to U.S. legislated-standards force conversion to the modern secular religion of liberalism. See EDWIN M. YODER JR., *THE HISTORICAL PRESENT: USES AND ABUSES OF THE PAST* 56 (1997) ("[W]e . . . preach on the subject of basic human rights to those elsewhere who still sit in darkness. It is among our great American susceptibilities to cherish our myths of exceptionalism and special virtue.").

8. Perceptions of inconsistency have attached to U.S. management of human rights issues as evidenced by the ejection of the United States from the United Nations Human Rights Commission. Marc Lacey, *U.S. Attacks Rights Group for Ousting It*, N.Y. TIMES, May 5, 2001, at A4.

9. Although they clearly accept that civil and political rights have penetrated the "veil of domesticity" that long preserved sovereign prerogatives and denied non-states standing as subjects of international law, Western states resist rights proliferation beyond the conceptual boundaries of "first-generation" civil and political rights to "second-generation" economic and social rights and "third-generation" group rights. See Dean B. Suagee, *Self-Determination for Indigenous Peoples at the Dawn of the Solar Age*, 25 U. MICH. J. L. REFORM 671, 683-84 (1992) (describing eighteenth-century diminution of state sovereignty to tap individuals as subjects of international law, post-World War II introduction of civil and political rights secured by state nonintervention, and late-twentieth century affirmative protection of group rights); see also CATHERINE BROLMANN ET AL., *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 121 (1993) (enumerating self-determination, development, and health as third-generation rights); Feisal Hussain Naqvi, *People's Rights or Victims' Rights: Reexamining the Conceptualization of Indigenous Rights in International Law*, 71 IND. L. REV. 673, 713 (1996) (adding "international peace and security"). First-generation commitments impede fair consideration of claims to collective rights central to the religion, culture, and sociopolitical organization of minority groups. See David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 424 (1994) [hereinafter Williams, *Legitimation*] ("the very [liberal democratic] mechanisms that make cohabitation possible for some cultures — majoritarianism, the franchise, and individual rights — make cohabitation impossible for others."); THE RELEVANCE OF CULTURE 44 (Morris Frehlich ed., 1989) [hereinafter FREHLICH] (noting that indigenous social orders define rights as public goods). Moreover, in a West just beginning to consider that second- and third-generation rights may fall within the penumbra of obligations enforceable against states, the United States is the foot-dragger, limiting rights to those necessary to constrain the government in favor of individuals. Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1783-84 (2000); see also Natsu T. Saito, *Beyond Civil Rights: Considering "Third Generation" International Human Rights Law in the United States*, 28 U. MIAMI INTER-AM. L. REV. 387, 397-98 (1997) (noting U.S. hostility to third-generation rights).

10. See ATHANASIA SPILIOPOULOU AKERMARK, *JUSTIFICATIONS OF MINORITY PROTECTION*

while calling into question whether the issue of human rights is to be defined solely by reference to lands beyond American shores or whether a more Janus-faced approach is in keeping with the American mission.<sup>11</sup> While it has staked an unclouded claim as *primus inter pares* in preventing the most egregious of *international* human rights violations, the United States remains less an object of emulation than a subject itself for intervention, albeit in another form, notwithstanding its belated recognition of its *domestic* human rights obligations.<sup>12</sup> Although the United States is indubitably an exceptional nation,<sup>13</sup> blessed with virtues too obvious and numerous to require cataloguing in this Article,<sup>14</sup> and although it is a beacon

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IN INTERNATIONAL LAW 15 (1997) (noting that a series of post-Cold War interventions has stimulated more expansive considerations of human rights issues).

11. In Roman mythology, the two-faced Janus, god of doorways, beginnings, and the rising and setting of the sun, is represented as having one face turned in either direction to remain perpetually aware of polarities and of contrasting or complementary characteristics. AMERICAN HERITAGE DICTIONARY 685 (2d coll. ed. 1982).

12. Not until the shocking discovery of the Nazi Holocaust in 1945 were U.S. policymakers impelled to consider, by analogy, the human rights dimensions of the treatment of domestic minority racial and ethnic groups in the United States. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 571 (1984) [hereinafter Delgado, *The Imperial Scholar*]. Even then, major legislative and judicial acts of the 1950s and 1960s calculated to improve domestic treatment of minority racial and ethnic groups were influenced less by the reenvisioning of minority groups as repositories of rights than by the fact that desegregation enabled the United States to win support for its Cold War policies from non-white peoples in Third World nations. See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 80-93 (1988). Indeed, President Clinton suggested that de facto resegregation, triggered by market rather than legal forces, may detract from the U.S. capacity to police global democracy and enforce human rights if the international community comes to view the United States as insincere in its commitment to equality and justice. See Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L. J. 477, 516-17 (1998) [hereinafter Yamamoto, *Racial Reparations*].

13. Critics of U.S. policies often reference the country's exceptionalism as an obnoxious attitudinal self-perception, lacking substance. See, e.g., Ibrahim J. Gassama, *Transnational Critical Race Scholarship: Transcending Ethnic and National Chauvinism in the Era of Globalization*, 5 MICH. J. RACE & L. 133, 134 (1999) (urging critical scholars to "puncture the self-satisfied attitude of [U.S.] national exceptionalism . . . that now so crudely bestrides the world"); see also Kevin Cullen, *On Eve of Bush Visit, U.S. Allies in Europe Register Their Disgust*, BOSTON GLOBE, Jun. 12, 2001, at A31 (describing frustration of European states with the United States' refusal, despite near-international consensus against capital punishment, to ban the practice). Nonetheless, one can proclaim the historical accomplishments and contemporary leadership of the United States while identifying issue-areas where the norms it champions do not adequately guide its practices. Exceptionalism neither implies perfection nor obviates the struggle toward it.

14. The collective and ongoing authorship of the U.S. Constitution, the struggles to create

to which the world turns for guidance and enlightenment, any claims of American infallibility are belied by its history, and uncertainties as to the motivations for and comprehensiveness of its global commitment to human rights are compounded by reference to unsettled issues closer to home.<sup>15</sup> In short, the compelling force driving U.S. humanitarian interventionism is ultimately a function not only of its military power but of the moral coherence and consistency of the standards to which it is itself willing to adhere. Should the United States commit to enhanced promotion and protection of the rights of its own minority groups, persuading others to follow suit may be less challenging.

### A. Age of Apology

Recently the term "Age of Apology" was coined to denote a global milieu wherein states, corporations, and other actors are reconciling contemporary aspirations as to the promotion and protection of human rights with past records of egregious human injustice.<sup>16</sup> Germany,<sup>17</sup> Australia,<sup>18</sup> Canada,<sup>19</sup>

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and preserve the Union in the Revolutionary and Civil Wars, the progressive articulation of liberal republican values sustaining the great democratic experiment, and the defense of global freedom are but a few of the treasures of the U.S. cultural patrimony in which all Americans can take pride and against which other nations must compare their accomplishments.

15. Contradictions between U.S. expectations for the treatment of minority groups beyond its borders and treatment of its own minority groups have not escaped the notice of tyrants. See BROOKS, *supra* note 1, at 262 (noting U.S. policymakers ignored human rights implications of domestic treatment of Indians until Hitler invoked nineteenth century U.S. practice of ethnic cleansing as justification for Nazi invasion of Czechoslovakia and Poland to gain *Lebensraum*). For a broader discussion of the politicization of linkages between domestic and international human rights and the influence of these linkages on international relations, see THOMAS BORSTELMANN, *THE COLD WAR AND THE COLD LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* (2001).

16. See BORSTELMANN, *supra* note 15, at 3, 6-7 (defining "human injustice" as "violation or suppression of rights . . . recognized by international law, including . . . genocide; slavery; extrajudicial killings; torture and other cruel or degrading treatment; arbitrary detention; rape; denial of due process of law; forced refugee movements; the deprivation of means of subsistence; the denial of universal suffrage; and discrimination . . . based on race, sex, descent, religion, or other . . . factors").

17. In 1949 West Germany committed to *Wiedergutmachung*, the principle that "when a great State . . . has . . . victimized and murdered a group . . . on the basis of group membership, that State . . . has an unquestionable moral obligation to compensate that group materially." See Robert Westley, *Many Billions Gone: Is It Time To Reconsider The Case for Black Reparations?*, 40 B.C. L. REV. 429, 456 (1998). Accordingly, in 1952 West Germany enacted laws providing more than \$40 billion in compensation to Jewish victims, including their heirs. See Irma Jacqueline Ozer, *Reparations for African Americans*, 41 HOW. L. J. 479, 481 n.17 (1998). In May 2001, slave labor claims were dismissed with prejudice in an executive

New Zealand,<sup>20</sup> the United Kingdom,<sup>21</sup> France,<sup>22</sup> South Africa,<sup>23</sup> Austria,<sup>24</sup> religious denominations,<sup>25</sup> and multinational corporations<sup>26</sup> have offered

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agreement with the United States providing per capita payments of \$6700. Geir Moulson, *Vote Clears Way to Pay Slave Laborers \$4.6b*, BOSTON GLOBE, May 31, 2001, at A12; see also *In re Nazi Era Cases Against German Defendants Litigation*, 129 F. Supp. 2d 370, 382 (D.N.J. 2001) (upholding, on basis of U.S. Statement of Interest stating suit presented nonjusticiable political questions and that the United States had foreign policy interest in global settlement, mechanism as exclusive remedy and forum). For a detailed discussion of the Holocaust reparation movement, see Michael J. Bayzler, *Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11 (2002). For a discussion of another outstanding claim for redress for German acts of (neo)colonialist injustice, see Sidney L. Harring, *German Reparations to the Herero Nation*, 104 W. VA. L. REV. 393, 396-97, 400 (2002) (discussing efforts of Herero people to advance claim against Germany for reparations for colonialism, land expropriation, and genocide).

18. In 1976 Australia granted its Aboriginal population 10,000 square miles in partial compensation for historical seizures. HENRY REYNOLDS, *LAW OF THE LAND* 31-54 (1987). However, despite the 1991 formation of a national Council For Aboriginal Reconciliation, no apology and no redress has issued for the removal of Aboriginal children from their families or the systematic destruction of Aboriginal culture. Clyde H. Farnsworth, *Australians Resist Facing up to Legacy of Parting Aborigines from Families*, N.Y. TIMES, Jun. 8, 1997, at A18. Still, while some Australians deride a "black armband" view of history, many march annually on a national "Sorry Day." Michael Christie, *Australia's Stolen Generation Makes the Grade in UK*, REUTERS, Jul. 12, 2001.

19. In 1996 Canada apologized for the cultural and physical destruction of its First Nations and in 1998 conveyed limited territorial autonomy to the Nisga'a Tribe. See Anthony DePalma, *Canada Pact Gives a Tribe Self-Rule for the First Time*, N.Y. TIMES, Aug. 5, 1998, at A1. In 1999 Canada executed a plan partitioning the Northwest Territories and marking the eastern half for de facto indigenous control. See *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* ch. 29 (1993) (Can.) (outlining plan).

20. See *infra* notes 674-87 and accompanying text.

21. In 1995 Queen Elizabeth apologized to the Maori for nineteenth-century British-inspired genocide and land theft. See *Queen Gives Land Back to Maoris*, ATLANTA J., Nov. 3, 1995, at A20 (noting return of 39,000 of 1.25 million acres confiscated in 1863 and payment of \$42 million).

22. In 1992, President Chirac acknowledged French complicity in the deportation of 76,000 Jews of French nationality to Nazi death camps. Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER, RACE & JUST. 47, 48 (1997) [hereinafter Yamamoto, *Race Apologies*].

23. See *infra* notes 661-73 and accompanying text.

24. In October 2000 the Austrian government established a \$380 million fund to compensate 150,000 elderly individuals, now living in the United States and Eastern Europe, forced into slave labor by the Nazis during World War II. ASSOCIATED PRESS NEWSWIRE, Oct. 6, 2000.

25. Joining with the Australian government, the Catholic Church apologized for removing Australian aboriginal children from their families. See REYNOLDS, *supra* note 18, at 31-54. In the United States, the Baptist Church apologized for its nineteenth century defense of slavery, while the Lutheran Church apologized for its history of anti-Semitism. Eric K. Yamamoto,

public apology and financial proposals to formally disown past acts and repair damages.<sup>27</sup> Not to be undone, the United States and its political

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*People of Color Speak: Healing Our Own*, 20 B.C. THIRD WORLD L.J. 101, 108 (2000).

26. See JEAN ZIEGLER, *THE SWISS, THE GOLD AND THE DEAD: HOW SWISS BANKERS HELPED FINANCE THE NAZI WAR MACHINE* 282 (John Brownjohn trans., 1998) (detailing compensation of Jewish depositors denied access to Swiss accounts); Paul Shepard, *Group to Seek Slavery Reparations: Large-Scale Lawsuit Planned to Acquire Compensation for Black Descendants*, WASH. POST, Nov. 5, 2000, at A11 (noting Aetna apology for selling policies in 1850s that reimbursed slave owners for death of slaves); Yamamoto, *Race Apologies*, *supra* note 22, at 68-86 (cataloging corporate apologia). Still, corporate responsibility is as difficult to fix as that of States: heretofore, no U.S. court has awarded damages for corporate participation in human rights violations overseas. See, e.g., *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 462-66 (D.N.J. 1999) (dismissing suit alleging corporate responsibility in torture of slave laborers); *Roe v. Unocal*, 70 F. Supp. 2d 1073 (C.D. Cal. 1999) (precluding, under Act of State Doctrine, adjudication of claim that U.S. company in joint venture with state employed slave labor). But see *Wiwa v. Royal Dutch Petroleum Corp.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (subjecting foreign corporation accused of overseas human rights violations to personal jurisdiction does not violate due process where significant contacts are maintained); *Doe v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002) (holding that domestic liability attaches to the conduct of private corporations for violations of international legal norms of *jus cogens*, including forced labor, genocide, and war crimes).

27. Widespread "validation of public confession" has reduced the cost perpetrators pay in admitting responsibility. Elazar Barkan, *Payback Time: Restitution and the Moral Economy of Nations*, 11 *TIKKUN*, 52, 56 (1996). However, Japan has refused redress for most of its World War II-era atrocities. See F.J. Khergamvala, *Japan Moves Closer to Normal Ties with North Korea*, *HINDU* (India), Apr. 28, 2000, at A1 (listing compensation to Korean "comfort women," treaty of reconciliation with Philippines, and waiver of reparations to China); Tong Yu, *Reparations for Former Comfort Women of World War II*, 36 *HARV. INT'L L.J.* 528, 538 (1996) (Japan is "not . . . a trusted member of the Asian . . . communit[y.]"). Japan has also precluded justice for U.S. POWs brutalized during the Bataan Death March and subsequent corporate slave labor. LINDA GOETZ HOLMES, *UNJUST ENRICHMENT* (2001). Litigation is stymied by a treaty precluding compensation. See *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 948 (N.D. Cal. 2000) [hereinafter *Japanese Labor*] (relying on Treaty of Peace with Japan, art. 14(b), 3 U.S.T. 3169 (1951), as absolute bar to claims and finding only the United States has standing under Treaty). Although various States have tolled statutes of limitations, see, e.g., CAL. CIV. PROC. CODE §354.6(c) (tolling limitations period for slave labor claims until 2010), because the question of the effect of the Treaty is a matter of the federal common law of international relations, Japanese corporate defendants are entitled to removal. *Japanese Labor*, 114 F. Supp. 2d at 940; see also Russell A. Miller, *Much Ado, But Nothing: California's New World War II Slave Labor Law Statute of Limitations and its Place in the Increasingly Futile Effort to Gain Compensation from American Courts*, 23 *WHITTIER L. REV.* 121 (2001). Fearing effects on trade, the State Department refuses to press the issue, and Congress refuses to offset the ruling. See Matt Beer, *Powell Agrees: No Compensation for Japanese War-Crime Victims*, *AGENCE FRANCE-PRESSE*, Sept. 9, 2001; Mark Fritz, *Calling Japan to Account*, *BOSTON GLOBE*, May 31, 2001 (noting defeat of bill to permit former U.S. POWs to sue Japanese corporations). Money, however, is not the issue: most POW slave



subdivisions have, within the past decade, made a bold foray into the Age of Apology, expressing formal regret and offering compensation to a number of groups, including Japanese American World War II-era internees,<sup>28</sup> indigenous Hawaiians,<sup>29</sup> Guatemalans,<sup>30</sup> and African American victims of the Tuskegee Syphilis Experiments,<sup>31</sup> Rosewood racial violence,<sup>32</sup> and

laborers "just want those [expletive deleted] Japs to apologize!" Interview with Ed Jackfaert, WWII U.S. P.O.W., in Miami, Fla. (Oct. 16, 1998). For a discussion of the litigation, see Carolyn A. Eilers, Note, Article 14 (b) of the 1951 Treaty of Peace with Japan: Interpretation and Effect on *POW's Claims Against Japanese Corporations*, 11 *TRANSNAT'L L. & CONTEMP. PROBS.* 469 (2001).

28. In 1942, pursuant to Executive Order 9066, all persons of Japanese ancestry resident in designated military exclusion zones in the Western United States were ordered to relocate to internment camps, an action upheld on grounds of military necessity. See *Korematsu v. United States*, 323 U.S. 214, 218, 223 (1944) (upholding internment based on "the judgment of the military . . . and of Congress that there were disloyal members of [the Japanese American] population, whose number and strength could not be . . . ascertained"); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (rejecting constitutional challenges to curfew and exclusion orders predicting support for invading Japanese force); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (upholding finding of military necessity). In 1983 a Commission, revisiting the loyalty question, recommended, inter alia, that Congress offer a national apology and compensate each surviving internee. Sarah L. Brew, *Making Amends for History: Legislative Reparations for Japanese Americans and Other Minority Groups*, 8 *LAW & INEQ.* 179, 187-88 (1989). In 1986 the factual finding upon which E.O. 9066 was predicated was overturned. See *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (finding, in coram nobis petition, that U.S. suppressed information proving Japanese American loyalty). The Civil Liberties Act of 1988, sponsored by Sen. Spark Matsunaga (D-Cal.), finally granted compensation and an apology. Pub. L. No. 100-383, 102 Stat. 903 (1988). "[E]ach eligible individual . . . of Japanese ancestry, or the spouse or a parent of [the same]" alive as of 10 August 1988 and who was relocated, interned, or deprived of property, received \$20,000. 50 U.S.C. app. § 1989b-4(a), (b) (2000). A letter from President Bush accompanying each check stated the following:

A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustice . . . But we can . . . recognize that serious injustices were done to Japanese Americans during World War II. In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have . . . renewed their traditional commitment to the ideals of freedom, equality, and justice[.]

The Office of Redress Administration verified more than 80,000 claims before the sunset date of the Act in February 1999. See 28 C.F.R. 74.1-17 (1994); 50 U.S.C. app. § 1989b-3-9 (2000).

29. See *infra* notes 688-99 and accompanying text.

30. See Richard Chacon, *Guatemalan People Still Waiting for Most Important Apologies: U.S., Rebels Regret Civil War Wars, But Government Has Yet to Speak*, *BOSTON GLOBE*, Mar. 14, 1999, at 1A.

31. See *Apologize but Don't Forget*, *AUSTIN AMERICAN-STATESMAN*, May 16, 1997, at A17 (noting that African American victims denied medical treatment in syphilis study conducted under federal auspices at Tuskegee Institute received compensation and presidential apology).

32. In 1923 the African American community of Rosewood, Florida was immolated by

lending discrimination,<sup>33</sup> prompting one commentator to opine that the United States had gone "apology crazy."<sup>34</sup> The 1997 appointment of a panel<sup>35</sup> tasked to boost racial harmony<sup>36</sup> offered, to African Americans and the indigenous peoples<sup>37</sup> who have inhabited since time immemorial the

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white rioters with the consent of public officials. Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 679 (1996) [hereinafter Minow, *Not Only for Myself*]. In 1994 a claims bill provided redress. Lori Robinson, *Righting a Wrong Among Black Americans, the Debate is Escalating Over Whether an Apology for Slavery is Enough*, SEATTLE POST INTELLIGENCER, Jun. 29, 1997, at E1. House Bill 591 provided nine survivors per capita compensation of \$150,000 and created a scholarship fund for descendants of 1923 inhabitants. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503, 518 (1994). Redress "taught a watching nation about . . . prejudice, violence, and official complicity." MICHAEL D'ORSO, *LIKE JUDGMENT DAY: THE RUIN AND REDEMPTION OF A TOWN CALLED ROSEWOOD* 323 (1996).

33. A class of African American farmers recently settled a suit against the U.S. Department of Agriculture, alleging failure to investigate discriminatory lending practices, for more than \$1 billion. Emily Newburger, *Breaking the Chain*, HARV. L. BULL., Summer 2001, at 19.

34. Yamamoto, *Racial Reparations*, *supra* note 12, at 480 (noting recent "spate of race apologies").

35. Over the past four decades the United States has launched a series of racial advisory commissions. See, e.g., Kerner Commission, Exec. Order No. 11,365, 3 C.F.R. 674 (1966-1970) (established after 1967 urban riots).

36. After a series of conferences, the Advisory Board on Race made the blandly obvious finding that the United States "still ha[s] a long way to go in eliminating racial discrimination[.]" See Julianne Malveaux, *There's Progress on Race But Much to Do*, USA TODAY, Oct. 2, 1998, at 15A; see Exec. Order No. 13,050, 3 C.F.R. 207, 207-08, 62 Fed. Reg. 32987 (1997) (directing President's Advisory Board on Race to "advise the President on matters involving . . . racial reconciliation").

37. Indigenous peoples are "descen[dants of] the populations which inhabited [a] country . . . at the time of conquest or colonisation"). Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, art. 1.1.b, 28 I.L.M. 1382 [hereinafter Convention No. 169]. The 300 million indigenous peoples are almost always numerical minorities in their states of residence, and they invariably lack access to political and economic power. Suagee, *supra* note 9, at 679-80. Although they now "find themselves engulfed by settler societies," indigenous peoples have embedded ancestral roots "much more deeply than the . . . powerful sectors of society living on the same lands[.]" S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (1996); W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350, 350 (1995) ("indigenous peoples . . . resisted . . . assimilation and survived with a distinct . . . cultural identity"). "Indian," "Indians," and "Indian tribe(s)" denote the indigenous inhabitants of the United States in the singular, plural, and collective forms. James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 55 (1996). "Native American" is a ["politically correct"] term . . . [that] perpetuates colonial efforts to subordinate indigenous sovereignty to mere ethnicity, as in the case of African-American or Irish-Americans." Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L.

lands that are now the United States, a vision of hope, as seductive as it was tardy,<sup>38</sup> that a place in the remedial queue might soon open for them.

### B. African American Redress

In recent years the Age of Apology has matured to permit consideration of redress for centuries of slavery<sup>39</sup> and segregation,<sup>40</sup> with African American

REV. 235, 236 n.7 (1997).

38. Legislative efforts to compensate African Americans for slavery began during the Civil War. The Freedmen's Bureau Act of 1865, vetoed by President Andrew Johnson, would have authorized sale of forty acre parcels confiscated from Southern landowners. *See* Act of Mar. 3, 1865, ch. 90, 13 Stat. 507. The Southern Homestead Act opened eighty acre plots in Southern States to settlement. *See* Westley, *supra* note 17, at 460. The Freedmen's Bureau was created to "seize, hold, lease or sell for school purposes" any property of the ex-Confederate States. *See* Act of July 16, 1866, ch. 200, 14 Stat. 173, 174; *see also* Westley, *supra* note 17, at 461-62 (noting that by 1871 the Bureau had built 600 schoolhouses and eleven Historically Black Universities and Colleges). Financial institutions were chartered to make capital available to African American enterprise. *See, e.g.*, Freedmen's Savings and Trust Company Act, ch. 92, 13 Stat. 510 (1865). However, in 130 years the United States has refused further redress for slavery. Rhonda V. Magee, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 882-99 (1993) (detailing history of redress); Vincene Verdun, *Is Affirmative Action Fair? The Only Lonely Remedy*, 59 OHIO ST. L. J. 793, 800-01 (1998) [hereinafter Verdun, *Affirmative Action*] (noting longstanding refusal to redress slavery). As impoverished as is the record of redress for blacks, "[t]he [U.S.] has never . . . establish[ed] an honorable and fair means" of Indian redress. Robert T. Coulter, *The Denial of Legal Remedies to Indian Nations under U.S. Law*, in RETHINKING INDIAN LAW 103, 107 (1982). The Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049 (formerly codified at 25 U.S.C. (70-70(v)(3)) (expired Sept. 30, 1978) trivialized Indian claims. Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992) [hereinafter Newton, *Courts of the Conqueror*]. Other measures of Indian "redress," such as the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (2000) [hereinafter ANILCA], and an apology from the Bureau of Indian Affairs (BIA), are just as hollow. *See* Matt Kelley, *Indian Affairs Head Makes Apology*, ASSOC. PRESS, Sept. 8, 2000 (apologizing for "legacy of racism and inhumanity").

39. From 1619-1865, the enslavement of Africans "hulled empty a whole race. . . Every . . . custom, every ritual, every god, every language, every trace element of . . . identity, [was] wrenched from them and ground into a sharp choking dust." RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 216 (2000) [hereinafter ROBINSON, *THE DEBT*]. Slavery also stole the value-consequences of billions of man-hours of black labor while endowing whites and their descendants with near-inestimable wealth. *See* CLARENCE J. MUNFORD, *RACE AND REPARATIONS: A BLACK PERSPECTIVE FOR THE 21ST CENTURY* 428 (1996) (claiming value of expropriated labor between \$96.3-97 billion).

40. Although the Thirteenth Amendment to the U.S. Constitution legally abolished slavery, informal sociopolitical regimes of segregation and discrimination further instilled inferiority and powerlessness in generations of African Americans. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (incorporating the racial doctrine of "separate but equal" in constitutional law).

scholars and activists the avant garde<sup>41</sup> and the Civil Liberties Act their lodestar.<sup>42</sup> Although efforts at legislative redress<sup>43</sup> have met withering

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41. Claims for redress for the African Diaspora have gained adherents, including the National Coalition of Blacks for Reparations in America (1969), Organization of African Unity (1992), the Pan-African Congress (1993), the National Association for the Advancement of Colored People (1993), the Congressional Black Caucus (1993), and the Southern Christian Leadership Conference (2001). MUNFORD, *supra* note 39, at 420; Mark Niese, *Reparations, Profiling Head Rights Group's Agenda Panelists Cite Pain in Racism*, SUN-SENTINEL (Ft. Lauderdale), Aug. 7, 2001, at 5A. Recently, the Reparations Coordinating Committee (RCC), a consortium of attorneys, politicians, and academics, joined them. Newburger, *supra* note 33, at 19 (noting RCC is considering redress for slavery, segregation, racial profiling, and sentencing disparities). Governments and corporations that benefitted from slavery may be named in a class action, with blacks as a group the plaintiffs. *Id.* at 21-22. Although some members fear compensation would smack too much of "40 acres and a Lexus," RCC seeks "full recognition . . . of how slavery stigmatized, raped, murdered and exploited millions of Africans[.]" *Id.* RCC anticipates "bitter reactions" when it acts in fall 2002. *Id.* at 22 (noting correspondence declaring blacks are not due so much as a "bucket of vomit."); Jamal E. Watson, *Blacks, Jews Found Still to Have Rifts: Reparations for Slavery Said to be an Issue*, BOSTON GLOBE, Aug. 16, 2001, at A3 (noting gap between blacks and Jews — groups often allied on race relations — on reparations). On March 26, 2002, the first class-action lawsuit against private U.S. corporations demanding reparations for slavery was filed by an African-American attorney and descendant of former slaves in the District Court for the Southern District of New York against Aetna, FleetBoston, and CSX, and as-yet to be named additional corporate defendants. See *Reparations Sought From Firms for Slavery*, REUTERS, Mar. 27, 2002, available at <http://www.nytimes.com/reuters/business/business-rights-slavery-lawsuit.html>. The lead plaintiff, Deadria Farmer-Paellmann, has consulted closely over a two-year period with Professor Charles Ogletree of Harvard Law School, one of the founders of RCC. Fred Kaplan & Corey Dade, *Granddad's Words Echo in Slavery Suit*, BOSTON GLOBE, Mar. 31, 2002, at A1, A18. The suit, although it does not directly implicate the conduct of public or individual actors, promises to be closely-watched and hotly debated. *Id.* RCC expects to file a series of reparations suits on behalf of African-American plaintiffs against corporate defendants in Fall 2002. Tatsha Robertson, *Reparations for Slavery: Old Idea Goes Mainstream*, BOSTON GLOBE, Apr. 4, 2002, at A1, A8. On August 18, 2002, supporters of reparations for African Americans will gather in a Millions for Reparations Rally on the National Mall in Washington, D.C. Deborah King, *Reparations Supporters Will Rally in Capital*, INDIANAPOLIS STAR, Aug. 13, 2002, at A6. For a discussion of contemporary African-American reparations theory, see Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689 (2002). For an argument that an independent African-American state, rather than money, is the proper form for reparations in redress of the injustices committed against black Americans, see Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S. U. L. REV. 25 (2001).

42. "Granting reparations to Japanese Americans without granting . . . compensation to [blacks] . . . made a previously tolerable condition seem degrading." Vincene Verdun, *If the Shoe Fits, Wear it: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 659 (1993) [hereinafter Verdun, *If the Shoe Fits*].

43. In 1991 U.S. Rep. John Conyers (D-Mich.) introduced legislation to require the United

resistance along a wide political frontage, opposition is attributable as much to the model of redress elected — reparations<sup>44</sup> — as to an inherent unwillingness to eradicate the legacy of slavery and segregation.<sup>45</sup> While a majority cannot yet recognize African American claims as meritorious of an apology or trillions of dollars in compensation,<sup>46</sup> the factual predicate to such claims is a firm fixture in the national discourse and a source of political currency upon which claimants can draw.<sup>47</sup> Indeed, so deeply ingrained in the public consciousness is this predicate that many erroneously believe the

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States to redress slavery and segregation. H.R. 1684, 102d Cong. (1991). The bill — never reported from Committee — is reintroduced annually to no avail. *See, e.g.*, Commission to Study Reparation Proposals for African-Americans Act, H.R. 40, 105th Cong. (1997). In 1997 U.S. Rep. Tony Hall (D.-Ohio) introduced a resolution stating that "Congress apologizes to African-Americans whose ancestors suffered as slaves under the Constitution and laws of the United States until 1865." H. Con. Res. 96, 105th Cong. (1997). A political firestorm immolated the proposal. Paul Leavitt & Robert Silvers, *Poll: Congress Shouldn't Make Apology for Slavery*, USA TODAY, Jul. 2, 1997, at A5 (61% of Americans disfavored apology). One irate critic countered that the U.S. should apologize to him for expropriating 435 slaves from his great-grandfather without compensation. Michael A. Fletcher, *For Americans, Nothing is Simple About Making Apology for Slavery; Congressman's Suggestion Draws Fire From All Sides*, WASH. POST, Aug. 5, 1997, at A1. President Clinton sidestepped the issue, fearing apology might be the gateway to compensation. *See* Interview of President Clinton by Travis Smiley of Black Entertainment Television, 33 WKLY. COMP. PRES. DOC. 1184, 1187-88 (1997) ("[L]et this [Advisory Board on Race] do its work and see what they have to say[.]" (quoting Clinton)); Jill Zuckman & Brian McGrory, *Talk of Apologizing for Slavery Sparks Debate on Efficacy*, BOSTON GLOBE, Jun. 17, 1997, at A1 (reporting Clinton opposition to reparations). The Congressional Black Caucus disavowed the bill largely because it did not address the grievances of present-day blacks still affected by legalized segregation and racism. Betsy Peoples, *A Simple Gesture: The Proposed Apology for Slavery Opens a National Discussion on Race*, EMERGE, Sept. 30, 1997, at 42.

44. Reparations is a mode of redress "where a guilty party makes up for an injustice by paying or otherwise benefitting a victim." Samuel C. Wheeler III, *Reparations Reconstructed*, 34 AM. PHIL. Q. 301 (1997); WEBSTER'S NEW WORLD DICTIONARY (2nd coll. ed., 1982) (defining reparations as "a making of amends . . . for a wrong or injury"); Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1690 (1999) (defining reparations as a damage remedy); Robert L. Allen, *Past Due: The African American Quest for Reparations*, 28 BLACK SCHOLAR 2, 14 (1998) (justifying reparations as compensation for rights violations); Sarah Pritchard, *The Stolen Generations and Reparations*, 21 U. NEW S. WALES L. REV. 259, 261 (1998) (describing reparations as restitution and compensation in amount of the harm inflicted).

45. *See* Yamamoto, *Race Apologies*, *supra* note 22, at 47 (suggesting this generation may be first to answer the question, "How can racial groups redress historical wrongs inflicted by one group upon the other to overcome present-day obstacles to peaceable and productive group interactions?").

46. *See supra* note 38 and accompanying text.

47. *See* FROM DIFFERENT SHORES 98 (Ronald Takaki ed., 1987) [hereinafter TAKAKI].

United States "made only one historical mistake — slavery."<sup>48</sup> Although the Indian experience<sup>49</sup> proves that original sin predates slavery in the New World,<sup>50</sup> "binary thinking"<sup>51</sup> undernourishes thought and action with respect to Indian claims<sup>52</sup> and thereby impedes domestic reconciliation and global rights leadership.<sup>53</sup>

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48. Richard Delgado, *Derrick Bell Lecture: Derrick Bell's Toolkit — Fit to Dismantle That Famous House?*, 75 N.Y.U. L. REV. 283, 297 (2000) [hereinafter Delgado, *Derrick Bell Lecture*].

49. See Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1653 (2000) (positing a pan-Indian historical experience) [hereinafter Tsosie, *Sacred Obligations*].

50. See BROOKS, *supra* note 1, at 233 (chronicling 500-year deprivation of Indian life, sustenance, culture, language, land, liberty, religions, and self-sufficiency).

51. See *id.* (defining "binary thinking" as unawareness that discrimination enmeshes nonblack races and cannot be explained by reference to a reductionist black/white paradigm); Paul Brest & Miranda Oshige, *Race and Remedy in a Multicultural Society: Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 900 (1995) ("no other group compares to [blacks] in the confluence of the characteristics that argue for [racial remedies]"); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 335 (1987) (elevating blacks to status of "paradigm victim group" while dismissing Indians as "another important model").

52. Historians of U.S.-Indian relations counsel that a multihued understanding of the past is a cardinal objective to present justice. See FRANCIS PAUL PRUCHA, *INDIAN POLICY IN THE UNITED STATES: HISTORICAL ESSAYS* 9 (1981) ("One of the goals of writing about Indian-white relations . . . [is] to explain that past to white America."). However, by nominating blacks as the primary victims of racial injury, "nonblack" claims are rendered dependent upon the subscription of the white establishment. Delgado, *Derrick Bell Lecture*, *supra* note 48, at 283; see also VINE DELORIA, *CUSTER DIED FOR YOUR SINS* 168 (1969) [hereinafter DELORIA, *CUSTER DIED*] ("By . . . making race refer solely to black, Indians [a]re systematically excluded from consideration [for redress]."); Steve Russell, *A Black and White Issue: The Invisibility of American Indians in Racial Policy Discourse*, 4 GEO. PUB. POL'Y REV. 129 (1999).

53. While deepening the U.S. commitment to the promotion of rights presumes to a large extent the fundamental indivisibility of all groups, Indians, by virtue of their existence on American soil prior to the founding of the United States and the unavailability of a "homeland" in which they could seek shelter, are arguably entitled to primacy in the consideration and balancing of their claims for redress. See, e.g., Matsuda, *supra* note 51, at 358 ("Any discussion of law, its uses, and its limits in America presupposes the right of those engaged in the debate to stand on American soil and resolve the questions. Yet . . . [b]ecause the sovereignty of native people was never legitimately extinguished, any conclusions the rest of us may come to about law and social change are subject to the special priority of [Indians]."); Jon M. Van Dykes, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 138 (1998). ("Unlike most other ethnic groups, whose ancestors came to the [U.S.] understanding that they would be participating in a multicultural community, the ancestors of native people made no such commitment[.]"); ANGIE DEBO, *A HISTORY OF INDIANS IN THE UNITED STATES* vii-viii (1970) ("The dominant race can never forget that [Indians] were here first[.]"); Felix S. Cohen, *The Erosion of Indian Rights, 1950-53*, 62 YALE L.J. 348, 390 (1953) ("[O]ur treatment of

### C. Binary Thinking, Ahistoricism, and The American Myth

A daunting obstacle on the road to Indian redress is the blithe ignorance of the fact that Indian people are the most materially deprived,<sup>54</sup> politically and economically dependent,<sup>55</sup> and legally exposed group in the nation.<sup>56</sup> Americans are ignorant, furthermore, of the fact that despite nearly two hundred years of federal Indian policies<sup>57</sup> that engineered their deprivation,

Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 337-40, 356 (1986) ("Unlike other American ethnic groups, Indians cannot rely on perpetuation of their tradition in a home country abroad."). While the preceding may elicit criticism as advocacy for a "red-white" paradigm of race relations, it is intended not to substitute one flawed social perspective for another but rather to champion claims for redress that are no less pressing, crucial, or salient than African American claims.

54. Indian reservations remain among the most impoverished areas in the United States. Whereas between 8-14% of the U.S. population toils below the poverty line, the figure is 40% of all Indians, with some tribes faring worse. See 138 CONG. REC. S3426 (daily ed. Mar. 12, 1992) (statement of Sen. John McCain (R.-Ariz.); Bureau of the Census, U.S. Department of Commerce, Social and Economic Characteristics, United States 95 tbl. 95, 98 tbl. 98 (listing poverty rates for nine largest tribes — Cherokee, 22%; Navajo, 48.8%; Sioux, 44.4%; Chippewa, 34.3%; Choctaw, 23.0%; Pueblo, 33.2%; Apache, 37.5%; Iroquois, 20.1%; and Lumbee, 22.1%). Indian unemployment hovers at 40%, eight times the national average, while the median Indian family income is less than half the national average. TERRY L. ANDERSON, SOVEREIGN NATIONS OR RESERVATIONS? AN ECONOMIC HISTORY OF AMERICAN INDIANS 1 (1995). Underfunded reservation schools are the worst in the U.S. See Mathew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 421 (1998). The socioeconomic status of "urban" Indians — the bulk of the Indian population — is no better. See Terrel Rhodes, *The Urban American Indian, in A CULTURAL GEOGRAPHY*, at 259, 262 tbl. 14.1 (data for 1990) (noting only 24% of Indians live on reservations). Unemployment, infant mortality, suicide, homicide, substance abuse, homelessness, and poor health are common: by every objective indicator Indians are the most disadvantaged group in the United States. WARD CHURCHILL, FANTASIES OF THE MASTER RACE: LITERATURE, CINEMA AND THE COLONIZATION OF AMERICAN INDIANS 7 (1992) (Indians are "the poorest of the poor").

55. Despite abundant natural resources, Indian tribes are stifled by a welter of federal laws and doctrines restricting access to capital and impeding sustainable development. For many, economic dependence waxes ever greater, in some cases because of the very federal programs ostensibly designed to reduce it. See Steven J. Prince, *The Political Economic of Articulation: Federal Policy and the Native American/Euroamerican Modes of Production* iv (1993) (doctoral dissertation) (on file with University of Utah Library).

56. See Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1779 (1997) (alleging dominant jurisprudence of federal Indian law remains "inextricably rooted in colonial notions that are simply inconsistent with any plausible contemporary normative universe").

57. United States' relations with Indian tribes have devolved from legal recognition of their

dependence, and exposure, Indian people, along with their distinct cultures,<sup>58</sup> histories, and dreams for a more respectful coexistence, have survived.<sup>59</sup> While the exclusion of Indian claims from contemporary remediation is partially grounded in the general inaccessibility of a universally known and compelling symbol of Indian injustice, such as the Nazi Holocaust or Japanese American internment,<sup>60</sup> federal refusals to entertain Indian claims for land theft, genocide,<sup>61</sup> and ethnocide<sup>62</sup>—in other words, for the forcible denial of the right to self-determination<sup>63</sup>—are rooted less in present ignorance of Indian

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sovereignty to forced relocation, genocide, internment, imposition of a guardian-ward relationship, forced assimilation and underdevelopment, and now limited self-government under the shadow of the power of Congress to legally terminate their existence. See THE POLITICAL ECONOMY OF NORTH AMERICAN INDIANS 72 (John H. Moore ed., 1993) [hereinafter MOORE].

58. See RONALD SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA 274 (1975) (defining Indian culture as "delicately balanced system of attitudes, beliefs, valuations, conditions, and modes of behavior" and discussing significance to tribal integrity).

59. See John T. McCutcheon, *Injun Summer*, CHI. TRIB., Oct. 4, 1998, (Magazine) at 30 (suggesting because "the Indians died and went away a long time ago now" they are fodder for casual retrospection or folk memorialization); Tsosie, *Sacred Obligations*, *supra* note 49, at 1660 ("Indian people have alternately been portrayed as 'noble savages' and as 'bloodthirsty savages[.]' . . . martyred and rendered virtually invisible . . . the 'vanishing redman' myth, the 'Last of the Mohicans'"). But see Newton, *Courts of the Conqueror*, *supra* note 38, at 753 ("Indian tribes have refused to disappear despite the genocide of the 18th and 19th centuries, the neglect of the first half of the 20th century, and the genocide-at-law that continued well into this century.").

60. Brew, *supra* note 28, at 200 (noting irony that the "sheer scope and magnitude of injustices towards . . . [Indians] deprives them of one single, distinct event behind which they can unite and to which [non-Indian] Americans . . . can respond."). Further irony is gleaned from an analysis of well-chronicled incidents of nineteenth century Indian genocide, any of which might heuristically stimulate further evaluation of Indian claims. See *infra* notes 77-109 and accompanying text. Still, one need not be a committed legal realist to recognize that "[m]odest misgivings are less likely to generate sufficient political interest," and Indian redress will remain buried under popular ignorance until the "earlier legal regime . . . comes to seem very wrong[.]" Levmore, *supra* note 44, at 1692. The "real battle" for Indian redress will thus be waged on the political front. Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 876 (1997).

61. See *infra* note 91 (defining genocide).

62. See San Jose Declaration, U.N. Education, Scientific, or Cultural Organization, U.N. Doc. E/CN.4/Sub.2/1982/2/Add.1, at 90 (1981) (creating the term "ethnocide" to describe actions with effect of destroying indigenous peoples as distinct societies, irrespective of intent).

63. Self-determination raises the question of precisely who has the right to decide the political, legal, cultural, and economic norms and rules that govern Indian tribes. See Felix S. Cohen, *Indian Self Government*, in ALVIN M. JOSEPHY, RED POWER: THE AMERICAN INDIAN'S FIGHT FOR FREEDOM 35 (1971). By exercising their rights to self-determination, Indian tribes challenge States, transnational corporations, NGOs, and others who impose norms and rules. See MICHAEL OMNI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 45-50



claims than in an American Myth<sup>64</sup> that sanitizes these depredations<sup>65</sup> and subverts justice in favor of strained polyethnic solidarity.<sup>66</sup> Although a truthful account of U.S.-Indian relations will upset the comforts drawn by a non-Indian majority from the American Myth<sup>67</sup> and challenge the legitimacy of federal sovereignty and control over Indian tribes, people, culture, and land,<sup>68</sup> the resolution of Indian claims, lest it fail to repair the damage or prevent future recurrences, must be undertaken in full cognizance of the past and present effects of that rapacious, bloody, dishonorable history.<sup>69</sup>

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(1994).

64. See *THE QUEST FOR JUSTICE: ABORIGINAL PEOPLE AND ABORIGINAL RIGHTS* 78 (Menno Boldt & Anthony Long eds., 1985) [hereinafter *BOLDT & LONG*] ("Most countries have a national myth — an account that purports to relate the central events of a country's history in compressed form, that explains how the country has come to be and what it stands for."). Despite generations of progressive enlightenment, the United States is still under the sway of a national myth that holds that, as the Indian is merely a "semi-human savage the extermination of which [is] in the best interests of [a] noble, democratic, divinely-inspired, Anglo-Saxon Republic" dedicated to extension of democratic freedoms, no national program designed to induce them to "disappear . . . to be remembered only as symbols of a by-gone and primitive era" or to assimilate them into the body politic can legitimately be contested. *AMERICAN INDIAN POLICY: SELF-GOVERNANCE AND ECONOMIC DEVELOPMENT* 39 (Lyman H. Legters & Fremont J. Lyden eds., 1994) [hereinafter *LEGTERS & LYDEN*]. The theopolitical imprimatur of this American Myth offers metaphysical justifications, sounding in Judeo-Christian and Anglo-Saxon supremacy, for denial of Indian rights while absolving the U.S. of original sin.

65. See *TAKAKI*, *supra* note 47, at 100.

66. See *MICHAEL KAMMEN, IN THE PAST LANE: HISTORICAL PERSPECTIVES ON AMERICAN CULTURE* (1997) ("stability is achieved at a price: a tendency to depoliticize the civic past by distorting the nation's memories of it — all in the name of national unity.").

67. *TAKAKI*, *supra* note 47, at 100. For some, the loss of the American Myth might be destabilizing to their psyches. As Professor Tsosie warns,

Indian nations suffered huge losses, whether measured in lives, lands, or other resources. In building a theory of intercultural justice, Indian and Euro-American people must acknowledge their connections to 'what happened here' — on those lands that were appropriated from Native people and on their reservation lands . . . The history [of] the relations between American Indians and the United States has been one of tremendous violence, treachery, and yes, pure "evil."

Tsosie, *Sacred Obligations*, *supra* note 49, at 1661-62. Nevertheless, all Americans might benefit from the knowledge that the methods employed by the United States are no worse than those used by every other European "settler-state." The United States is not the sole nation owing redress to its indigenous peoples. See Robert Williams, Jr., *Encounters on the Frontier of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 *DUKE L.J.* 660, 673 (1990).

68. See Williams, *supra* note 9, at 430 (stating that, if Indian tribes are entitled to self-determination, the process by which the United States came to exercise sovereignty over Indian people and land — fraud, conquest, internment — is illegitimate as a matter of law).

69. See Tyron J. Sheppard & Richard Nevins, *Constitutional Equality — Reparations At*

Nevertheless, even if the non-Indian majority would reject the American Myth in the interest of mending national fences, the path to Indian redress winds through terrain unmapped heretofore. Compensation and apologies, gestures potentially part of an amicable settlement, are not germane to the resolution of Indian claims for injustices that cannot be remedied save by reinvestiture of lands and sovereignty in self-determining Indian tribes.<sup>70</sup> This requires not merely an abstract acknowledgment of the value of pluralism but a comprehensive program of legal reform that dispenses with doctrines and precedents perpetuating the denial of the human rights of Indian tribes and people.<sup>71</sup> As law, more than any other social variable, has (re)produced the subordination of Indians in the United States,<sup>72</sup> legal reform occupies a central position in the claim for Indian redress.<sup>73</sup>

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*Last*, 22 UWLAW L. REV. 105, 127-28 (1991) (noting that to obtain redress and prevent future harm it is necessary to "identify the . . . wrong" and "produce a report designed to influence the public . . . to accept the theory that statutes, ordinances, and other official actions [are] the . . . source of the [harms.]"); *see also* Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals (June 7, 1945), reprinted in 39 AM. J. INT'L L. 178, 184 (1945) (advocating documentation of atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future[.]").

70. Indian claims are "invariably advanced on behalf of [Indian] communit[ies]" and will be addressed as such herein. BOLDT & LONG, *supra* note 64, at 324.

71. Events in the Balkans, the former Soviet Union, Africa, Afghanistan, and elsewhere raise "radical questions about the legitimacy of law and the nature of legal order." LAW AS POLITICS: CARL SCHMITT'S CRITIQUE OF LIBERALISM 13 (David Dyzenhaus ed., 1998). Indigenous peoples across the globe, burdened by legal precedents and doctrines that "perpetuate the injuries of a historical era now condemned and lamented", have added their voices to recent debates. *See* Reisman, *supra* note 37, at 371. The basis for critical revision of U.S. law is no less compelling: doctrines and precedents given a permanent place in the legal pantheon reduce tribes to mere wards under the trust of a fickle Congress with plenary power to terminate their legal existence. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (establishing Indian tribes as diminished sovereigns); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (establishing U.S. trust responsibility to protect Indian "wards"); Frickey, *supra* note 56, at 1765 ("The Constitution became possible only by virtue of colonization, and the document rests awkwardly on top of that history."). While the liberal impulse to escape politics through law" is apropos in redress of claims wherein the law itself is not implicated as an instrument of subordination and claimants seek incorporation within and equality before, rather than wholesale revision of, the legal regime, with respect to Indian claims it is to the assumptions of Indian inferiority inherent in the law that reform efforts are directed.

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

73. "Scarcely an political question arises in the United States that is not resolved, sooner or later, into a judicial question." ALEXANDER DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 267

In short, proponents of Indian redress must not only displace a flawed version of history: they must articulate a proposal for remediation that transports the American people far beyond the strictures of existing law to enable the peaceful restoration of Indian lands and powers of self-government.<sup>74</sup> Such a transformative mission cannot be accomplished by positing Indians and the non-Indian majority as adversaries, as would reparations; rather, redress of Indian claims and the healing of the American nation — crucial foci of the drive toward perfection — necessitate dialogue, reconciliation, and joint authorship of a future history of peace, harmony, and justice.<sup>75</sup>

Part II of this Article offers a disquieting version of U.S.-Indian history that accelerates erosion of the American Myth and acquaints the non-Indian majority with the necessary factual predicate to Indian redress. Parts III and IV contrast the assumptions, procedures, and remedies that distinguish reparations and reconciliation,<sup>76</sup> the dominant contending models of redress available to group victims of human injustice, and demonstrate that, because it offers the best hope for a peaceful American coexistence marked by mutual respect for sovereignty, reconciliation is a more appropriate avenue to Indian redress. Several preliminary proposals, including the introduction of traditional tribal peacemaking as perhaps the most appropriate form of

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(1832). However, to suggest that legal reform is central to the claim for Indian redress does not imply a judicial approach: the history of redress in the courts, coupled with principles of separation of powers, advocate for the legislature. See JOHN ELY, *DEMOCRACY AND DISTRUST* (1980) (noting strong U.S. preference for political, rather than judicial, resolution of minority rights questions).

74. Although other aggrieved domestic groups who have advanced claims for redress, such as African Americans and Japanese Americans, are endowed with distinct cultural identities, they cannot claim rights to self-determination as politically distinct groups in possession of territorial sovereignties. See Tsosie, *Sacred Obligations*, *supra* note 49, at 1650-51.

75. Although the concept "justice" may be inherently unstable in that it is impossible to limit to some intuitively clear definition of conduct, this Article is motivated by the belief that there is some common political and legal theory — starkly different from past theories — upon which most Americans can agree the present and future relations between the United States and Indian tribes should be governed, even if complete development of this theory is beyond the present scope.

76. Reconciliation, the primary paradigmatic challenger, reorients focus toward healing. Yamamoto, *Racial Reparations*, *supra* note 12, at 522. Although reconciliation may be augmented by compensation, its focus is enhancement of group interdependence, and remedies are tailored to encourage the dominant group to recognize moral responsibility, to restore the dignity of the aggrieved minority group, and to effect attitudinal changes that craft a more symmetrical distribution of economic, political, and legal power. Stephen P. Garvey, *Punishment as Atonement*, 46 *UCLA L. Rev.* 1801 (1999). For a discussion of reconciliation, see *infra* notes 627-63 and accompanying text.

reconciliation, will be offered to stimulate thinking.

## II. *The Claim for Indian Redress: How the West Was Stolen*<sup>77</sup>

Concealed behind the benevolent facade of the American *mission civilisatrice* is the brutal reality of invasion, slavery, forced relocation, genocide, land theft, ethnocide, and forcible denial of the right to self-determination wholly incompatible with contemporary understandings of U.S.-Indian history and with the notions of justice informing the human rights regime. It is perhaps impossible to overstate the magnitude of the human injustice perpetrated against Indian people in denial of their right to exist, on their aboriginal landbase, as self-determining peoples: indeed, the severity and duration of the harms endured by the original inhabitants of the United States may well exceed those suffered by all other groups domestic and international.<sup>78</sup>

### A. *Genocide: "The Metaphysics of Indian Hating"*<sup>79</sup>

#### 1. *Conquest*

On May 3rd, 1493, Pope Clement called upon Spanish *conquistadores* to discover and conquer new lands in the Americas in order to draw "barbarous nations" to the Christian faith.<sup>80</sup> The subsequent invasion of the Western Hemisphere, predicated upon a jurisprudential assumption that the indigenous inhabitants were a distinctly inferior species,<sup>81</sup> was governed by the legal

77. This heading parodies THEODORE ROOSEVELT, *THE WINNING OF THE WEST* (1887).

78. See BROOKS, *supra* note 1, at 241. The author describes Euro-American treatment of Indians:

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

79. The phrase is from the title of a book chapter from a Melville novel that propounds the view that U.S. Indian policy is a confidence game with the government the confidence man and U.S. citizens, ignorant of the genocide ongoing against the Indian population, the dupes. See HERMAN MELVILLE, *THE CONFIDENCE-MAN* ch. 26 (1857).

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

81. Donald Juneau, *The Light of Dead Stars*, 11 AM. INDIAN L. REV. 1, 8 (1983).

principles of discovery<sup>82</sup> and conquest. The latter provided as a matter of international law<sup>83</sup> that a nation became the sovereign of territory its agents "discovered" provided it subjugated the population and annexed its lands.<sup>84</sup>

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82. The international legal fiction of "discovery" bestowed occupancy and exclusive negotiating rights to impair the title of a "discovered" Indian nation upon a so-called discovering European nation. Although Europeans initially affirmed the collective rights of indigenous peoples, once European military superiority was established state sovereignty trumped claims to collective rights, and indigenous peoples were relegated to the status of minorities devoid of legal personality and entitled to protection only as individuals within states. See Lawrence Rosen, *The Right to Be Different: Indigenous Peoples and the Quest for a Unified Theory*, 107 YALE L. J. 227, 242 (1997) (book review). By fiat, discovery permitted European colonial powers to construct mutually exclusive and distinct spheres of influence and thereby prevent internecine conflicts. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 572-3 (1823)

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire . . . [I]t was necessary, in order to avoid . . . war[,] to establish a principle, which all should acknowledge as the law by which the right of acquisition . . . should be regulated . . . . This principle was, that discovery gave title to the government by . . . whose authority, it was made, against all other European governments, which title might be consummated by possession[.]

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

83. "International law" is an intellectual amalgam of medieval and Renaissance European philosophers who "perceived a normative order independent of and higher than the positive law or decisions of temporal authority" and whose "fundamentally humanist, moral perspective . . . withh[e]ld the imprimatur of law from acts of earthly sovereigns found to violate the moral code." ANAYA, *supra* note 37, at 10. Natural law philosophers were sympathetic to the plight of indigenous people struggling to exist and self-determine in the face of conquest. See, e.g., HUGO GROTIUS, *DE JURE BELLE ET PACIS* (elaborating natural law perspective); BARTOLOME DE LAS CASAS, *HISTORIA DE LAS INDIAS* (Andre Niu Van ed., 1986) (1561), *abr. and trans. in HISTORY OF THE INDIES* (Andree Collard ed. & trans., 1971) (describing failed clerical efforts to protect indigenous peoples by invocation of natural legal theories). However, by the mid-seventeenth century international law morphed into a Western, state-centric instrument justifying European colonialism. EMMERICH DE Vattel, *THE LAW OF NATIONS, OR THE PRINCIPLES OF THE LAW OF NATURE* (Charles G. Fenwick trans., 1758). The post-Westphalian era turned the "universal moral code into a bifurcated regime comprised of the natural rights of individuals and the natural rights of [territorial] states[.]" ANAYA, *supra* note 37, at 13. By the seventeenth century indigenous peoples were formally excluded from statehood by virtue of their failure to exhibit attributes of Western civilization in property relations and trade, and placed beyond the pale of the protective premises of the positivist law of nations, such as mutual respect for sovereignty and non-intervention. L. OPPENHEIM, *INTERNATIONAL LAW* 134-35 (3d ed. 1920). By the eighteenth century, states, freed from external scrutiny, treated indigenous people according to domestic law and policy. ANAYA, *supra* note 37, at 19-20, 131.

84. Juneau, *supra* note 81, at 8. However, the right to acquire territory by conquest was not theoretically absolute: "a 'conquering' country only gained recognizable rights to land if it

Although prudence restrained pre-eighteenth century aggression in lands that became the United States,<sup>85</sup> conquest was eventually applied in all the Americas, and the period subsequent to first contact is notorious as the "Age of Genocide."<sup>86</sup>

## 2. Slavery

In the aftermath of conquests, colonizers offered financial incentives to corporate slavers to create bounties between tribes,<sup>87</sup> thereby facilitating a divide and conquer strategy that served territorial objectives while providing free labor to developing economies. The abomination of the Indian slave trade

played a significant role in both colonial trade and in the extermination of most of the southeastern tribes . . . [T]he Indian slave trade involved all the colonies and . . . involved all the horrors long associated with the worst images of slavery, including beatings, killings, and tribal and family separation. It became routine policy to separate families, sending the Indian men off to the northern colonies while keeping the women and children in the south . . . . In the east, Indian slaves became a viable component of trade, along with deer skins and furs; in the west, American Indians were enslaved by the Catholic Church in order to build and maintain its missions . . . Indian slavery was . . . an integral part of the colonial economy.<sup>88</sup>

Although Indian slavery had largely discontinued in favor of African

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entered into armed struggle defensively; . . . [and as] empire-building expeditions did not qualify as just wars [the] land[s] obtained thereby did not qualify as legitimately conquered . . ." See Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 HAWAII L. REV. 519, 560 (1992). In practice, however, the formal legal proscription against conquest was circumvented by claims to self-defense buttressed by papal imprimatur.

85. See THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S, at 191 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984) [hereinafter CADWALADER & DELORIA] (noting European "conquerors" of militarily superior Indian tribes would have been handily defeated prior to the mid-nineteenth century); see also *M'Intosh*, 21 U.S. at 543 ("Indians . . . were fierce savages, whose occupation was war . . . [T]hey were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.").

86. See DAVID E. STANNARD, AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD 55-146 (1992).

87. See Prince, *supra* note 55, at 89.

88. BROOKS, *supra* note 1, at 242.

American slavery by the early nineteenth century, Californian Indians, as late as the mid nineteenth century, were regularly raided by slave-hunters looking for men to work in mines and women to work in brothels, and extermination befell many who resisted.<sup>89</sup>

### 3. *Transcontinental Ethnic Cleansing*<sup>90</sup>

The precise number of Indian victims of the genocide<sup>91</sup> committed by Euro-American colonizers over the past half-millennium evades quantification. Estimates of the pre-Columbian indigenous population in what later became the United States range from five to ninety four million,<sup>92</sup> yet by 1880 disease,<sup>93</sup> slaughter, slavery, and aggressive wars<sup>94</sup> reduced their number to as few as 300,000 — and declining.<sup>95</sup> Although luminaries such as President

89. See Atkinson, *supra* note 54, at 389. For a detailed discussion of Indian slavery, see generally L.R. BAILEY, *INDIAN SLAVE TRADE IN THE SOUTHWEST: A STUDY OF SLAVE-TAKING AND THE TRAFFIC IN INDIAN CAPTIVES* (1966); CAROLYN THOMAS FOREMAN, *INDIANS ABROAD 1493-1938*, at 3-21 (1943).

90. See Gassama, *supra* note 13, at 143 (applying to U.S.-Indian relations the euphemism "ethnic cleansing," coined during Bosnian war to describe violent depopulation by one ethnic group of a territory populated by another to facilitate resettlement).

91. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277 (entry into force Jan. 12, 1951) [hereinafter Genocide Convention]. The Convention defines genocide as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

92. See Tsosie, *Sacred Obligations*, *supra* note 49, at 1662 (stating that between seventy-four and ninety-four million Indians died during conquest of the Americas compared to the number of African Americans who perished during slavery — forty to sixty million — and the number of Jews killed in the Holocaust — six million).

93. See generally JARED DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* (1997) (describing deliberate and indeliberate introduction of European diseases against which Indians had no immunities); STANNARD, *supra* note 86 (same); RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492* (1992) (providing demographic data on destruction by disease of Indian populations); E. WAGNER STEARN & ALLEN E. STARN, *THE EFFECT OF SMALLPOX ON THE DESTINY OF THE AMERINDIAN* 44-45 (1945) (same).

94. BROOKS, *supra* note 1, at 241.

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

Thomas Jefferson denounced the genocide as it unfolded,<sup>96</sup> the prevailing racial ideology reassured the public that the disappearance of an inferior people before the United States' continental advance was a "historical and scientific inevitability."<sup>97</sup> Initially, a legislative approach effected physical removal of Indian people from ancestral lands; however, when this proved politically inefficient,<sup>98</sup> measures more clearly within the inherent powers of the executive and therefore less susceptible to judicial review were devised:<sup>99</sup> Indian genocide became official policy of the United States and its political subdivisions.<sup>100</sup>

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96. See, e.g., Letter from Thomas Jefferson to Alexander von Humboldt (Dec. 6, 1813), in THOMAS JEFFERSON: WRITINGS 1311, 1313 (Merrill Peterson ed., 1984) [hereinafter JEFFERSON: WRITINGS] ("the extermination of this race in our America . . . is therefore to form an additional chapter in the English history of the same colored man in Asia, and of the brethren of their own color in Ireland, and wherever else Anglo-mercantile cupidity can find a two-penny interest in deluging the earth with human blood."). *Id.*

97. See REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 6 (1981).

98. Of the many forcible relocations, the removal of the Cherokee Nation from ancestral homes in the Eastern Woodlands is perhaps the most infamous. With a federal statute explicitly overruling a contrary Supreme Court opinion, the entire Cherokee Nation was forced, in the dead of winter, on a 1000-mile "Trail of Tears" trek to Oklahoma. See Indian Removal Act of May 28, 1830, ch. 148, 4 Stat. 411 (declaring all Cherokee laws invalid and ordering forced relocation of Cherokee Tribe) (overruling Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) which held that the Cherokee were entitled to retain possessory interest in their lands and to exercise reserved rights under treaties of peace). Gloating after passage of the Indian Removal Act, President Jackson is reported to have remarked, "Marshall has made his decision; let him enforce it now." See FERGUS M. BORDEWICH, KILLING THE WHITE MAN'S INDIAN 47 (1996). More than 4000 Cherokee died during the Trail of Tears. *Id.* at 47.

99. See BORDEWICH, *supra* note 98, at 44-45 (quoting Georgia Governor Wilson Lumpkin) ("Our government over that [Indian] territory . . . in order to be efficient, must partake largely of a military character, and consequently must be more or less arbitrary and oppressive . . .").

100. See Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713, 718 (1986) (listing resolutions passed by State legislatures legalizing murder of Indians by declaring them beyond the protection of the law); see also STANNARD, *supra* note 86, at 142-46 (noting private and public actors in several U.S. States capitalized on earlier Spanish genocide with legalization of Indian murder); see generally FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984). For purposes of affixing legal responsibility under the Genocide Convention, official public policies supporting deliberate murder of Indian individuals, whether by State laws, federal legislation reasonably calculated to force Indian removal, and attendant Indian deaths, or massacres by federal agencies, clearly satisfy the requirements of the intent to kill Indians as a group, in whole or in part, due to their status as Indians, a protected class whether construed as a racial, ethnic, or national group. See Genocide Convention, *supra* note 91, art. II (a)-(e). Introduction of diseases to effect Indian deaths, although initially indeliberate



In the aftermath of the Civil War, the might of the U.S. Army was directed toward Indian eradication. Military and civilian contractors induced deliberate starvation by destroying primary food sources such as the buffalo,<sup>101</sup> yet Indian tenacity necessitated more direct applications of force.<sup>102</sup> One by one, the Seminole, Nez Perce, Lakota, Shoshone, Comanche, Apache, and other tribes were hunted, pursued, cornered, and murdered.<sup>103</sup> A series of "massacres" were written in Indian blood on the pages of American history: Blue River (1854), Bear River (1863), Sand Creek (1864),<sup>104</sup> Washita River (1868), Sappa Creek (1875), Camp Robinson (1878), Wounded Knee (1890), and about forty others.<sup>105</sup> Gruesome, shocking, deliberate exterminations of defenseless women and children, were perfectly legal exercises of State and federal authority as the law then stood.<sup>106</sup> By the conclusion of the "Indian Wars" in 1890,<sup>107</sup> the pre-Columbian Indian population was reduced as much

when carried by infected "discoverers," constitutes genocide when deliberately transmitted.

101. See Prince, *supra* note 55, at 186 (noting by the 1870s many thousands succumbed to starvation occasioned by the loss of the buffalo).

102. Most Indian tribes were not passive subjects of genocide during the dark decades of the 1870s and 1880s. Skilled and courageous armed resistance earned Indian warrior-heroes the respect and begrudging admiration of adversaries. Still, though they might be respected for their military prowess, Indians were the objects of a program of elimination, and, as General George Crook, U.S.A., a famed "Indian fighter" commented in 1873, "The American Indian commands respect for his rights only so long as he inspires terror for his rifle." J.G. Bourke, *On The Border With Crook* (1892), <http://wicketup.com/wicketup/seton>.

103. See Atkinson, *supra* note 54, at 389. Aggressive Indian Wars of the nineteenth century — campaigns intended to depopulate territory as prelude to annexation — clearly satisfy the element of deliberate killing of persons belonging to a protected class.

104. In one of the most brutal incidents of genocide on U.S. soil, 105 Cheyenne and Arapaho women and children were murdered in the village of Sand Creek, Colorado on Nov. 29, 1864, by Col. Chivington and 700 troops of the U.S. Cavalry. See Tsosie, *Sacred Obligations*, *supra* note 49, at 1670; see also STAN HOIG, *THE SAND CREEK MASSACRE* (1987).

105. Atkinson, *supra* note 54, at 391.

106. See Strickland, *supra* note 100, at 718; see also Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 (1990) (describing collusion of law and force producing one such massacre-by-law of Indian men).

107. In 1886 the surviving three hundred members of the Chiricahua Apache, suffering from disease, starvation, and the murder of over three thousand of their number, became the last Indian tribe to surrender. DONALD E. WORCESTER, *THE APACHES: EAGLES OF THE SOUTHWEST* 167 (1979). The entire tribe was incarcerated for a generation in military prisoner-of-war camps in which the population was reduced to less than half by disease, hunger, and exposure. See PERRY, *supra* note 102 (chronicling Chiricahua Apache conflict, surrender, incarceration, relocation, and genocide). Upon their release in 1913, the Chiricahua were divided in two and relocated to reservations far from ancestral lands and surrounded by traditional rivals. See generally MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES* (1997).

98%,<sup>108</sup> and an *Indianrein* United States was not beyond possibility.<sup>109</sup> Although radical depopulation of Indian land may have been merely an efficient means to capture and annex territory, the United States nonetheless committed genocide in overtly manifesting a clear intent to kill, and killing, Indians as such.<sup>110</sup>

### B. Land Theft

The relationship between the land and Indian people is fundamental to their physical and cultural survival as distinct, autonomous groups. Indian land is constitutive of the Indian cultural identity<sup>111</sup> and designative of the boundaries of the Indian cultural universe.<sup>112</sup> Indian land transmits knowledge about history, links people to their ancestors, and provides a code of appropriate moral behavior. From the moment of first contact with European "discoverers,"

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108. Sterba, *supra* note 92, at 430.

109. Though a fraction of the pre-contact Indian population survived, the remainder were corralled on reservations, many infested with vermin and disease and lacking in adequate shelter and food. Desperate reservation populations were initially forbidden to depart by illegal threats of renewed military force. See *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 700-01 (C.C.D. Neb. 1879) (No. 14,891) (holding, contrary to position of War Department, that Indians are "persons within the meaning of the law" with rights to protest and move freely throughout the United States).

110. See Genocide Convention, *supra* note 91, art. II. The crime of genocide does not require state action and can be committed by individuals, whether in official or unofficial capacity, as well as states. See *id.* art. IV. Moreover, the Convention is applicable in war as well as peace, and with respect to state conduct toward its own, as well as foreign, nationals. *Id.* art. I; see also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia)*, 1993 I.C.J. 325 (Provisional Order of Sept. 13) (establishing applicability of Convention without respect to nationality or conflict status). The forced sterilization of Indian women in BIA health clinics may also constitute genocide under the Convention and thereby give rise to a separate element in a cause of action. See THOMAS M. SHAPIRO, *POPULATION CONTROL POLITICS: WOMEN, STERILIZATION, AND REPRODUCTIVE CHOICE* 91 (1985) (noting routine sterilization of as many as 3000 Indian women per year by the Indian Health Service); Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 939 (2002) (describing covert and forcible sterilization of more than 42% of Indian women of childbearing age between early 1970s and 1980's) (citing Bill Wagner, *Lo, the Poor and Sterilized Indian*, AMERICA, Jan. 29, 1977, at 75).

111. See VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 122 (2d ed. 1994) ("Indian tribes . . . identify their origin as a distinct people with a particular geographic site. This origin place — which may be a river, mountain, plateau, or valley — becomes a central and defining feature of the tribe's religion and cultural world view[.]").

112. See Tsoisie, *Sacred Obligations*, *supra* note 49, at 1640.

Indians proclaimed a sacred responsibility to preserve and transmit Indian land, and with it, identity, religion, and culture, to successive generations.<sup>113</sup> The discharge of that responsibility was compromised by federal policies of land acquisition ranging from fraud and deceit to expropriation and outright theft.

Throughout the seventeenth and early eighteenth centuries, prudence directed Euro-Americans to formally recognize militarily potent Indian tribes as independent societies and accord them diplomatic recognition as sovereigns.<sup>114</sup> Even subsequent to the defeats of France in the Seven Years' War in 1763 and Britain in the War of Independence in 1781, the Euro-American foothold in North America remained tenuous, and ongoing military insecurity stymied territorial ambitions while stifling any notions of conquest. Moreover, the United States' land hunger was largely sated by available space within the original thirteen colonies, and land acquisitions from Indian tribes were of necessity accomplished by treaties of cession<sup>115</sup> after peaceful negotiations.<sup>116</sup>

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113. See BOLDT & LONG, *supra* note 64, at 22-23 ("Our aboriginal responsibility is to preserve the land for our children"). So sacred is the Indian obligation to preserve the tribal landbase for future generations that the loss of Indian land, and the severance of links to ancestors, religion, and culture, is universally deemed the ultimate catastrophe. See DALE VAN EVERY, *DISINHERITED: THE LOST BIRTHRIGHT OF THE AMERICAN INDIAN* 239 (1966).

114. See William N. Fenton, *Leadership in the Northeastern Woodlands of North America*, 10 AM. IND. Q. 21, 81 (1986).

115. For Indian tribes, entry into treaty relations with the United States was a sacred act undertaken to secure mutual advantages as well as create kinship bonds of peace and friendship. See ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800*, at 71, 112 (1997) [hereinafter WILLIAMS, *LINKING ARMS*] (describing U.S.-Indian treaties as "multicultural agreements that impart duties of good faith and fair dealing"). For the United States, Indian treaties were constitutive documents providing the framework for an ongoing economic and political joinder with mutual sovereigns. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 409 (1993). Thus, the Indian treaties of the post-Revolutionary period, though they ceded Indian land in exchange for U.S. promises, must be construed not as acts of tribal surrender but as negotiated contracts, governed by international law, in which Indian tribes reserved those rights not clearly granted to the United States and acquired other rights and privileges from the United States. *Id.* at 402.

116. The late eighteenth century U.S. policy with regard to land acquisition from Indian tribes is seemingly predicated upon a desire for peaceful relations, honorable negotiations, and mutual respect for sovereignty and territorial integrity. See Report of Secretary of War Henry Knox on the Northwestern Indians (June 8, 1789 ("[t]he principle of the Indian right to the lands they possess being thus conceded, the dignity and interest of the nation will be advanced by making it the basis of the future administration of justice toward the Indian tribes."); see also 25 U.S.C. § 177 (2000) ("Trade and Intercourse Act") (precluding acquisition of Indian land except for by cession via a U.S.-Indian treaty). In those rare eighteenth century instances of military hostilities initiated by the United States to annex Indian land, most campaigns resulted in stalemate or decisive Indian victory. CADWALADER & DELORIA, *supra* note 85, at 193.

Still, if during its first several decades of existence the fledgling government was obliged to recognize the sovereignty of Indian nations and to respect Indian land titles as a matter of international and domestic law,<sup>117</sup> from the moment of its creation the United States was crafting legal solutions to the "problems caused by the . . . fact that the Indians were here when the white man arrived[.]"<sup>118</sup>

### 1. *Fraud and Firewater*

The Indian conception of land as utterly incapable of reduction to ownership as property by human beings<sup>119</sup> — an essential element of pan-Indian cosmology<sup>120</sup> — crippled tribes in their early negotiations with U.S. representatives operating within an imported common law tradition commodifying land.<sup>121</sup> While Indian tribes generally understood treaties to create sacred kinship ties entitling the United States to share and settle the lands

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117. See Statement of U.S. Attorney General William Wert (Apr. 26, 1821) ("So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive . . . [and] we have no more right to enter upon their territory than we have to enter upon the territory of a foreign prince."), cited in Atkinson, *supra* note 54, at 383.

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

119. See Eric T. Freyfogle, *Land Use and the Study of Early American History*, 94 *YALE L.J.* 717, 723 (1985) ("Like other hunter-gatherer and horticultural groups, [Indian tribes] believed that land was no more subject to ownership than was the air, water, sky, or . . . spirits[.]").

120. See VAN EVERY, *supra* note 113, at 239.

121. See CHARLES M. HAAR & LANCE LIEBMAN, *PROPERTY AND LAW* 15 (1977) (quoting letter from Chief Sealth of the Duwamish Indians in Washington State to President Franklin Pierce) ("[the] white man . . . is a stranger who comes in the night and takes from the land whatever he needs. The earth is not his brother but his enemy, and when he has conquered it he moves on."); see also Carol M. Rose, *Possession as the Origin of Property*, 52 *U. CHI. L. REV.* 73, 87 (1985) (stating that "the audience presupposed by [common law property concepts] is an agrarian or a commercial people" and these concepts are not well-suited to understanding land usage of nomadic peoples).

in question,<sup>122</sup> the government, disinterested in kinship but desirous of no less than fee simple title, manipulated Indian (mis)appreciations of Western property rights in treaty texts incomprehensible to Indian negotiators not proficient in the English language.<sup>123</sup> Moreover, U.S. negotiators, notwithstanding their claims of moral ascendancy over Indian tribes as the philosophical basis for acquiring dominion over their lands, secured further fraudulent advantage by dulling Indian wits with alcohol.<sup>124</sup> Deliberately faulty translations of treaty text and inaccurate explanations of treaty terms to Indian tribes possessed of limited language skills and a *Weltanschauung* in which land is a sacred living thing incapable of reduction to ownership exacerbated a fundamentally unequal bargaining position and erased the line between consent and coercion,<sup>125</sup> worse,

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122. See Gerald Torres & Kathryn Milun, *Frontiers of Legal Thought III: Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 637-38 (1990) (noting early inability of Indian tribes to understand and adapt to Western property concepts).

123. See Newton, *Courts of the Conqueror*, *supra* note 38 (suggesting language barriers and variant conceptions of relationship of people to land caused misunderstanding of legal nature of grants to whites).

124. See STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 26 (1992) (chronicling history of Indian land transfers by treaties fraught with unconscionability, coercion, and fraud).

125. Twentieth-century federal jurisprudence, in recognition of the fundamental unfairness prevailing during the creation of many Indian treaties, belatedly adopted canons of construction to guide interpretation of these instruments and mitigate the severity of their operation against Indian rights. As the United States is the party with presumptively superior negotiating skills and knowledge of the language of an Indian treaty, the Court has held that it has the responsibility to avoid taking advantage of Indians and therefore has interpreted the terms of treaties liberally in favor of Indian parties. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979). The canons of construction also require courts to give effect to the terms of an Indian treaty as the Indians themselves would have understood them at the time of their drafting. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 246 (1985) (providing that "treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); *Choctaw Nation of Indians v. United States*, 318 U.S. at 423; *United States v. Winans*, 198 U.S. 371, 380-381 (1905). Ambiguities in Indian treaties are to be resolved "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians[.]" *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979), quoting *Jones v. Meehan*, 175 U.S. 1 (1899); *Winters v. United States*, 207 U.S. 564, 576-577 (1908); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992). Still, courts are "without authority to determine the rights of parties upon the ground of mere justice or fairness, much less, under the guise of interpretation, to depart from the plain import of the words of the treaty." *United States v. Choctaw Nation*, 179 U.S. 494, 535 (1900); see also *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) ("The canon of construction. . . [does] not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of

later treaties simply codified the results of more pronounced forms of coercion, including conquest and genocide. In sum, many, if not all, of the Indian treaties ceding land to the United States are physical embodiments of the fraud,<sup>126</sup> unconscionability,<sup>127</sup> and duress<sup>128</sup> governing their drafting and as such are arguably subject to revisitation, reconstruction, and even renunciation as void.<sup>129</sup>

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

By the early nineteenth century the U.S. population was clamoring for more Indian land<sup>130</sup> even as Indian tribes, increasingly convinced of the insatiability of white land hunger, began to resist. Original legal protections for Indian land grew incompatible with white notions of progress, and pressure mounted to annul the marriage of political convenience and legal principle effected by the discovery doctrine.<sup>131</sup> However, even as the United States waxed ever more militarily potent, Indian tribes retained the capacity to defeat conquest, and thus it fell not to armed force but yet again to law to wrest away additional Indian

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Congress."). Thus, despite the ameliorative influence of the canons of construction, Indian treaties themselves can impede enjoyment of Indian rights.

126. See *Patterson v. Meyerhofer*, 204 N.Y. 96 (N.Y. 1912) (elaborating implied duty of good faith in contracting); see also RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a ("good faith . . . excludes conduct . . . involving violat[ions] of community standards of decency, fairness or reasonableness."); Vienna Convention on the Law of Treaties, May 23, 1969, art. 49, S. Treaty Doc. No. 92-1, 1155 U.N.T.S. 331 (entry into force Jan. 27, 1990) [hereinafter Vienna Convention] (providing as a matter of customary international law that "if a [party] has been induced to conclude a treaty by the fraudulent conduct of another [party], the [party] may invoke the fraud as invalidating its consent to be bound by the treaty").

127. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (holding that unconscionability includes absence of meaningful choice available to one party coupled with contractual terms unreasonably favoring the other party); see also Vienna Convention, *supra* note 126, art. 53 (providing, as an international legal definition of unconscionability, that "a treaty is void if, at the time of its conclusion, it conflicts with a pre-emptory norm of general international law.").

128. See, e.g., *Employers Ins. of Wausau v. United States*, 764 F.2d 1572, 1576 (Fed. Cir. 1985) (providing that duress consists of the involuntary acceptance of terms of another party where circumstances permit of no other alternative and such circumstances were the result of coercive acts of the other party); see also Vienna Convention, *supra* note 126, arts. 51-52 ("A treaty is void if its conclusion has been procured by the threat or use of force.").

129. See *Friedman*, *supra* note 84, at 559 (arguing that Indian cessions of lands in fraudulent, unconscionable, or duressive treaties are void or voidable); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 18-20 (1981) (developing basis for judicial reconstruction or voiding of unconscionable contracts).

130. See CADWALADER & DELORIA, *supra* note 85, at 195.

131. PETRA T. SHATTUCK & JILL NORGREN, *PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM* 113 (1991).

lands. The seminal case *Johnson v. M'Intosh*<sup>132</sup> provided the opportunity whereby to expand the Euro-American foothold.

Although he acknowledged both the "impossibility of undoing past events and the fact that the sovereign he represented was born in sin,"<sup>133</sup> and although he recognized that Indian tribes were as yet independent political communities in retention of original rights to property and self-governance, Chief Justice John Marshall accepted the extravagant arguments that European discovery, not Indian occupancy, constituted ultimate title to lands in the United States<sup>134</sup> and that purchase or, in the alternative, conquest of territories by the discovering sovereign conferred good title to those lands.<sup>135</sup> While Marshall conceded that such arguments "may be opposed to natural right, and to the usages of civilized nations," he drew from the doctrine of *stare decisis*,<sup>136</sup> comparisons to the practice of other states,<sup>137</sup> and ultimately a jurisprudential affirmation of the "inferiority" of Indian nations<sup>138</sup> to find that "if [such arguments] be indispensable to that system under which the [U.S.] has been settled, and be

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132. 21 U.S. (8 Wheat.) 543 (1823).

133. Joseph William Singer, *Well-Settled? The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 489-90 (1994).

134. See *M'Intosh*, 21 U.S. at 574. The Court stated:

[T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily . . . impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it[;] . . . but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will . . . was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy."

*Id.*

135. *Id.* at 588 (noting that while the denial of good title to original Indian occupants was unjust, "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.").

136. *Fletcher v. Peck*, 10 U.S. 87 (1810) (deeming Indian land vacant for purpose of uncompensated taking by State).

137. *M'Intosh*, 21 U.S. at 592 (noting uniform practice of European states in accepting discovery and conquest as operative in the Americas as support for their operation in U.S. courts).

138. *Id.* at 573 ("[T]he character and religion of [Indians] afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy.").

adapted to the actual condition of the two people, it . . . certainly cannot be rejected by Courts[.]”<sup>139</sup> Although the progressive Marshall intended to impose legal limits on the future conduct of conquerors less charitably disposed toward Indian tribes than he,<sup>140</sup> *M’Intosh* fueled subsequent claims that “Indians were conquered as soon as John Cabot set foot on American soil,” “that it only required the inevitable march of history to carry out this preordained outcome,” and that “tribal property rights are not properly understood as rights at all, but merely as revocable licenses, or . . . ‘permission by the whites to occupy.’”<sup>141</sup>

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

Subsequent cases further diminished tribal sovereignty over Indian land. In the 1831 case, *Cherokee Nation v. Georgia*,<sup>142</sup> the second in the Marshall Trilogy, Chief Justice Marshall determined that, despite their retention of a set of reserved rights and powers to include occupancy of their lands subject only to voluntary cession,<sup>143</sup> Indian tribes were “domestic dependent nations”<sup>144</sup> and “wards” under U.S. “pupilage,”<sup>145</sup> not sovereign foreign nations or states within

139. *Id.* at 591-92.

140. *See id.* at 596-97. The Court discussed its role in Indian-White relations:

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

*Id.*; *see also id.* at 574 (making clear that in the absence of conquest, Indian title can only be lawfully acquired by the United States through a consensual transfer, as Indians were the “rightful occupants of the soil, with a legal as well as a just claim to retain possession of it . . .”; *see also id.* at 603 “[The Indian] right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.”).

141. Singer, *supra* note 133, at 489-90 (noting citation of conquest theories derived from *M’Intosh* for proposition that Congress has unlimited authority over Indians) (citing *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955)).

142. 30 U.S. (5 Pet.) 1 (1831).

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

144. *Id.*

145. As Chief Justice Marshall proclaimed,

[Indian tribes] are in a state of pupilage. Their relation to the [U.S.] resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.



the meaning of the Constitution,<sup>146</sup> and that as a result the Court could not take original jurisdiction over a case wherein the Cherokee sought to enjoin enforcement of the laws of Georgia on land guaranteed by treaties.<sup>147</sup> Although Marshall held that the United States owed a common-law trust duty to Indian tribes, not only was this duty specifically held to be judicially unenforceable,<sup>148</sup> but an examination of the other justices' opinions, construing the U.S.-Cherokee relationship as that between a conqueror and a subject people,<sup>149</sup> hinted that the "trust doctrine," true to its roots in medieval Christian xenophobia and scientific racism,<sup>150</sup> would serve as yet another legal tool with which to diminish Indian sovereignty.<sup>151</sup> In short order, the United States claimed trust title to all Indian lands within its borders.

Although U.S. federal Indian policy with respect to Indian land under the trust

*Id.*

146. *Id.* at 11-12 (citing U.S. CONST. art. III, § 2).

147. *Id.* at 10.

148. Cherokee Nation, 30 U.S. (5 Pet.) at 20 ("If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.")

149. *See id.* at 16 (Johnson, J., concurring); *id.* at 32-33 (Baldwin, J., concurring). The dissent proved more consonant with the trend in international law, which, although it continued to sanction the creation of consensual guardianships with powers and duties limited by treaties between sovereign peoples, shortly thereafter abandoned altogether any consideration of indigenous peoples as political bodies with rights. *See ANAYA, supra* note 37, at 14.

150. *See ANAYA, supra* note 37, at 21 (arguing that the trust doctrine is a "form of scientific racism" that posits that whites have a duty to "wean native peoples from their 'backward' ways and to 'civilize' them"); *see also* Friedman, *supra* note 84, at 563-64 ("From the very beginning, the federal-tribal trust doctrine . . . explicitly relied upon the 'primitivism' of natives to justify interference in their affairs. "); CADWALADER & DELORIA, *supra* note 85, at 196 (noting that the trust doctrine was the political will of a white population committed to the notion that Indians were a semi-barbarous people who ought to yield to white civilization).

151. Such fears proved well-founded when the Supreme Court explained the trust obligation as the duty to act as "a Christian people in their treatment of an ignorant and dependent race." *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877). The "white man's burden" motivated federal Indian policy as actualized through the trust doctrine well into the twentieth century. *See United States v. Sandoval*, 231 U.S. 28, 39, 46 (1913). The Court revealed its feelings towards Indians:

Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, [Indians] are essentially a simple, uninformed, and inferior people . . . as a superior and civilized nation [the U.S. has] the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders[.]

*Id.* Manifestations of this odious philosophy now travel in more subtle garb.

doctrine<sup>152</sup> generated a host of express obligations to ceding Indian tribes undertaken in subsequent treaties, statutes, and executive orders to create and protect permanent land reservations<sup>153</sup> as against States and private parties, popular political pressure ensured that these judicially unenforceable obligations were almost never discharged with "good faith and utter loyalty to the best interests" of the Indian tribes.<sup>154</sup>

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

In *Worcester v. Georgia*,<sup>155</sup> Marshall interpreted the Commerce Clause of the U.S. Constitution<sup>156</sup> to hold that Congress had "plenary" power over Indian

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

153. U.S.-Indian treaties post-*Cherokee Nation* unambiguously contemplated discrete reservation land bases where Indian tribes would exercise beneficial ownership while enjoying political, economic, and cultural sovereignty under U.S. guardianship. See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14, 16 (1987) (asserting that the central thrust of federal Indian law has always been to create a "measured separatism"). Indian tribes under the trust doctrine would remain distinct peoples and continue in a political relationship with the United States largely based on treaties and on the Commerce Clause, which sets Indian tribes apart from states and foreign nations as sovereign governments and provides that Congress has the exclusive authority to regulate trade. See U.S. CONST., art. I, § 8, cl. 3.

154. In a democratic republic, a self-interested majority represents a powerful barrier to honoring treaty-commitments benefitting a discrete minority not formally an organic part of the body politic yet in possession of vast lands and natural resources. See ELY, *supra* note 73, at 135-79 ("There will always be a conflict when a government . . . must act both as trustee in the best interests of a small segment of the populace and also as a servant of the best interests of the entire society."); THE FEDERALIST NO. 51 (James Madison) (warning of the majoritarian problem); *Whitney v. California*, 274 U.S. 357, 376 (1927) (same). As a result, the paternalistic policies of a non-Indian majority, violative of the moral and legal imperatives arising under the trust doctrine, add the insult of impoverishment to the injury of expropriation: the BIA arranges Indian leases, and collects their royalties and usufructuary benefits for their "protection." See Atkinson, *supra* note 54, at 405. Moreover, because all tribal land is held in trust, leases of more than one year are prohibited without permission of the Secretary of the Interior, and funds generated from such leases cannot be used to purchase land. THE ROAD TO WOUNDED KNEE 118 (Robert Burnette & John Koster eds., 1974) [hereinafter BURNETTE & KOSTER].

155. 31 U.S. (6 Pet.) 515 (1832).

156. See U.S. CONST. art. I, § 8, cl. 3 (granting power to Congress "to regulate commerce

affairs.<sup>157</sup> Although the precise meaning of the term "plenary" was not subject to ready determination,<sup>158</sup> *Worcester* loosed Congressional plenary power upon Indian tribes, qualifying all remaining tribal powers by express congressional legislation by 1900.<sup>159</sup> Moreover, by the late 1840s, with the military power calculus shifting<sup>160</sup> and gold discovered out West, "whites

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with foreign Nations, and among the several States, and with the Indian Tribes.").

157. *Worcester*, 31 U.S. (6 Pet.) at 540-42. However, even as it expanded the power of Congress, *Worcester* restricted State jurisdiction. *See id.* at 561 (holding that the "Cherokee nation . . . is a distinct community . . . in which the laws of Georgia can have no force").

158. The "plenary power" doctrine, with origins in medieval-era traditions of "Christian cultural racism and discrimination against . . . normatively-divergent peoples," was carried into the New World by Columbus, developed by successive European arrivals, and reified as moral imperative in U.S. jurisprudence to permit the "superior" race to exercise whatever power necessary to "civilize" indigenous peoples. DAVID GETCHES ET AL., *CASES AND MATERIALS IN FEDERAL INDIAN LAW* 177 (3d ed. 1993); *see also* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence*, 1986 WIS. L. REV. 219, 260 [hereinafter Williams, *Algebra of Federal Indian Law*] (arguing plenary power "erase[s] the difference presented by the Indian in order to sustain . . . European norms and value structures"). Other commentators suggest Marshall's use of the term "plenary" was not meant to denote "absolute" or "total" power but rather to signify federal, as opposed to state powers, thereby shielding tribal sovereignty from state legislation. *See* Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 524 (1987). The orthodox view suggests that "plenary" as used in *Worcester* implies general police powers, as opposed to the limited and delegated powers the federal government bears in relation to states, and as such arrogates to Congress general powers to regulate every aspect of Indian affairs. WILKINSON, *supra* note 153, at 78-79. By the late nineteenth century "plenary power" was accepted as the absolute prerogative of Congress vis-à-vis the Indian tribes. *See* *United States v. Kagama*, 118 U.S. 375, 381-84 (1886) (holding Congress has incontrovertible right to exercise authority over Indians for their own well-being); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (holding Congress, under its plenary power, could abrogate a treaty when doing so would be "in the interests of the country and the Indians themselves"). Plenary power to dispose of Indian land is a nonjusticiable political question, and no congressional exercise of regulatory jurisdiction over Indian affairs has ever been set aside by the courts. *See* CADWALADER & DELORIA, *supra* note 85, at 200 (noting plenary power places Indian policy outside constitutional limits while rendering all U.S. Indian legislation non-justiciable political questions ab initio); Laura Nader & Jay Ou, *Idealization and Power: Legality and Tradition in Native American Law*, 23 OKLA. CITY U. L. REV. 13, 20 (1998) (same). Thus, when plenary power threatens their rights, Indian tribes must seek recourse from the very body posing the threat — Congress.

159. *See* LEGTERS & LYDEN, *supra* note 64, at 3 (noting that subsequent to *Kagama*, Congress passed the first of more than 5000 laws regulating Indian tribes and individual Indians).

160. After the Civil War, U.S. military power was so overwhelming that all subtlety in relations with Indian tribes was abandoned, and armed force was employed against Indian nations west of the Mississippi. *See* ALBERT K. WEINBERG, *MANIFEST DESTINY* 115 (1935).

c[ould] no longer be kept out of Indian country."<sup>161</sup> By adding plenary power to the legal arsenal, *Worcester* and its progeny ushered in a violent phase of expansion, executed under the rubric "Manifest Destiny."<sup>162</sup>

Over the next several decades the Army prosecuted a sequence of wars to perfect discovery by divesting Indians of their possessory interest<sup>163</sup> and enabling the United States to claim trust title and exercise plenary power. Still other wars were fought to suppress Indian unrest after violations of Indian treaties.<sup>164</sup> After each genocidal campaign, a dwindled, harried, and hungry

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161. BRIAN W. DIPPY, *THE VANISHING AMERICAN: WHITE ATTITUDES AND UNITED STATES' INDIAN POLICY* 73 (1982). See also VAN EVERY, *supra* note 113, at 260. By the late 1840s, homesteaders and prospectors pressured policymakers to grant access to the coveted territorial and material wealth of the American West — an area populated theretofore almost exclusively by Indian nations. However, not all sectors of society supported ethnic cleansing; intelligentsia and religious organizations led a vocal opposition:

We are, it appears, of the "Anglo-Saxon race," of a lineage of "land-stealers," a progeny of plunderers! Oh, pious genealogy! How we "honor our father and mother, that our days may be long in the land which the Lord our God hath given us!" which land is to be all that, with carnage and devastation and enslavement we can wrest from weak and wretched neighbors! The pagans who came as friends among an unarmed people and fell to butchering them?

NAT'L INTELLIGENCER, Jan. 15, 1848, at 1.

162. "Manifest Destiny," a term which first appeared in print in 1845, refers to the nineteenth-century political philosophy holding that the United States was charged with a divinely-inspired mission of extending its moral enlightenment, democratic principles, and republican values to the furthest reaches of North America. See generally WEINBERG, *supra* note 160. If fulfillment of this Manifest Destiny required the defeat, displacement, and murder of Indian nations, the imprimatur of the Supreme Court and racial science supported the inevitability of the expansion of the frontier and affirmed divine approbation of the mid- to late nineteenth century Indian Wars. *Id.*

163. Theretofore, Indian claims based on lineal descendancy and exclusive occupancy earned recognition, by treaty, statute, or agreement, of a limited possessory right to permanent occupancy known as "recognized Indian title." See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 453, 543 (1823).

164. The Supremacy Clause establishes treaties as legal authority coequal to the Constitution itself. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws . . . which shall be made in Pursuance thereof, and all Treaties made . . . under the authority of the United States, shall be the supreme Law of the Land[.]"). A violation of a treaty is therefore a violation of federal law unless Congress subsequently and unambiguously legislates to abrogate the treaty. *Edey v. Robertson*, 112 U.S. 580, 599 (1884) (commonly known as "Head Money Cases") (citing common-law rule supporting legislative modification of treaties); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (providing Congress may modify treaty provisions, or "supersede them altogether[.]" by subsequent statute). Although an Indian treaty thus binds all branches of government, Congress has plenary power to abrogate or otherwise limit it provided it does so explicitly and "with perfect good faith toward Indians," which good faith is legally presumed. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (establishing plenary power to abrogate or limit

Indian nation *in extremis* sued for a peace that surrendered vast tracts of lands and political freedom in exchange for dependence<sup>165</sup> and "civilization."<sup>166</sup> During the first decade after the Civil War, the United States acquired nearly one-fourth of the land within its modern contiguous boundaries<sup>167</sup> entirely free of any legal obligation to pay more than token compensation.<sup>168</sup> Yet despite

terms of an Indian treaty); *Puyallup Tribe v. Dep't of Game of Wash.*, 433 U.S. 165 (1977) (upholding, under political question doctrine, plenary power to abrogate Indian treaties). Moral restraint has been in as short supply as "perfect good faith." To cure breaches of land provisions of Indian treaties occasioned by invasion, Congress passed abrogating statutes allowing the United States to violate with impunity all of the more than 400 Indian treaties. Singer, *supra* note 133, at 483-84. For a historical review of Congressional bad faith, see VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES* (1974) [hereinafter DELORIA, *BEHIND THE TRAIL*].

165. DELORIA, *BEHIND THE TRAIL*, *supra* note 164, at 382 ("The [U.S.] Army dogged tribes across the plains, through the forests[,] in and out of desert canyons, and through the swamps . . . until tribe after tribe realized they would have to sign a terrible treaty or face extinction[.]"). Treaty promises of annuities for peace were bitter bargains: defeated tribes were confined on distant, strange lands, restricted from engaging in traditional subsistence practices, and forced into dependency. *Id.*

166. See *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883) ("Congress . . . expected . . . the semi-barbarous condition of the Indian tribes [to] give way to the highest civilization of our race.").

167. See Nell Jessup Newton, *Compensation, Reparations, and Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 460 (1994) (noting expropriation of one billion acres of Indian land from 1865-1875) [hereinafter Newton, *Compensation*].

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

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

*Id.* Given the judicially-crafted distinction between "recognized Indian title" and "aboriginal title," Congress may take even those lands undisputedly owned and exclusively occupied by a tribe since time immemorial and extinguish Indian occupancy at will, without compensation, and for any purpose, so long as those lands were not conveyed by an official act of Congress or so long as the tribe did not enter into a treaty to claim them. *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 234, 243-44 (1998) (requiring explicit congressional designation, by treaty or statute, to find recognized Indian title); CADWALADER & DELORIA, *supra* note 85, at 187-88 (stating Indians occupying aboriginal title lands are "mere tenants at the will of the [U.S.]"). Furthermore, even with respect to recognized title, Congress is free to pay

distribution of millions of cheap acres to settlers,<sup>169</sup> the national greed for space,<sup>170</sup> fueled by an evolving inter-branch compact authorizing takings of Indian land,<sup>171</sup> dictated confiscation of the remainder of Indian country.

##### 5. *Sunset of Indian Sovereignty: End of the Treatymaking Era*

In 1871 Congress exercised plenary power to strip away the last formal vestiges of Indian juridical sovereignty by providing that "[n]o Indian nation or tribe shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."<sup>172</sup> No longer compelled as a matter of federal law to treat Indian nations as foreign sovereigns or to regulate Indian affairs by treaty, the government could now acquire Indian land without even the pretense of consent, and Congress, unwilling to allow "(a)n idle and thriftless race of savages . . . to stand guard at the treasure vaults of the nation[.]" gave the Army free rein to employ genocide<sup>173</sup> to crush the last obstacles to the orderly march to the Pacific.

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compensation at levels bearing no discernible nexus to market value. See *Babbitt v. Youpee*, 519 U.S. 234 (1997) (subjecting plenary power only to limited Constitutional restraint that Congress pay some compensation when extinguishing recognized title). In sum, Indian property is beyond the Constitutional pale. See Newton, *Compensation*, *supra* note 167, at 457-58 (analogizing federal Indian law to Communist law in that neither afford meaningful protection against takings).

169. See, e.g., Homestead Act of 1862 ch. 75, 12 stat. 392 (granting 250 million acres of Indian land to settlers at as little as \$1/acre).

170. In part, U.S. land hunger is attributable to rapid post-Civil War technological development that demanded raw materials and rendered land more important than labor to the U.S. political economy. Prince, *supra* note 55, at 251.

171. See Singer, *supra* note 133, at 483-84 (stating that, as all questions relating to Indian affairs were now nonjusticiable political questions, "Congress and the President therefore possessed absolute, unreviewable power over Indian nations").

172. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2000)).

173. Glenn T. Morris, *International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples*, in *THE STATE OF NATIVE AMERICA* 55, 67 (M. Annette Jaimes ed., 1992). Scores of tribes, their numbers reduced by war, disease, and starvation, were forced onto land reservations in the 1860s and 1870s. The surviving three hundred members of the last belligerents, the Chiricahua Apache, surrendered unconditionally in 1887 after the murder of three thousand of their number. For a comprehensive history of the genocide of the Chiricahua Apache, see generally LIEDER & PAGE, *supra* note 107.

### 6. Allotment to Present: "Mighty Pulverizing Engine"<sup>174</sup>

By 1887 all two billion acres of the U.S. continental landmass had been discovered, conquered, and expropriated save for the 138 million acres apportioned to Indian reservations, which the General Allotment Act of 1887 (Allotment)<sup>175</sup> targeted for further dismemberment and colonization. Allotment, an exercise of plenary power, subdivided large swaths of communally-owned tribal lands into parcels for the private use of individual Indian allottees under a twenty-five-year period of federal guardianship.<sup>176</sup> Upon expiration of the trust period, the United States issued an unrestricted fee patent to allottees who proved "competence," assumed U.S. citizenship, and paid real estate taxes.<sup>177</sup> For most tribes, Allotment was devastating: although tribal governments remained *in situs* on vestiges of reservations still under trust protection, by encouraging Indian individuals to formally withdraw from the tribe<sup>178</sup> in exchange for a per capita share of tribal land and by meeting the failure of unemployed Indian allottees to pay property taxes with foreclosure, reversion of title, and sale to white speculators at prices far below market value,<sup>179</sup> Allotment abolished Indian reservations as autonomous and

174. See 15 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1914, at 6674 (James D. Richardson ed., 1917) (calling Allotment a "mighty pulverizing engine [designed] to break up the tribal mass").

175. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 26 U.S.C.).

176. *Id.* The original plan was to allot tribal heads of household 160 acres each and to make surplus land available to non-Indians. See WILKINSON, *supra* note 153, at 19-20. However, effects varied, and while some reservations, such as the Jicarilla Apache, remained unallotted, see *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 133-34 (1982), others, such as the Lake Traverse Reservation of the Wahpeton and Sisseton Bands of the Sioux Tribe, were held to be terminated once 85% of the reservation had been purchased by non-Indians, see *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427-28 (1975).

177. See PEVAR, *supra* note 124, at 62 (noting that Allotment subjected individual Indian landowners to the full panoply of territorial and state laws, including property taxation).

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

179. JAMES J. LOPACH ET AL., *TRIBAL GOVERNMENT TODAY* 20 (1990). Subsequent to the allotment of the lands of several tribes in what is now Oklahoma, in 1889 development companies formed in Northern and Eastern cities for the purpose of settling the "unassigned lands," and a oft-violent scramble erupted over recently depopulated Indian lands despite supervision of the U.S. Army. STAN HOIG, *THE OKLAHOMA LAND RUSH OF 1889* (1984). Settlers entering lands assigned for white settlement prior to the designated time for entry-noon

integral sociopolitical entities.<sup>180</sup>

Although several Indian tribes attempted to block Allotment,<sup>181</sup> the Supreme Court ruled not only that Indian land was subject to the sovereign right to take for public use upon payment of just compensation,<sup>182</sup> but that takings of Indian land, described as a "legitimate form of 'investing for the tribe'"<sup>183</sup> that did not require either consent or notification, were precluded from judicial review.<sup>184</sup> By 1934, Indian lands had been reduced by a further ninety million acres, with almost twenty-six million lost through fraudulent transfers, and of the two billion acres of formerly contiguous tribal land holdings all that remained was a fragmented, forty-seven million acre mosaic of reservation lands under trust, plots owned in fee simple by whites, and plots held by Indian individuals no longer members of any tribe.<sup>185</sup> Moreover, 95,000 Indians were now landless.<sup>186</sup> In sum, the synergy of discovery, the

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on April 22, 1889- earned the epithet "sooners," and when local land offices could not resolve disputes arising between sooners and "lawful" settlers, known as "boomers," over rights in erstwhile Indian lands, the U.S. Supreme Court was ultimately called to resolve not the question of the legal legitimacy of Allotment but rather of the relative rights as between sooners and boomers in the recently reoccupied lands. See *Smith v. Townsend*, 148 U.S. 490 (1893).

180. See PEVAR, *supra* note 124, at 5 (describing Allotment as divorce of individual Indians from sources of tribal resistance to expropriation and a partitioning of the tribal estate).

181. Kiowa Chief Lone Wolf sued unsuccessfully to prevent allotment of 2.5 million acres of tribal lands, guaranteed by treaty against allotment, without the signature of two-thirds of adult males. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (providing that compensation for takings of Indian land need not be paid where Congress acts as a trustee in the "best interest" of Indian tribes despite violation of treaty); (abrogating Medicine Lodge Treaty, 15 Stat. 581, 589 (1867)).

182. See *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902) (upholding legislation allotting Indian land as constitutional despite violation of existing treaties and lack of tribal consent).

183. Atkinson, *supra* note 54, at 397.

184. *Lone Wolf*, 187 U.S. at 566 (establishing that Congressional exercise of plenary power in regulation of Indian affairs, even to the extent of abrogating treaty-based property rights, is immune from judicial review under political question doctrine). A skein of subsequent cases has reinforced, as a matter of domestic law, the sweeping breadth and depth of plenary power to abridge Indian treaty-based property rights. See William J. Murphy, *Jurisdiction — Sovereign Immunity — Business Owned by Native American Nation Granted Sovereign Immunity from Suit Arising from Its Private Off-Reservation Transaction*, In re *Greene*, 980 F.2d 590 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 681 (1994), 17 SUFFOLK TRANSNAT'L.J. 599, 601 n.16 (1994) (listing cases). Still, several Indian tribes continue, perhaps quixotically, to assert legal claims arising from U.S. takings of recognized Indian title. See Susan Lope, *Indian Giver: The Illusion of Effective Legal Redress for Native American Land Claims*, 23 S.W.U.L. REV. 331 (1994) (evaluating such claims).

185. See Atkinson, *supra* note 54, at 398 (noting that due to Allotment many reservations are checkerboards of federal and Indian land, with some even populated mainly by non-Indians).

186. Frank Pommersheim, *The Reservation as Place*, 34 S.D. L. REV. 246, 256, 261 (1989).



trust doctrine, and plenary power as manifested in Allotment perfected the legal theft of Indian land.<sup>187</sup>

Despite infrequent restitution and compensation for Indian land,<sup>188</sup> the Constitution affords no protection to Indian tribes,<sup>189</sup> and what remains of their landbase continues under siege.<sup>190</sup> In light of the progressive evolution of

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187. More than half of the U.S. land mass was purchased at an average price of pennies per acre, while another 300 million acres were taken without compensation and another 700 million acres are claimed by the United States although it has taken no action to extinguish Indian title. See Russel Lawrence Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. REV. 7, 8-9 (1982). Moreover, all of "Indian Country", a legal term-of-art meaning essentially lands within the territorial limits of an Indian reservation, is now either trust land owned by the United States or non-trust land permanently Indian-occupied but subject to Congressional plenary power to restrict alienation and use. See 18 U.S.C. § 1151 (2000) (defining "Indian Country"); see also *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 234, 243-44 (1998) (noting that to qualify as "Indian Country" subject to federal jurisdiction, the trust doctrine, and limited immunity from State jurisdiction, Congress must explicitly designate lands in question, by treaty or statute, either a "reservation," "dependent Indian community," or Indian allotment). In sum, the United States owns superior title to all land within its borders, and efforts to reacquire Indian land are vigorously opposed by all levels of government. See Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Act*, 29 ARIZ. ST. L.J. 25, 80 (1997) [hereinafter Tsosie, *Negotiating*]. From the Indian viewpoint, non-Indians not only shamelessly "gorg[e] themselves on the spoils of old wars" but remain unrepentant, as evinced by ongoing land seizures. Atkinson, *supra* note 54, at 381.

188. See, e.g., Maine Indian Land Claims Settlement Act, 25 U.S.C.A. § 1723 (2000) (providing recognition and \$81.5 million for purchase of 300,000 acres to Penobscot, Passamaquoddy, and Maliseet); Florida Indian Claims Settlement Act 25 U.S.C. § 1744 (a) (2000). While the United States has restored 540,000 acres since 1970, this represents .05% of the two billion acres under Indian possession at First Contact. Newton, *Compensation*, *supra* note 167, at 476-77.

189. *United States v. Sioux Nation*, 448 U.S. 371, 416-17 n.30 (1980) (reiterating that nonconsensual transfers of Indian land to third parties are insulated from the Takings Clause of the Fifth Amendment when the United States acts as tribal guardian, rather than as sovereign).

190. See Larry Sager, *Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations*, 76 U. DET. MERCY L. REV. 745, 781 (1999) (noting recent expropriations of Indian land), Newton, *Compensation*, *supra* note 167, at 473 (chronicling post-World War II uncompensated expropriations of Indian land); Lope, *supra* note 184, at 331 (enumerating outstanding Indian land claims); Ward Churchill, *The Earth Is Our Mother: Struggles for American Indian Land and Liberation in the Contemporary United States*, in JAIMES, *supra* note 95, at 139, 147-48 (discussing ongoing Indian land struggles). Moreover, tribal efforts to aggregate land parcels fractured by Allotment and other federal policies are kept at bay only by the occasional intervention of the judicial branch. See, e.g., *Babbitt v. Youpee*, 519 U.S. 234, 242-43 (1997) (holding a provision of the Indian Land Consolidation Act, 25 U.S.C. § 2206 (2000), prohibiting the descent or devise of small fractional interests in allotments and providing that such fractional interest would escheat back to tribes, unconstitutional as a taking of private property without compensation).

rights regimes it is surreal that the United States continues to wield:

[a]bsolute, unreviewable power to continue the conquest of Indian nations that have not yet been forced to sign a treaty . . . [and to] take land held under original Indian title as it pleases, . . . without any constitutionally mandated obligation to pay compensation for the taking of land possessed by Indian nations for thousands of years, and despite the fact that the members of such tribes are United States citizens otherwise protected by the Constitution.<sup>191</sup>

### C. *Ethnocide*<sup>192</sup>

With its Manifest Destiny secured, the United States, heretofore oriented toward the physical separation and extermination of indigenous people, changed tacks to follow the prevailing political winds,<sup>193</sup> and U.S. Indian

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191. Singer, *supra* note 133, at 487. Reference to remedial federal legislation of purportedly general applicability designed to enforce the legal equality of "all persons within the jurisdiction of the United States[.]" particularly with respect to the "full and equal benefit of all laws and proceedings for the security of . . . property " and the "right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property" renders the legal burden placed upon Indian property all the more unsupportable and indefensible. Civil Rights Act of 1866, 42 U.S.C. §§ 1981-1982 (2000). Perhaps the only way to harmonize the statutes with the burdens upon Indian property is to deny that Indians are persons within the meaning of the Constitution.

192. Ethnocide is defined as "any act which has the aim or effect of depriving [indigenous people] of their ethnic characteristics or cultural identity [or] any form of forced assimilation or integration, [such as the] imposition of foreign life-styles . . . ." Erica-Irene Daes, *Discrimination Against Indigenous Peoples: First Revised Text of the Draft Universal Declaration on Rights of Indigenous People*, ESCOR, Part 2, ¶5, U.N. Doc. E/CN. 4/Sub. 2/1989/33 (1989). The WGIP synonymously uses the term "cultural genocide," defined as denying an ethnic group "its right to enjoy, develop and disseminate its own culture and language," to label actions that have the effect of destroying indigenous peoples as distinct societies without requiring a showing of specific intent. See San Jose Declaration, *supra* note 62, at 90; see also, Draft United Nations Declaration on the Rights of Indigenous Peoples, ESCOR, U.N. Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., 7, U.N. doc. E/CN. 4/sub. 2/1994/56, 34 I.L.M. 541, 548, adopted Aug. 26, 1994 [hereinafter Draft Declaration] ("Indigenous peoples have the collective and individual right not to be subjected to cultural genocide, including the prevention of and redress for: (a) Any act which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; . . . (d) Any form of assimilation or integration by other cultures or way of life imposed upon them by legislative, administrative or other measures[.]").

193. See Russel Lawrence Barsh, *Progressive-Era Bureaucrats and the Unity of Twentieth-Century Indian Policy*, 15 AM. INDIAN Q. 1, 10 (1991) [hereinafter Barsh, *Progressive-Era Bureaucrats*] (identifying liberal humanists and intellectuals as partly responsible for

policy adopted a treble action agenda for implementation in conjunction with private actors:<sup>194</sup> liquidation of Indian culture,<sup>195</sup> eradication of tribal self-government,<sup>196</sup> and forced assimilation of "civilized" Indians, shorn of cultural and social attachments, into the body politic.<sup>197</sup> These interrelated policies, along with the specific laws, regulations, practices, and customs developed throughout the late nineteenth and much of the twentieth centuries to deny Indians the right to maintain separate and autonomous polities and preserve their culture from interference, painted Indian tribes as targets for a sinister "genocide-at-law."<sup>198</sup> Promising to free "backward" Indians from an "outmoded past" and endow them with "civilization," "education," and "prosperity"<sup>199</sup> whether they desired these "blessings" or not,<sup>200</sup> the BIA,<sup>201</sup>

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transformation of late-nineteenth century Indian policy).

194. See ANAYA, *supra* note 37, at 26 (discussing formation, in latter half of nineteenth century, of a government-Christian church conspiracy against Indian land and culture).

195. Culture can be defined as a "set of shared and enduring meanings, values, and beliefs that characterize national, ethnic, or other groups and orient their behavior which is transmitted from one generation to the next and shapes interactions with others and the environment[.]" Guy O. Faure & Gunnar Sjostedt, *Culture and Negotiation: An Introduction*, in CULTURE AND NEGOTIATION 1, 3 (Guy O. Faure & Jeffrey Z. Rubin eds., 1993). As such, "[e]ach culture . . . records . . . experiences in ways that provide meaning, guidance and codes of rectitude that serve as compasses for the individual as he or she navigates the vicissitudes of life[.]" See W. Michael Reisman, *International Law and the Inner Worlds of Others*, 9 ST. THOMAS L. REV. 25, 25 (1996). While culture is germane to the constitution of group identities, it is particularly so for Indian tribes: a communal culture, constituted by language, law, music, dance, religion, history, and world view, touches every facet of Indian life and serves as a template for determining and patterning Indian behavior. See Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691, 703 (1993) ("[Indians] without communal culture are not whole. They are, as one Indian leader derisively put it, 'just people' and nothing more."). Indian culture, thus construed, can be analogized to tribal property entitled to defense as such. See Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L. REV. 723, 725 n.7 (1997) ("[O]wnership of cultural property may actually be a . . . right, not unlike a right to speak a certain language or practice a religion[.]"). For a discussion of Indian culture as a property right, see, e.g., Walter R. Echo-Hawk, *Museum Rights v. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437, 441-51 (1986); see also Symposium, *The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation Related Legislation*, 24 ARIZ. ST. L.J. 1 (1992).

196. The term "self-government" refers to the autonomous determination of the institutions, structures, and processes of political organization, economic development, and legal regulation.

197. See Fenton, *supra* note 114, at 81 (analyzing 1871-1934 federal Indian policy as acquisition of Indian land, destruction of Indian political leadership, and assimilation of Indians).

198. See Strickland, *supra* note 100, at 718 (coining the term "genocide-at-law").

199. Barsh, *Progressive-Era Bureaucrats*, *supra* note 193, at 10.

200. Despite the pretensions to enlightenment maintained by advocates of Indian genocide-

along with religious missionaries, set about dissolving the "glue" of Indian society.<sup>202</sup>

### 1. Cultural Liquidation

#### a) "Kill the Indian to Save the Man"<sup>203</sup>

Of all the processes engineered to strip away the Indian sense of self, world view, and tribal identity, perhaps the most nefarious was Congressional funding of religious schools geared toward eradication of Indian culture and the substitution of Euro-American, Christian culture in its stead.<sup>204</sup> Beginning in the late nineteenth century, Indian children were taken, often without parental or tribal consent, to boarding schools where their hair was cut, their tribal clothing exchanged for Western garb, forced manual labor was required, and harsh abuses of a physical and sexual nature were meted out for speaking tribal languages or engaging in customary religious practices.<sup>205</sup> During their residence, Indian children were prohibited from visiting their relatives, who, as a result, they often did not see for years.<sup>206</sup> Removed Indian children, and their descendants down through the generations, have typically lost the use of their languages, been denied cultural knowledge and inclusion, and been deprived of opportunities to take on tribal responsibilities.<sup>207</sup>

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at-law, an understanding that compulsion would be as necessary to effect disenculturation as it was to steal land explains the application of plenary power, rather than proselytism.

201. The BIA is the executive agency responsible for U.S. intergovernmental relations with the tribes and for discharge of the trust responsibility.

202. See ANDERSON, *supra* note 54, at 24.

203. In 1892, Captain Richard Henry Pratt, founder of the Carlisle Industrial Indian School, opined that "all the Indian there is in the race should be dead. Kill the Indian in him and save the man." Atkinson, *supra* note 54, at 392.

204. See Jorge Noriega, *American Indian Education in the United States: Indoctrination for Subordination to Colonialism*, in JAIMES, *supra* note 95, at 380-81 (noting that boarding school curricula stressed Anglo-American, while stifling Indian, languages, cultures, and religions).

205. See *id.* at 371 (stating that Indian children in boarding schools were subjected to beatings, whippings, and sexual abuse well into the twentieth century); see also Tsosie, *Sacred Obligations*, *supra* note 49, at 1663 (terming this forcible process whereby full Indian participation in, and knowledge of, their culture was denied beginning at an early age by non-Indians as "natal alienation"); ROBERT A. TRENNERT, JR., *THE PHOENIX INDIAN SCHOOL: FORCED ASSIMILATION IN ARIZONA, 1891-1935* (1988).

206. See Pommersheim, *supra* note 186, at 256-57 (noting that denial of visitation, along with opportunities to visit reservations, advanced the process of assimilation).

207. See Pritchard, *supra* note 44, at 263 (discussing deprivation of cultural patrimony occasioned by removal of indigenous children); see also Allison M. Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901, 905-08 (1999) (detailing effects of suppression of Indian languages).

b) *American Crusade: Eradication of Indian Religion*

While Indian children were spirited off to forced conversions at distant boarding schools, the United States, exercising its plenary power, posted Christian missionaries to the reservations as Indian agents with orders to ban tribal religions, initiate Christianization of tribal populations, and pacify political and cultural discourse.<sup>208</sup> At the behest of the Indian agents, Congress launched a broad-based assault upon Indian religion with laws<sup>209</sup> that weakened "marriage, family and clan relationships, the distribution of property, and social and political organization."<sup>210</sup> Courts of Indian Offenses ("CIO") enforced these stringent social control mechanisms.<sup>211</sup> In arguing before Congress for the suppression of tribal dancing and feasting, the Secretary of the Interior proclaimed that "[i]f it is the purpose of the [U.S.] to civilize the Indians, they must be compelled to desist from . . . savage rites and heathenish customs."<sup>212</sup> For most of the twentieth century, non-Indians played "cultural game warden,"<sup>213</sup> circumscribing the legal exercise of Indian religion.<sup>214</sup> Despite passage of the American Indian Religious Freedom Act

208. See DELORIA, *CUSTER DIED*, *supra* note 52, at 108.

209. By 1892 the BIA Commissioner had listed the following offenses as within the jurisdiction of the CIO: "participating in dances or feasts, entering into plural . . . marriages, acting as medicine men destroying property of other Indians, and engaging in immorality, [and] intoxication . . ." Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003, 1033-34 (1995) [hereinafter Newton, *Memory and Misrepresentation*].

210. Sidney L. Haring, *Crow Dog's Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 194 (1989); see also *United States v. Clapox*, 35 Fed. 575, 577 (D. Or. 1888) (characterizing CIO courts as civilizing instrumentalities).

211. By 1900 CIO/CFR Courts had been created on the majority of reservations, extending the criminal jurisdiction of the United States. See Newton, *Memory and Misrepresentation*, *supra* note 209, at 1034. Judges were chosen from the ranks of "assimilated" Indians who were willing to cut their hair, wear western attire, and accept land allotments. See Andrea M. Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127, 139 n.28 (1999).

212. Newton, *Memory and Misrepresentation*, *supra* note 209, at 1033.

213. Rosen, *supra* note 82, at 253

214. Instances of the denial of the right to practice Indian religion are legion. For several generations the BIA suppressed Indian religious practices, particularly the Sun Dance, as promoting "superstitious cruelty, licentiousness, idleness, . . . and shiftless indifference to family welfare." COHEN, *supra* note 178, at 175 n.347 (citing BIA Commissioner in 1921 congressional testimony). Rigid proscriptions of all manifestations of Indian religion have been vigorously enforced by all three branches of the federal government for more than a century. See Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policies in Twentieth-Century Native American Free Exercise Cases*, 49 STAN.

(AIRFA) establishing the federal policy to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise . . . traditional religions,"<sup>215</sup> in practice Indian religions have proven too enigmatic for non-Indian jurists to admit them within the meaning of "religion" as enunciated in the Bill of Rights.<sup>216</sup> For Indian claimants, who have not won

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L. REV. 773, 792 (1997); Jose Monsivais, *A Glimmer of Hope: A Proposal to Keep the Indian Child Welfare Act of 1978 Intact*, 22 AM. INDIAN L. REV. 1, 3 (1997) (chronicling prohibition of all forms of traditional Indian religious practice). In recent times denials have often involved the right to gather or use ceremonial natural materials. See, e.g., *United States v. Dion*, 476 U.S. 734 (1986) (finding in legislative history and text of a federal criminal statute extending protection to eagles clear evidence of Congressional intent to exercise plenary power and abrogate right of the Yankton Sioux to quiet and undisturbed possession of their reservation, to include reserved right to hunt eagles); Sharon O'Brien, *The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Families*, 53 FORDHAM L. REV. 315 (1984) (noting international travel restrictions and domestic laws prohibiting importation of flora and fauna prevent Indians from crossing national boundaries to gather or trade sacred items as they have done since time immemorial); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (discussed *infra* note 218).

215. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified in part at 42 U.S.C. § 1996 (2000)) [hereinafter AIRFA] (declaring as grounds for protecting and preserving expression of Indian religions against infringement by state action that "the religious practices of the American Indian . . . are an integral part of their culture, tradition and heritage[.]").

216. Racism, paternalism, and romanticism conspire to prevent protection of Indian religious freedom except when it is possible to cram Indian claims into the pigeonholes of the Bill of Rights and the European-derived values and traditions supporting notions of what religion should be — organized churches, formal institutions, a separation between the church and state, and a hierarchical relationship between the deity and worshiper. See GETCHES, *supra* note 158, at 764 (explaining inability of non-indigenous federal judges to translate Indian claims under AIRFA into cognizable claims). According to Getches:

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

*Id.*

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

America is content with religious denominations which are capable of squeezing their entire experience with land into a city block, into a pew, and into a pulpit, leaving plenty of environmental "elbow room" for the business of the real world. As long as our religions tow [sic] the line insofar as they expect land to be sacrificed to our needs, we are happy . . . But when a religion dares to turn the tables and encourages humans to make medicine, prayers, and sacrifices in behalf

a single case of religious freedom since AIRFA was signed in 1978<sup>217</sup> and who may not celebrate the sacraments of their faith without threat of prosecution for violation of controlled-substance or species-protection legislation, the American tradition of religious freedom has been a "cruel hoax."<sup>218</sup> With AIRFA ineffectual in the courts and Congress unwilling to strengthen statutory protection,<sup>219</sup> a new millennium reveals only that Indians' freedom

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of other living things, we feel violated, bullied by "an agenda," and even irritated at such "primitive" ideas which hold "progress" hostage.

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

217. See Sharon O'Brien, *A Legal Analysis of the American Indian Religious Freedom Act*, in HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 27, 29-30 (Christopher Vecsey, ed., 1995); see also *New Mexico Navajo Ranchers' Ass'n v. Interstate Commerce Comm'n*, 850 F.2d 729 (D.C. 1988) (obligating United States to consider impact of actions on Indian religion but not obligating consultation with affected tribes nor halt to proposed action threatening imminent destruction of material foundations of a tribal religion).

218. Suagee, *supra* note 9, at 712. Not only did AIRFA provide little intellectual support for the finding that Indian religions were "religions" with respect to the Constitution, but it was passed as a resolution without concrete mandate other than a requirement that federal agencies evaluate their policies and procedures in consultation with Indian religious leaders and report findings to Congress. Nader & Ou, *supra* note 158, at 22-23. Moreover, judicial interpretation further guts constitutional protection of Indian religious practice: in 1988 the Court, finding no independent cause of action arising under AIRFA, upheld U.S. logging and construction activities on National Forest lands used for religious purposes by several tribes, even while conceding it was undisputed that the activities could have "devastating effects on . . . Indian religious practices," on the theory that to find otherwise would be tantamount to permitting a religious servitude on public lands. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452-53 (1988) ("Whatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its rights to use what is, after all, *its* land.") In 1990 the Court again left Indian religion subject to political whim when it refused to apply the "compelling state interest" test developed under the First Amendment to a Oregon general prohibition on the use of peyote applied, in the case at bar, to essential religious practice by members of the Native American Church: a majority held it would be "courting anarchy" to "open the prospects of constitutionally required religious exemptions from civic obligations of almost every conceivable kind" and that "leaving accommodation to the political process" is the appropriate means to determine the state interest in regulating Indian religion. *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 888-90 (1990).

219. After Indian NGOs and human rights groups formed the American Indian Religious Freedom Coalition and drafted the "Native American Cultural Rights Act" to assure greater protection of sacred sites, rights to make religious use of peyote, and rights to take endangered species as needed for religious purposes, Congress specifically overruled *Smith* and created additional substantive protections for Indian religion. See GETCHES, *supra* note 158, at 169. However, the Court struck down the result, unable to identify a history of religious bigotry necessary to support the legislation as a remedial or preventive measure under the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (finding Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2000), an attempt to define the substance of,

to preserve their religious beliefs "amounts to nothing more than the right to believe that their religion will be destroyed."<sup>220</sup> Even as Indians continue to assert that denial of their religious freedom is a deprivation of the highest magnitude,<sup>221</sup> the preservation of teachings, values, objects, and places for which they bear sacred inter generational responsibility is yet diminished by federal law.<sup>222</sup>

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

The United States' Indian policy has long disabled autonomous determination of the political organization, economic development, and legal regulation of Indian tribes and people, principally by disintegrating tribal institutions and supplanting them with Euro-American forms of governance. From the dark ages of the Allotment Era<sup>223</sup> to the present, Indian legal institutions have presented an attractive point-of-entry to agents of forced "social evolution"<sup>224</sup> whose labors have wrought the domination and physical assimilation of Indian tribes and people.

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rather than enforce under §5 of the Fourteenth Amendment, the protections of the First Amendment Free Exercise Clause, thereby intruding into the general authority of states to exercise police powers). Protection of Indian cultural patrimony, an important constituent of Indian religion, has fared no better despite specific legislative attention. *See* Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. § 3001-13 (2000) (instructing federal agencies and museums receiving federal funds to identify the origin of Indian cultural items for purpose of expeditious return). By conditioning repatriation on tribal assertion of an extant religious tradition associated with the cultural patrimony in question, as well as proof of tribal capacity to care for the property, NAGPRA primarily serves the financial interests of counsel for institutions asserting costly defenses to repatriation. *See* Harding, *supra* note 195 (identifying limitations of NAGPRA).

220. *Lyng*, 485 U.S. at 477 (Brennan, J., dissenting).

221. *See* ARNE SVENSSON, *THE ETHNICS IN AMERICA* 36 (1960) ("We believe in the inherent right of all people to retain spiritual and cultural values, and that the free exercise of these values is necessary to the normal development of a people.") (citing Declaration of Indian Purpose of Chicago Conference of the National Congress of American Indians (1960)).

222. The emerging international indigenous rights regime, though more aspirational than federal Indian law with respect to encouragement of Indian religious diversity, does not, for reasons endogenous to the dualist U.S. legal system, serve as a particularly potent source of law in U.S. courts. *See, e.g.*, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 135, U.N. GAOR, 47th Sess., U.N. Doc. A/Res/47/135 (1992) (establishing broad protection for minority religions); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 55, U.N. GAOR, 36th Sess., U.N. Doc. A/Res/36/55 (1981) (declaring rights to freedom of thought, conscience, religion, association, and institution formation).

223. The period 1887-1934 is referred to as the "Allotment Era."

224. MOORE, *supra* note 57, at 63.



a) *Legal Imperialism*

Although no Indian tribe had codified a body of written law as of 1776, many tribes had "rules of conduct and attitudes of the mind concerning their kinship system."<sup>225</sup> Tribal legal systems conditioned members to adhere to a sacred system of well-elaborated tribal values of order, harmony, interdependence, and peace.<sup>226</sup> Consequently, disputes within the tribe were typically resolved not in formal institutions using adjudicative procedures, but rather with the aid of respected elders who would guide disputants to a restorative compromise. "[T]hough it appeared to the casual white observer that anarchy reigned,"<sup>227</sup> spiritual consensus produced a coherent jurisprudence that served Indian tribes well despite the absence of the "paraphernalia of European civilization."<sup>228</sup> In contrast, the Anglo-European model imported by discovering nations focused on individual rights, the placement of the burden of proof on accusers, and the punishment and removal of offenders from the community by imprisonment.<sup>229</sup> Despite

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225. Ken Traisman, *Native Law: Law and Order Among Eighteenth-Century Cherokee, Great Plains, Central Prairie, and Woodland Indians*, 9 AM. INDIAN L. REV. 273, 274 (1981)(quoting John Phillip Reid, *The Cherokee Thought: An Apparatus of Primitive Law*, 46 N.Y.U L. REV. 281, 290 (1971)).

226. Traisman, *supra* note 225, at 274.

227. WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 11 (1966).

228. WILCOMB E. WASHBURN, THE INDIAN IN AMERICA, 40 (1975) [hereinafter WASHBURN, INDIAN IN AMERICA]. Prior to Euro-American arrival, a system of Indian dispute resolution existed in which, despite the absence of coercive centralized authority, enforceable economic sanctions, supported by the severe sanction of ostracism, could be imposed via procedures similar to a blend of contemporary mediation and arbitration. *See id.* at 40-41. Remarkably, however, the guilt or responsibility of the parties was almost never at issue: the sole basis for contention was typically the amount of restitution to be paid and the sole method for resolving the dispute was negotiated consensus. No member of the tribe would presume to impose a solution and individuals were simply not conceived of as possessing adjudicatory powers. *See* Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875, 878 (1999) (noting that because serious disputes threatened to disrupt the life of the entire tribe, resolution of such controversies required either the interposition of family members or the assistance of "peacemakers" endowed with moral authority). In sum, underpinning the traditional Indian dispute resolution model was the notion that indigenous communities were organic. These communities horizontally constituted egalitarian entities bound to coexist with nature or perish. For the tribe to function, balance and harmony had to govern intra-tribal relationships. Disputes invariably opened rifts in the tribe and thus required healing, not only of the parties directly affected but of the entire tribe.

229. *See* Robert Yazzie, "Hozho Nahasdlit" — *We are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 120 (1996) (contrasting vertical European legal

retention of nearly exclusive subject matter and personal jurisdiction to the territorial limits of their reservations even as of the late nineteenth century,<sup>230</sup> Indian tribes, with no easily identifiable legal institutions, procedures, or records, were beset by a constellation of religious proselytizers, "friends of the Indian," and BIA agents<sup>231</sup> who, concluding Indians were without law or justice,<sup>232</sup> imposed legal "civilization."<sup>233</sup>

The 1883 case of *Ex parte Crow Dog*,<sup>234</sup> in which the U.S. Supreme Court

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systems, built upon coercive and hierarchical institutions, with horizontal Indian legal systems, predicated upon egalitarianism and kinship relations); see also Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557, 594-5 (1999) (distinguishing traditional indigenous legal systems, which emphasize "accountability, truth, restoration, forgiveness and integration of the offender back into the community," with adversarial legal systems that stress procedural rights and punishment).

230. Individual federal statutes had provided for piecemeal federal prosecution of crimes occurring on Indian land since the eighteenth century. See, e.g., Act of Mar. 3, 1817, ch. 92, 3 Stat. 383 (extending federal jurisdiction to crimes committed on reservations by non-Indians) (codified as amended at 18 U.S.C. §1152 (2000)). Still, the legal regulation of reservation transactions not involving non-Indians was left intact well into the late nineteenth century, save for the removal of virtually all tribal jurisdiction over non-Indians. See, e.g., *United States v. McBratney*, 104 U.S. 621 (1881) (permitting Colorado to exercise criminal jurisdiction over crimes of non-Indians against other non-Indians occurring on the Ute Reservation as no exception was made to territorial jurisdiction on Colorado's admission to Union).

231. See Haring, *supra* note 210, at 191, 229.

232. See *Zion & Yazzie*, *supra* note 37, at 56-57 (contrasting U.S. practice with longstanding international practice of recognizing the validity and legitimacy of indigenous law); see also Porter, *supra* note 37, at 266 (discrediting indigenous regime of property rights as unworthy of respect enabled colonizers to legally ratify expropriation of Indian land and displace Indian methods of dispute resolution without moral reprobation).

233. See Haring, *supra* note 210, at 224 (quoting Secretary of the Interior Carl Schurz in 1879 report to Congress) ("If the Indians are to be advanced in civilized habits it is essential that they be accustomed to the government of law[.]")

234. 109 U.S. 556 (1883). Spotted Tail, an authoritarian Brule Sioux chief who had staked his political fortunes on accommodation with U.S. authorities, was shot and killed on the reservation by his political rival, Crow Dog. After a peacemaking ceremony, the family of Spotted Tail agreed to accept a payment from Crow Dog of \$600, eight horses, and one blanket to resolve the dispute. See Haring, *supra* note 210, at 199. Despite the satisfaction of the entire Brule tribe, the case presented federal authorities the pretext for extension of federal criminal law to Indians. *Id.* at 200-01. Crow Dog was arrested, tried in the Territorial Court of South Dakota, and sentenced to hang by an all-white jury. *Id.* at 204-12. However, the Supreme Court reversed the conviction, albeit with reference to Indian "savagery," finding that the Brule had the sovereign right to resolve, free from U.S. interference, disputes wholly internal to the tribe. See *Crow Dog*, 109 U.S. 571-72 (refusing to extend U.S. criminal law to acts occurring on Indian reservations on the ground that to do so would "measure[] the red man's revenge by the maxims of the white man's morality."). Nonetheless, for a white majority *Crow Dog* was a "legal atrocity" inasmuch as an Indian killer had "escaped punishment." Haring,

overturned, for lack of jurisdiction, the federal conviction of an Indian charged with the murder of another Indian, induced Congress to extend the complete coercive power of federal criminal law to the reservations. Determined to rectify the barbarous, "savage quality" of tribal law and mollify public fervor, Congress applied "white man's morality"<sup>235</sup> with the Major Crimes Act of 1885<sup>236</sup> to expressly establish concurrent federal jurisdiction over major felonies committed by Indians on reservations regardless of the status of their victims.<sup>237</sup> Legal challenges to the Major Crimes Act failed to reestablish tribal legal self-determination but provided the judiciary occasion to further undergird the trust doctrine and plenary power.<sup>238</sup>

The paternalistic assault upon Indian legal sovereignty, joined on the religious front with the adoption of the CIO/CFR courts, intensified during the Great Depression with the passage of the Indian Reorganization Act of 1934 ("IRA" or "Dawes Act").<sup>239</sup> Although the IRA expressly recognized that tribes might create their own courts<sup>240</sup> and enact their own laws,<sup>241</sup> the legislation imposed BIA-drafted boilerplate constitutions<sup>242</sup> that created

*supra* note 210, at 191, 194.

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

[A]n Indian, when he commits a crime, should be recognized as a criminal, and so treated under the laws of the land. I do not believe we shall ever succeed in civilizing the Indian race until we teach them regard for the law, and show them that they are not only responsible to the law but amenable to its penalties. It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder[.]

16 CONG. REC. 934 (1885).

236. Major Crimes Act of 1885, ch. 341, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2000) and expanded to fourteen felonies from the original seven).

237. The Major Crimes Act subjects Indians charged with fourteen serious felonies to exclusive federal criminal jurisdiction regardless of the place of the alleged offense or the identity of the victim. 18 U.S.C. § 1153 (2000).

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

239. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461-79 (2000)).

240. Although the IRA appeared to encourage tribal legal self-determination, tribal courts created under the IRA were merely revamped CIO/CFR Courts, with American substantive law governing judicial process and imposing a regime of individual rights hostile to traditional Indian legal systems. *See supra* note 37 and accompanying text.

241. *See* 25 C.F.R. § 11.100(c) (2000).

242. *See* BURNETTE & KOSTER, *supra* note 154, at 183-85 (noting that under the IRA as

strange new substantive and procedural obligations. Moreover, after the passage of Public Law 280 in 1954,<sup>243</sup> providing that specified states could unilaterally accept concurrent jurisdiction over Indian territory within their borders, the entire body of state civil and criminal law was extended to classes of cases involving Indians.<sup>244</sup> Fearing that failure to create acceptable tribal courts would result in states taking jurisdiction over *all* cases occurring on reservations,<sup>245</sup> and understanding that review of plenary power in the exercise of regulatory jurisdiction over Indian affairs was an exercise in futility,<sup>246</sup> the tribes begrudgingly implemented constitutions and adversarial justice systems.<sup>247</sup>

The penultimate blow fell in 1968 with the Indian Civil Rights Act (“ICRA”),<sup>248</sup> which imposed many of the individualist strictures of the U.S. Constitution — in particular the Bill of Rights and the Fourteenth Amendment

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implemented, only standardized, authoritarian tribal constitutions that mirrored a BIA-promulgated model providing for no separation of powers or branches and incorporating harsh restrictions on freedom of action in trade, property, land, and political associations, were ratified). Furthermore, constitutions imposed by the IRA subject tribal governments to majority rule principles and grant the Secretary of the Interior or his delegate, the BIA Commissioner, veto power over almost all important tribal decisions. *See* *Shakopee Mdewakanton Sioux (Dakota) Cmty. v. Babbitt*, 107 F.3d 667 (8th Cir. 1997) (upholding review and veto powers of Secretary of the Interior over tribal actions).

243. Public Law 280 (Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2000), 28 U.S.C. § 1360 (2000)). Although it expressly disclaimed any grant to the states of power to tax Indian lands held in federal trust or to abrogate Indian reserved rights under treaties, Public Law 280 extended state civil and criminal jurisdiction to Indian tribes in California, Nebraska, Minnesota (except for the Red Lake Reservation), Oregon (except for the Warm Springs Reservation), and Wisconsin. Alaska was added in 1958. *See id.* Perhaps just as significantly in terms of the deevolution of authority and responsibility, Public Law 280 also shifted responsibility for administration and funding trust-based Indian entitlement programs to the states. *Id.*

244. *See, e.g., Williams v. Lee*, 358 U.S. 217, 219 (1959) (upholding application of state law to Indians absent a governing federal statute without explicitly overturning *Worcester* holding that state law cannot be applied due to its harmful effect on tribal sovereignty).

245. *See, e.g., Costello, supra* note 228, at 896 (stating that the Navajo Tribal Courts were reestablished to prevent state court jurisdiction over the Navajo nation).

246. *See Nader & Ou, supra* note 158, at 19 n.26.

247. *See COHEN, supra* note 178, at 332-35 (detailing U.S. role in the development of tribal courts).

248. Indian Civil Rights Act of 1968 (ICRA), Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301- 1303 (2000)). ICRA limits tribal powers to define and punish offenses and imposes substantive due process provisions of Article III and the Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments of the Constitution upon tribal governments. 25 U.S.C. § 1302 (2000).

— on tribal governments<sup>249</sup> and smoothed the way for what Indian activists branded "white-man's justice."<sup>250</sup> Although the ICRA amended Public Law 280 to require tribal consent for the exercise of state civil and criminal jurisdiction and left interpretation of the legislation to the tribes themselves,<sup>251</sup> by the early 1970s the centuries-long federal assault on tribal legal systems had displaced pre-Columbian methods of social control from tribal courts<sup>252</sup> where an Anglo-American adversarial legal system had acquired tenure. BIA-drafted codes permitted tribal court judges to apply tribal statutes, yet federal and state laws were supreme,<sup>253</sup> and federal judicial review steered tribal court jurisprudence into lockstep conformity with the U.S. legal system.<sup>254</sup>

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249. Indian tribes were not subject to Constitutional restrictions prior to ICRA. See *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that Indian tribes, as they are not states within the meaning of the U.S. Constitution, are not subject to its restrictions); see also Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557 (1972).

250. Rights of Members of Indian Tribes, Hearing on H.R. 15419 Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong., 127 (1968) (statement of John S. Boyden) See also Porter, *supra* note 37, at 271-72 (indicating ICRA "significantly altered the focus . . . from the tribal community towards the individual[.]"); Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 449 (1992) (disputing claim propounded by sponsors that ICRA would aid Indian tribes in establishing "meaningful self-determination"). ICRA was foreign to sacred tribal traditions of fairness and justice, and its reference to "due process," "equal protection," "speedy trial," and "freedom of speech" were an unwelcome intrusion on tribal sovereignty. See Robert Laurence, *The Convergence of Cross-Boundary Enforcement Theories in American Indian Law: An Attempt to Reconcile Full Faith and Credit, Comity and Asymmetry*, 18 QUINNIAC L. REV. 115 (1998).

251. See 25 U.S.C. §§ 1321-1322, 1326 (2000). Congress specifically provided that interpretation of the ICRA was to be left within the authority of the tribes and admonished that its purpose was protection of individual rights as against the administration of tribal justice without eroding the parameters of tribal sovereignty. Laurence, *supra* note 250, at 135-36. Furthermore, ICRA did not provide a remedy in federal court for a tribal member contesting the legality of his detention by a tribal court, except for a writ of habeas corpus. See 25 U.S.C. § 1303 (2000).

252. See Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983) (terming U.S. courts "jurispathic" as they destroy law generated by interpretative communities such as tribal courts, which are "jurisgenerative").

253. See 28 U.S.C. § 1360 (c)(2000) (requiring state courts exercising jurisdiction in Indian Country to apply tribal laws and customs only "if not inconsistent with any applicable civil law").

254. Newton, *Memory and Misrepresentation*, *supra* note 209. One of the most powerful instruments in enforcing control is the doctrine of comity. A long-standing practice of American courts is the denial of comity to tribal court judgments on the ground that tribal justices systems do not accord sufficient due process, such denial courts of the United States are swift to identify where tribal justice departs "significantly" from practices "commonly employed

Individual reliance on foreign legal concepts and advocacy removed Indian disputes from their natural contexts<sup>255</sup> and compounded growing acrimoniousness in reservation communities.<sup>256</sup> With tribal governments increasingly shackled by American legal hegemony, enforcement of judgments became far more difficult,<sup>257</sup> further damaging tribal harmony.<sup>258</sup> When a landmark 1978 case<sup>259</sup> extended the United States' legal colonization of Indian tribes still further by denying them jurisdiction over the acts of non-Indians occurring on reservations,<sup>260</sup> a new generation of critical legal jurisprudence, influenced by the Civil Rights Movement, began to question the foundations and institutions of federal Indian law.<sup>261</sup>

Although tribal proactivity and federal interposition hold state law partly at bay,<sup>262</sup> at present Indian tribes may exercise jurisdiction solely over

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in Anglo-Saxon society." *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1143 (9th Cir. 2001) (holding individual rights to due process violated by closing argument in Tribal Court referencing history of white oppression and genocide against Indians). Although U.S. courts are quick to disavow any interest in judicial paternalism in derogation of tribal self-government or Indian "dignity," denial of recognition of tribal court judgments utterly neuters the legal autonomy of Indian tribes, particularly with respect to their trans-border legal contacts. *See id.* at 1141-43.

255. *See* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 526 (1980-81) (constructing notion of "natural contexts" for particular types of disputes).

256. *See* Steven Haberfeld & Joan Townsend, *Power and Dispute Resolution in Indian Country*, 10 MEDIATION Q. 405, 409 (1993) (noting that by the 1970s Indian tribes were split into contending camps of traditionalists, who opposed violating the sanctity of tribal lands through extractive commercial development, and modernists, who supported exploiting collective tribal resources for jobs, income, status, and power); *see also* Zuni Cruz, *supra* note 229, at 596 (describing how adversarial system employed by tribal courts, by placing high value on protecting individuals from excesses of the collective, compounded tribal rifts to the detriment of the traditional "mutually beneficial relationship between the individual and the community").

257. *See* Newton, *Memory and Misrepresentation*, *supra* note 254, at 1003.

258. *See* Porter, *supra* note 37, at 277-81 (arguing that adoption of litigation as primary means of resolving interpersonal conflict pushed tribal members to focus on vindication of individual rights, thereby marginalizing relationships).

259. *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

260. *See* *Montana v. United States*, 450 U.S. 544 (1981) (denying Indian tribes inherent power to regulate hunting and fishing by non-Indians on non-Indian-owned land within reservation).

261. *See* Newton, *Memory and Misrepresentation*, *supra* note 254, at 1003. "Federal Indian law," as distinguished from "tribal law," is the body of U.S. statutes, doctrines, and caselaw that governs relations with Indian tribes.

262. *See* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996) (stating that the Indian Commerce Clause divested states "of virtually all authority over Indian commerce and Indian

consenting tribal members on fragmented remnants of former tribal holdings.<sup>263</sup> Even this vestige of sovereignty is threatened by the plenary power to extend all federal, and, by inaction, state laws to the reservations.<sup>264</sup> Rediscovery of tribal dispute resolution methods after a century of legal imperialism, and their reintroduction in Indian Country as an assertion of legal autonomy, are pressing concerns of Indian scholars and activists,<sup>265</sup> yet reacquisition of Indian law is inadequate by itself to offset the crushing force of federal Indian law, a mechanism "genocidal in both its practice and intent."<sup>266</sup>

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tribes"); *Williams v. Lee*, 358 U.S. 217, 219, 223 (1959) (ruling that to permit states to exercise jurisdiction over Indians where "essential tribal relations" are involved would "infringe on the right of the Indians to govern themselves."). *But see County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) (allowing states to tax reservation lands held in fee); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (allowing states to tax cigarette sales on reservations); *Rice v. Rehner*, 463 U.S. 713 (1983) (allowing state regulation of on-reservation liquor sales); *Seminole Tribe.*, 517 U.S. at 76 (Indian Commerce Clause does not grant Congress power to abrogate Eleventh Amendment immunity of a state from suits by tribes, regardless of whether congressional intent to do so is clear). The contentious battle between tribes and states over the precise boundaries of Indian legal autonomy, fought increasingly on the plain of taxation, continues. *See Robert A. Fairbanks, Native American Sovereignty and Treaty Rights: Are They Historical Illusions?*, 20 AM. INDIAN L. REV. 141 (1995-96) (predicting future state attempts to tax Indian tribes).

263. *See Montana*, 450 U.S. at 564 ("[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."). Although the *Montana* Court recognized tribal competence to regulate aspects of the dealings of non-Indians who enter consensual relationships with or threaten the political or physical well-being of the tribe, subsequent decisions eroded these inherent powers still further. *See Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997) ("*Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation . . ."). Presently, the presumption is that Indian sovereignty over Indian land is absent unless Congress explicitly legislates otherwise. *Id.* at 451.

264. *See McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973) (providing that states may exercise jurisdiction over Indian tribes where federal law does not preempt exercise of such power, the conduct of non-Indians is at issue, and tribal self-government will not be impeded). Although the complex web of jurisdictional issues exceeds the scope of this Article, the general pattern is the transfer of legal sovereignty from Indian tribes to federal and state governments.

265. *See William C. Bradford, Reclaiming Indigenous Legal Autonomy on the Path to Peaceful Coexistence: The Theory, Practice, and Limitations of Tribal Peacemaking in Indian Dispute Resolution*, 76 N. D. L. REV. 551 (2000) [hereinafter Bradford, *Reclaiming*].

266. *Williams, Algebra of Federal Indian Law*, *supra* note 158, at 363-65 (implicating federal Indian law in displacement of indigenous peoples, dissolution of tribal institutions, domination of indigenous legal systems, and disabling of Indian land title, religious expression, and cultural practice).

b) *Political Domination*

Although Indian tribes are separate sovereigns in retention of all rights and powers not explicitly ceded to the United States by treaty<sup>267</sup> or abrogated by explicit legislative intent,<sup>268</sup> U.S. Indian policy has been generally hostile to the right of Indian tribes to self-govern as politically distinct communities.<sup>269</sup> If the theme of the nineteenth century was eradication of Indians and the seizure of their land, the motif of the twentieth century was the destruction by law of tribal sovereignty. With the passage of the IRA,<sup>270</sup> Indian tribes, traditionally hyper democratic and consensus-driven institutions,<sup>271</sup> were

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267. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). As separate sovereigns predating the U.S. Constitution, Indian tribes possess inherent, residual powers of sovereignty not deriving from Congressional grants. *See Cherokee Nation v. Georgia*, 30 U.S. (Pet.) 1, 16 (1831). These inherent recognized powers include, *inter alia*, powers to establish a tribal government, determine tribal membership (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)), administer justice, exclude persons from the reservation (*see Quechan Tribe v. Rowe*, 531 F.2d 408 (9th Cir. 1976)), charter business organizations, exercise police power, invoke sovereign immunity (*Santa Clara Pueblo*, 436 U.S. at 49 (1978)), levy taxes (*see Confederated Colville Tribes*, 447 U.S. at 152-55), and regulate domestic relations (*see Fisher v. Dist. Court*, 424 U.S. 382 (1976)). Still, although tribes retain many of the trappings of sovereign nations, the exercise of inherent tribal powers may be abrogated or restricted by the operation of a treaty or law of the United States or, in limited circumstances, by state laws. *See Atkinson*, *supra* note 54, at 427.

268. *See United States v. Dion*, 476 U.S. 734 (1986). Several federal statutes have restricted the political rights of Indian tribes to self-govern. *See, e.g.*, Act of July 1, 1898, ch. 545, 30 Stat. 571 (Curtis Act) (terminating territorial sovereignty of Indian Nations and depriving tribal governments of functions). In recent years, the legal doctrine that the powers lawfully vested in an Indian tribe are not delegated powers, but rather inherent concomitants of a limited sovereignty never extinguished by the United States, has been under threat. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 219 (1999)(Rehnquist, C.J.) (dissenting) (suggesting that rights reserved by Indian tribes under treaties may be "temporary and precarious" if not explicitly guaranteed in perpetuity by the plain language of the texts) (quoting *Ward v. Race Horse*, 163 U.S. 504 (1896)).

269. U.S. hostility to indigenous political forms found expression in official policy statements supporting Allotment. *See ANDERSON*, *supra* note 54, at 94 (quoting BIA Commissioner) ("[E]xisting forms of Indian government which [are] menacing the peace . . . and irritating their white neighbors, should be replaced by a regularly organized Territorial form of government[.]")

270. Act of June 18, 1934, ch. 576, 48 stat. 984 (codified as amended at 25 U.S.C. §§ 461-491 (2000)).

271. *See generally* LARRY W. BURT, *TRIBALISM IN CRISIS* (1982); *see also* BURNETTE & KOSTER, *supra* note 154, at 15 (describing tribal governments prior to 1934 as council democracies advised by elders that operated on principles of consensus and voluntary compliance with decisions).



reconstituted in the image of non-Indian society<sup>272</sup> and subjected to the veto power of the Secretary of the Interior.<sup>273</sup> Subsequent legislative and judicial action has stripped artificially reconstructed Indian tribes of most of their inherent sovereignty over their form, property, and powers.<sup>274</sup> Relations with post-IRA Indian tribes, rather than proceed as if between mutual sovereigns, are conducted largely through a welter of executive agencies.<sup>275</sup> As a result, the terms and conditions of Indian existence are frequently dictated from Washington, rather than debated on the reservations.<sup>276</sup> Federal agencies to which Congress delegates power smother tribes under a blanket of regulation and programming<sup>277</sup> that, although it provides the means of subsistence,

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272. See GRAHAM D. TAYLOR, *THE NEW DEAL AND AMERICAN INDIAN TRIBALISM* 29 (1980) (terming post-IRA Indian tribes "artificial units of Indian political and social life").

273. See BURNETTE & KOSTER, *supra* note 154, at 183 (noting that BIA-adopted constitutions grant the Secretary of the Interior veto power over most tribal actions and decisions). For an opposing view, see *AMERICAN INDIAN LAW DESKBOOK* 22-23 (Nicholas J. Spaeth et al. eds., 1993) (suggesting the IRA replaced federal with tribal governance).

274. See LEGTERS & LYDEN, *supra* note 64, at 6-7 (noting that as a consequence of the legislative and judicial diminution of their sovereignty, Indian tribes are now often junior partner in the hierarchy of federal, state, local, and tribal governments).

275. See Thomas Biolsi, "*Indian Self-Government as a Technique of Domination*," 15 *AM. INDIAN Q.* 23 (1991) (describing U.S. policy of "indirect rule" through nexus of federal agencies and reorganized tribal structures). Indirect rule imposes fiscal, cultural, and social costs: increased tribal bureaucratization associated with governance from afar consumes nearly half of tribal budgets, far more than that allocated to economic development. WELLS, *supra* note 152, at 17-18.

276. See Clyde Warrior, *We Are Not Free*, in JOSEPHY, *supra* note 63, at 84 ("We are not allowed to make those basic human choices and decisions about our personal life and about the destiny of our communities . . . Our choices are made for us . . . by federal administrators, bureaucrats, and their 'yes men,' euphemistically called tribal governments."); see also Atkinson, *supra* note 54, at 393 (describing exclusion of Indian organizations and individuals from agency planning); ANDERSON, *supra* note 54, at 148-49 (noting that rather than foster time-honored and socioculturally appropriate education, cultural expression, and economic development, federal Indian agencies force tribal leaders to lobby for federal funding for social programs developed without significant Indian participation).

277. Under the trust doctrine, the United States funds and participates in the management of a welter of complex statutory programs, involving education, health, social services, economic development, and resource management, on Indian reservations. See, e.g., Economic Opportunity Program, Native American Program Act, 42 U.S.C. §§ 2991-92d (2000); Education Program of the Bureau of Indian Affairs, 25 U.S.C. §2001 (2000); Job Training Partnership Act, 29 U.S.C. §§1501-1792b (repealed, Aug. 7, 1998); Indian Manpower Program, Pub. L. No. 93-0203, 87 Stat. 239, (codified at 20 U.S.C. §§2301-02 (2000)); Native American Languages Act, Pub. L. No. 101-477, 104 Stat. 1154 (1990) (codified at 25 U.S.C.A. §§ 2902-06)(2000); Indian Health Care Act, 25 U.S.C. §§ 1601-83 (2000). Although Indian participation in the development and administration of these and other programs shapes them to fit tribal needs and values, the parameters within which such local influence are exercised are determined by

suppresses traditional modes of social control and value allocation, and the Secretary of the Interior looms large over every aspect of tribal life.<sup>278</sup>

Driven in part by the Civil Rights Movement, a "dawning recognition that [Indians] must be freed from federal dominance . . . and that Indian[s] must have more control over . . . their lives and institutions"<sup>279</sup> spurs calls to end the fundamental asymmetry of U.S.-Indian relations. Nevertheless, several decades after official introduction of the federal policy of "Indian Self-Determination,"<sup>280</sup> many Indian tribes remain politically subordinate to and, consequently, economically dependent upon the United States<sup>281</sup> Whether

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Congress.

278. ANDERSON, *supra* note 54, at 247 (noting veto power of Secretary of Interior over tribal decisions).

279. SAR A. LEVITAN, *INDIAN GIVING: FEDERAL PROGRAMS FOR NATIVE AMERICANS IX* (1975).

280. The legal history of "Indian Self-Determination" shall be rendered in brief. In 1970 Congress delegated authority to the Secretaries of the Interior and Health, Education, and Welfare to enter contracts with Indian tribes in which federal Indian programs would continue to be funded by the United States but responsibility for planning and administration would be assumed by tribal governments. Indian Self-Determination and Education Assistance Act of 1975 (ISDEA), 25 U.S.C. §§450-57 (2000). Support for Indian Self-Determination took on a bipartisan tint in the early 1980s. *See* President Reagan, Statement on Indian Policy, PUB. PAPERS OF RONALD REAGAN 96 (Jan. 24, 1983) ("Our policy is to reaffirm dealing with Indian Tribes on a government-to-government basis"). Congress in turn authorized development of enhanced self-governance plans under the rubric of a "New Federalism" advanced by the Senate Select Committee on Indian Affairs. *See* Indian Self-Determination and Education Assistance Act Amendments of 1988, 25 U.S.C. § 450 (2000) (allowing tribes to assume administration of some BIA programs). Nevertheless, federal Indian agencies remained mired in entrenched patterns of costly, ineffective and unresponsive provision of services. PEVAR, *supra* note 124, at 32 (noting investigations implicating BIA as primary deterrent to development of Indian self-government in areas of employment, housing, and health care). Throughout the 1980s Indian Self-Determination simply decentralized the fiduciary relationship, and by the start of the 1990s both major political parties, eager to decrease the financial drain of Indian welfare programs, cut aid while pressing Indian tribes to enter the world of private enterprise. *See* VINE DELORIA & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 7 (1983). To wit, the Regan and Bush Administrations recommended that federal agencies initiate extensive leasing and exploitation of tribal resources and develop programs to lure non-Indian businesses to reservations by offering tax advantages, regulatory relief, preferential contracting, and technical assistance. WELLS, *supra* note 152, at 9, 347. Although the Clinton Administration urged federal Indian agencies to adopt the Reagan principle of mutual sovereignty, many Indian tribes remain, paradoxically, under pupilage. *See* 59 Fed. Reg. 22951 (1994) (instructing each agency to operate "within a government-to-government relationship" with Indian tribes); WELLS, *supra* note 152, at 9-10 (elaborating on paradox wherein continued federal funding is necessary to implement Indian Self-Determination). In short, politics, economics, and law impede Indian self-government.

281. Empirical evidence suggests that, for Indian tribes, political domination produces

political subordination of Indian tribes is the translation of the majoritarian principle of democracy into action<sup>282</sup> or a statist demonstration, by induction, of the inferiority of competing governance structures and philosophies,<sup>283</sup> Indian Self-Determination, absent an ideological revolution spanning from the treetops of the international human rights regime<sup>284</sup> to the

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economic dependence. See generally ANDERSON, *supra* note 54. Nonetheless, economics and politics exert reciprocal influence, and economic dependence precludes the free exercise of Indian sovereignty. See John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, 39 BUFF. L. REV. 495, 499 (1991) ("Indian economic development may be less about creating wealth than it is about creating the conditions for political power[.]").

282. See ELY, *supra* note 73, at 135-79 (noting that democratic majorities violate the duty of "equal concern and respect" for the interests of discrete and insular minority groups).

283. See MOORE, *supra* note 57, at 280-81 ("The . . . treatment [of the Indian] by the state symbolically conveys a message of state power and intentions to larger audiences[.]").

284. Decolonization whetted interest in the customary international legal principle of self-determination — the concept that institutions should be substantially and continuously guided by the will of the governed. See U.N. Charter, *supra* note 3, arts. 1(2), 55, 56, 73 (calling for "friendly relations among nations based on . . . self-determination of peoples[.]"); 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess. (adopted Dec. 14, 1960), Supp. No. 16, at 66, U.N. Doc. A/4684 (1961) (calling for elimination of "alien subjugation"); 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, U.N. GAOR, 20th Sess. (adopted Dec. 21, 1965), Supp. No. 14, at 11, U.N. Doc. A/6014 (1965), reprinted in 5 I.L.M. 374 (1966) (calling upon states to eliminate colonialism); ICESCR, *supra* note 3, pt. I, art. 1(1) ("All peoples have the right [to] . . . freely determine their political status [and] . . . development."); 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (Friendly Relations Declaration), G.A. Res. 2625, U.N. GAOR, 25th Sess. (adopted Oct. 24, 1970), Supp. No. 28, at 121, 123, U.N. Doc. A/8208 1970 (charging states with duty to respect self-determination), reprinted in 9 I.L.M. 1292 (1970); Convention No. 169, *supra* note 37, art. 6(1)-(2) (requiring states to consult with indigenous peoples as to the formation and endowment of indigenous institutions and programs); Jose Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 36th Sess., Agenda Item 11, at 74, U.N. Doc E/CN.4/Sub.1983/21/Add.8, paras. 58-81 (1983) ("Self-determination must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights"); Draft Declaration, *supra* note 192, pt. I art. 3 ("Indigenous peoples have the right [to] freely determine their political status and . . . development."); *Western Sahara Case*, I.C.J., Advisory Opinion, 1975 I.C.J. 12, 33 (incorporating UNGA resolutions to "[f]ree association . . . [and] voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.").

Issues of indigenous sovereignty, statehood, and membership in international organizations have also found expression in the CIL of self-determination. States inhabited by indigenous peoples may have the legal obligation to recognize them as independent states where they possess specific territories, exercise governmental authority over those territories, and have

roots of federal Indian law, will remain a chimera.

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the capacity to enter into international relations. See Makauwa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1125 (1995) (noting practice "favors the requirement that an entity be treated as a state if it attains the qualifications of statehood"); Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 75 (1994) [hereinafter Barsh, *Indigenous Peoples in the 1990s*] (suggesting obligations of Draft Declaration confer international legal personality upon indigenous peoples). However, in practice the legal obligations owing from states to peoples seeking self-determination are case-specific and fact-intensive: questions of entitlement, the extent of the right, the process whereby the popular will is to be ascertained, and remedies available for denial of the right provoke disagreement. See ANAYA, *supra* note 37, at 3 (describing conflict over definition of "peoples"); BOUTROS BOUTROS-GHALI, AGENDA FOR PEACE, U.N. Doc. S24111, para. 11 (1992) ("if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation"); HAROLD S. JOHNSON, SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS 71-98 (1967) (discussing difficulties in determining who is allowed to express self-determination). Despite inherent tension with state sovereignty, however, self-determination can be actualized through forms of autonomous association short of political independence. See Friendly Relations Declaration, *supra*, at 121, principle V (refusing to authorize or encourage "any action which would dismember or impair . . . [State] territorial integrity[.]"); Katangese Peoples' Congress v. Zaire, ACHPR/RPT/8th/Rev.1, Annex VI, Comm. 75/92, at 9 (1994-95) ("[S]elf-determination may be exercised [as] independence, self-government, local government, federalism, confederalism, [or] unitarism[.]"); FERNANDO R. TESON, A PHILOSOPHY OF INTERNATIONAL LAW 127-56 (1998) (contrasting justifications for indigenous rights to self-determine with liberal critiques); ANAYA, *supra* note 37, at 83-84 (noting redress of historical violations of self-determination does not require reversion to status quo ante or formation of new states). Still, states have tended to cast the question, particularly for indigenous peoples whose claims to prior sovereignty are embarrassing, as an "all-or-nothing" issue. MORTON H. HALPERIN & DAVID J. SCHEFFER, SELF-DETERMINATION IN THE NEW WORLD ORDER 60 (1992) (noting state fears that self-determination translates into secessionism); Suagee, *supra* note 9, at 674 (noting spectrum of official government policies regarding indigenous self-determination ranges from the paternalistic to the formally assimilative to the "genocidal use of military force"). Although secession may be appropriate where violations of indigenous rights are permanent features of governance, the crowning glory of the indigenous rights regime — the Draft Declaration — is meant to strengthen protection of self-determination without posing such a threat. See *id.* at 692 ("Most indigenous peoples do not seek recognition as independent states, but rather seek to establish [autonomy] within their traditional territories."). Nonetheless, states, jealous of sovereign prerogatives, have prevented that instrument — currently under discussion by UNHRC — from reaching the General Assembly for a vote. Erica I. Daes, *Dilemmas Posed by the UN Draft Declaration on the Rights of Indigenous Peoples and Autonomous Assembly of Indigenous Peoples*, in 2 INDIGENOUS AFF. 52 (1995) (discussing contentious drafting process). While the idea that they should enjoy the right to self-determine through institutions reflective of their culture is gaining theoretical force, many indigenous peoples remain trapped in webs of politico-economic dependence. See Mireya Maritza Pena Guzman, *The Emerging System of International Protection of Indigenous Peoples' Rights*, 9 ST. THOMAS L. REV. 251, 256 (1996) (examining indigenous self-determination globally).

c) *Ethnodevelopmental Suppression*

Despite significant endowment with resources natural and human,<sup>285</sup> many Indian tribes<sup>286</sup> remain ensnared in a web of economic dependence<sup>287</sup> deliberately fashioned by the United States over centuries<sup>288</sup> from the strands of institutionalized domination,<sup>289</sup> geographic dislocation, gross undercapitalization,<sup>290</sup> and various legal disabilities. Although the non-legal

285. The irony of Indian poverty is rendered all the more acute by reference to the abundant, sustainable resources in Indian Country. Timber, hydroelectric sources, grazing land, minerals, oil and gas, and wildlife abound. However, few tribes own the mineral resources on their reservations, and the United States, as trustee, controls leasing and production of these assets. *See, e.g.*, Prince, *supra* note 55, at 239-42 (noting that federal management of the \$27 billion of mineral assets on the Crow Reservation currently yields a return of only .01 percent to the tribe).

286. The conditions of each reservation are as distinct as are the more than five hundred tribes; several "report a sense of pride and accomplishment" in recent development of autonomous programs which include "law enforcement, education, organic farming, sustainable-resource logging, recycling plants, construction, environmental repair industries, language and culture academies, arts and crafts workshops, casinos, buffalo ranches, resorts, solar and wind energy production, computer assembly, tribal courts, veterans affairs offices, housing, road improvement, sanitation, etc." Atkinson, *supra* note 54, at 430.

287. *See* Daniel Boxberger, *Individualism or Tribalism? The "Dialectic" of Indian Policy*, 15 AM. INDIAN Q. 29, 29 (1991) (noting "complex factors that have shaped tribal institutions . . . [as] dependent, internal colonies"); *see also* ROBERT H. WHITE, TRIBAL ASSETS: THE REBIRTH OF NATIVE AMERICA 7 (1990) ("Less than 10 percent of [Indian] communities have . . . any control over their economic fate[.]"). In addition to dependence upon the United States for social services, many tribes rely upon low-wage federal and state jobs and the export of nonrenewable natural resources for subsistence. WELLS, *supra* note 152, at 361-71.

288. A federal policy of promoting Indian economic dependence as a technique of reducing the costs of direct political domination traces to the earliest foundations of the United States *See* Letter from Thomas Jefferson to Charles Carroll (Apr. 15, 1791), in JEFFERSON: WRITINGS, *supra* note 96, at 976-77. ("The most economical as well as most humane conduct towards [Indians] is to bribe them into peace, and to retain them in peace by eternal bribes." ). *Id.* Although time has witnessed a progression to more subtle forms of dependence, a system of annuities and transfer payments has held Indian tribes captive to the beneficence of the United States for their economic viability and, in some cases, their physical existence, for generations. *See* CADWALADER & DELORIA, *supra* note 85, at 136. For an examination of dependency theory as applied to Indian economies, *see, e.g.*, ROBERT D. WALLER, THE POLITICAL ECONOMY OF INTERNATIONAL EQUALITY: A TEST OF DEPENDENCY THEORY (1976) (suggesting, by analogy, that the U.S. deliberately under develops Indian reservations through resource extraction and welfare payments); WELLS, *supra* note 152, at 377-78 (accusing federal agencies of "internal colonization").

289. *See* Mohawk, *supra* note 281, at 496-97 (suggesting Indian economic development is hostage to BIA interference with organization of independent political communities).

290. *See* Robert Williams, *Small Steps on the Long Road to Self-Sufficiency for Indian*

obstacles to Indian economic independence, the first and foremost goal of tribal governments,<sup>291</sup> are very real, the constraints imposed by federal Indian law are even more formidable.

The United States holds trust title to Indian lands and resources,<sup>292</sup> and Indian property owners cannot sell, lease, or borrow against their property without the express approval of the Secretary of the Interior.<sup>293</sup> As the very question of Secretarial approval introduces political uncertainty,<sup>294</sup> trust-

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*Nations: The Indian Tribal Governmental Tax Status Acts of 1982*, 22 HARV. J. ON LEGIS. 335, 343-52 (1985) (relating remoteness of reservations from centers of commerce and education to difficulty in accessing markets, capital, and managerial expertise).

291. See WHITE, *supra* note 287, at 273. Still, tribal governments do not always speak with a single voice as to the appropriate developmental path: there is a broad intra and intertribal diversity of opinion as to the objectives, pace, and direction of Indian economic development. Federal approaches advanced in recent years by the Task Force on Indian Economic Development stress external investment, regulatory relief, preferential contracting, and technical assistance to support the development of postmodern reservation industries. See Prince, *supra* note 55, at 256; see also Naomi Mezey, *The Distribution of Wealth, Sovereignty, and Culture Through Indian Gaming*, 48 STAN. L. REV. 711, 724-35 (1996) (discussing "modernist" approach to Indian economic development). However, "traditionalist" Indian tribes cherish fidelity to a non-materialist and collectivist political economy that eschews acquisitiveness in favor of a group commitment to culture; such tribes elect traditional indigenous modes of production such as hunting, fishing, and trading through kinship groups. See Suagee, *supra* note 9, at 709-10 (noting that rather than maximize material wealth, traditional indigenous economic development strives to "preserve and transmit language[. . .] religion and culture; to preserve sacred places; to record and retain oral history; . . . and to . . . maintain the integrity of communities[.]"); LOPACHET AL., *supra* note 179, at 117 (expressing traditionalist view that the modernist development approach imports economic, political, and cultural values hostile to Indian culture and, thereby, to Indian self-government). Schismatic disputes between traditionalists and modernists have rocked a number of tribes and damaged their relations with non-Indian parties, with gaming and industrial dumping but two among many catalysts. See WELLS, *supra* note 152, at 341; Tom Gorman, *Tribe Seeks to Store Nuclear Waste*, INDIANAPOLIS STAR, Jun. 2, 2002, at A3 (noting seizure by State of Utah of road leading into Goshute reservation to prevent tribe from importing radioactive waste under terms of a lucrative contract). Still, a pan-Indian near-consensus favors independent Indian allocation, free from non-Indian mediation, of the cultural values informing Indian economic life. ANDERSON, *supra* note 54, at 246. Time will tell whether Indian sovereignty, prosperity, and culture can coexist.

292. The United States defines the trust responsibility as the obligation to assert plenary power "to ensure the survival and welfare of Indian[s]" by "provid[ing] those services required to protect and enhance Indian lands, resources, and self-government, and "to raise the[ir] standard of living . . . to a level comparable to the non-Indian society." WELLS, *supra* note 152, at 19.

293. See 25 U.S.C. §§ 393, 396, 415, 483 (2000) (providing that an Indian individual or tribe who wishes to sell, convey, lease, or mortgage property in Indian Country for a period greater than one year must first secure the permission of the Secretary of the Interior).

294. Justifications for congressional refusal to consign the trust doctrine to the ashcan of

based land-tenure constraints diminish the relative output-values of land-intensive enterprises such as agriculture, ranching, and resource development.<sup>295</sup> Moreover, federal management of Indian resources grants the government paternalistic control over Indian economic destiny.<sup>296</sup> Although the United States is under a moral obligation to husband Indian resources, diligently advance Indian land claims against the states, secure adequate funding for Indian social services,<sup>297</sup> and enhance the economic well-being of Indian people,<sup>298</sup>

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history focus on the claim that the trust is necessary to protect Indians from exposure to market forces and the improvident disposal of their property. See PERRY, *supra* note 102, at 16. However, it is questionable at best whether the increasingly sophisticated tribes of the twenty-first century are any longer in need of the "protection" afforded by an inept trustee such as the United States has demonstrated itself to be. Critical examinations of BIA management decisions, as well as recent case law, support the argument that the trust doctrine operates as legal dressing for the assertion of federal politico-economic power for the benefit of non-Indian constituencies, such as industries that compete against, or rely upon raw materials derived from, Indian interests. See WELLS, *supra* note 152, at 379 (identifying trust doctrine as facilitating corporate exploitation of Indian lands and resources); see also Cobell v. Babbitt, 91 F. Supp. 2d 1, 7-11 (D.D.C. 1999) *aff'd sub sub nom.* Cobell v. Norton, 240 F.3d 1081 (D.D.C. 2001) (finding as a matter of fact that the purpose of the trust doctrine was to "deprive [Indians] of their native lands and rid the nation of their tribal identity" in order to avail non-Indians of tribal lands and resources). Within this understanding of the trust, agency decisions regarding Indian property are inherently governed by political considerations, rather than fiduciary concerns.

295. See ANDERSON, *supra* note 54, at 134 (illustrating process whereby the trust imposes opportunity costs, bureaucracy, and dependence rather than permits self-determination).

296. Royalties earned from leases of rights on Indian lands are paid not to Indian individuals or tribes but are deposited by the BIA, in theory, into trust accounts. See 25 U.S.C. § 415(a)-(d)(2000). However, a 1996 federal audit discovered that the BIA could not account for \$2.4 billion in Indian monies ostensibly safeguarded in federal trust funds. See Atkinson, *supra* note 54, at 427. Indian beneficiaries seeking remedies for breach of trust must confront the fact that federal authority over Indian resources held in trust is legally limited only by the requirement of "good faith." See *United States v. Sioux Nation of Indians*, 448 U.S. 371 (holding that United States, as trustee, may alter the form of trust assets as long as it attempts, in good faith, to provide property of equivalent value).

297. Although the trust imposes a moral obligation upon the United States to provide funding for Indian social services, the process whereby such funds are made available is a paradigm of inefficiency and paternalism: only a fraction of what Congress allots to the BIA reaches Indian tribes, and monies are specifically earmarked for programs selected by the BIA despite tribal determinations that funds are better allocated elsewhere. WELLS, *supra* note 152, at 20-21. Nevertheless, the United States has created a series of Indian benefit programs that purport to uphold its obligations under the trust responsibility. See National Historic Preservation Act, 16 U.S.C. 470(a) (2000) (providing particular protection to properties with cultural and religious importance to Indian tribes); National Museum of the American Indian Act, 20 U.S.C. § 80(q)-(q)(15) (2000) (creating museum exclusively for preservation and study of history and artifacts of Indians); Drug Abuse Prevention, Treatment and Rehabilitation Act, 21 U.S.C. § 1177(d) (2000) (giving preference to grant applications aimed at combating Indian

federal agencies have withheld basic subsistence,<sup>299</sup> mismanaged tribal resources,<sup>300</sup> and violated the animating principles of the trust with near-impunity: only in very recent years has the trust doctrine charged the United States with judicially enforceable obligations apart from those incorporated in specific treaties, statutes, or executive orders.<sup>301</sup> Although the protective dimensions of the trust doctrine have broadened,<sup>302</sup> aggrieved Indian

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drug abuse); Native American Languages Act, 25 U.S.C. §§ 2901-2906 (2000) (according Indian languages statutory protection); Workforce Investment Act of 1998, 20 U.S.C. § 2911 (2000) (supporting Indian employment); AIRFA, *supra* note 215 (pledging to protect and preserve Indian religions); Native American Programs Act of 1974, 42 U.S.C. §§ 2991-2992 (2000) (creating financial and cultural benefit programs); Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Program Act, 42 U.S.C. § 4577(c)(4) (2000) (giving preference to grant applications aimed at combating Indian alcoholism); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000) (protecting Indian burial sites and remains).

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

299. *DELORIA & LYTLE*, *supra* note 280, at 181 (charging both major political parties with default on financial obligations arising under trust doctrine).

300. See S. REP. NO. 216, 101st Cong., 1st Sess. 105-29, 140 (1989) (documenting century of theft of Indian oil and gas). In the most recent breach of Indian trust case, a federal court, finding the United States in breach of a common-law fiduciary obligation due to its "long and sorry history" of gross mismanagement of over \$500 million in 300,000 individual Indian Money Accounts, retained continuing jurisdiction to enforce an accounting but stopped short of ordering further remedies unauthorized by statute. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 7 (D.D.C. 1999), *aff'd sub. nom. Cobell v. Norton*, No. CIV.A.96-1285 (RCL), 2002 WL 1480903 (D.D.C.). Although the Secretary of the Interior concedes the issue of gross federal mismanagement and resulting disarray, the means proposed as the most cost-effective to make an accounting — statistical sampling — would cost Indian claimants more than \$70 million: whether relief will ever be afforded is uncertain, although the Court maintains jurisdiction and defendants' are currently required to file reports as to trust reform activities. *Id.* See also *Assiniboine and Sioux Tribe of the Fort Peck Indian Reservation v. Norton*, 211 F. Supp. 2d 157 (D.D.C. 2002) (finding case-at bar presented same questions of law and fact as in *Cobell*, a "related" case, and refusing to refer case-at-bar, and other related tribal cases, to Calendar Committee).

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

302. The full range of obligations owed under common law principles of fiduciary duty is broad. RESTATEMENT (SECOND) OF TRUSTS §§ 170-72 (1959)(listing, *inter alia*, duties to exercise diligence and prudence, avoid conflict of interest, deal fairly, and assume liability for loss). A few limit federal management of the Indian trust. See, e.g., *Cramer v. United States*, 261 U.S. 219, 229 (1923) (construing statute in light of trust doctrine to protect Indian right of occupancy); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)(judging U.S. conduct with respect to Indians "by the most exacting fiduciary standards"); Joint Tribal Council



beneficiaries still lack effective legal recourse for its breach.<sup>303</sup>

Plenary power, as well as judicial review of its exercise,<sup>304</sup> further stifles Indian economic development by enabling Congress to terminate federal benefits<sup>305</sup> and restrict<sup>306</sup> or even abrogate Indian rights reserved under treaties.<sup>307</sup>

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of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (enforcing fiduciary obligations to Indians). For a discussion of judicial efforts to expand enforcement, see Reid Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

303. See COHEN, *supra* note 178, at 169 (noting full body of common-law duties and rights "does not exist between the [U.S.] and the Indians"); *Cobell*, 91 F. Supp. 2d at 7-11 (holding federal courts are limited by separation of powers considerations in reviewing executive management of Indian resources and, where not authorized by statute, cannot function as "a grievance committee"). As of 2002, the U.S. Supreme Court has never granted relief for a breach of duty arising under the trust doctrine as defined generally at common law: relief for a putative breach is available only in those limited circumstances where the United States acts in the narrow and specific role of (quasi)private, rather than public, trustee. See *Nevada v. United States*, 463 U.S. 110, 128 (1983) (holding when the United States acts generally under the trust doctrine it "cannot follow the fastidious standards of a private fiduciary"); *Loudner v. United States*, 108 F.3d 896, 901-02 (8th Cir. 1997) (holding allegations of federal mismanagement state compensable claim whenever United States assumes "elaborate control" over Indian assets even absent authorizing statute creating trust relationship).

304. Two centuries after *Worcester* the Supreme Court continues to permit the exercise of plenary power "where . . . broad discretionary powers were vital to the solution of the immensely difficult 'Indian problem.'" Williams, *Algebra of Federal Indian Law*, *supra* note 158, at 261. Recently, the Supreme Court heard oral arguments in two cases that will illuminate the future direction of the trust doctrine in terms of its domestic enforceability. See *United States v. White Mountain Apache Tribe*, No. 01-1067 (Dec. 2, 2002); *United States v. Navajo Nation*, No. 01-1375 (Dec. 2, 2002).

305. L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millenium*, 96 COLUM. L. REV. 809, 809 (1996).

306. Congressional plenary power to regulate Indian treaty rights for conservation purposes is beyond the scope of the present analysis, as are corresponding state powers. See *Puyallup Tribe v. Dep't of Game of Wash.*, 391 U.S. 392, 398 (1968) (upholding federal conservation statute regulating Indian treaty rights); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (finding tribal reserved rights to hunt and fish can coexist with State management plan).

307. See *supra* notes 267-68 and accompanying text (elaborating doctrines of reserved rights and Congressional plenary power and their intersection in federal Indian law). The legal standard for abrogation of Indian treaties remains "plain and unambiguous" Congressional intent. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985); see also *Lac du Flambeau Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 759 F. Supp 1339 (1991) (same); *United States v. Dion*, 476 U.S. at 740 (establishing that "Congress actually [has to have] considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose[n] to resolve that conflict by abrogating the treaty."). Absent such clear and unambiguous intent, federal courts have read reserved rights to require imposition of corresponding state and federal duties, including obligations to secure access rights to historic

Domestic lobbying to induce Congress to allow non-Indian economic interests access to Indian resources<sup>308</sup> threatens tribes with divestiture of sustenance, culture, religion, and income.<sup>309</sup> Furthermore, although Indians, as prior sovereigns, reserved rights in treaties to, inter alia, use water,<sup>310</sup> hunt and fish, and engage in traditional modes of production and worship on customary lands and waters,<sup>311</sup> recent federal jurisprudence suggests that Indian reserved rights are "temporary and precarious"<sup>312</sup> privileges subject to revocation even in the absence of explicit Congressional intent to abrogate them.<sup>313</sup> The synergy of the

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lands and waters, insulate tribes from state licensing fees, and protect against discriminatory state regulations. See Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 500 (1998) (enunciating negative and affirmative duties of United States and states to protect Indian reserved rights).

308. Recent critics of Indian reserved rights have attacked the foundations of the reservation system itself, not merely as "some sort of Rube Goldberg device for the control of Indian people" but as an inefficient, ineffective system. Several call for the dissolution of reservations and the redistribution of reservation-based resources. See, e.g., MOORE, *supra* note 57, at 274.

309. Indian reserved rights to fish, hunt, use water, and possess land have been frequent subjects of violent treaty abrogation campaigns. See, e.g., Progressive Animal Welfare Soc'y v. Slater, No. 98-36053, 1999 U.S. App. LEXIS 3525 (Mar. 4, 1999) (affirming decision of District Court in refusing to grant preliminary injunction to prevent Coast Guard from implementing rule establishing protective zone around Makah Indian tribe exercising reserved right to whale); John Enders, *Oregon Farmers Rejoice at Water's Release*, BOSTON GLOBE, Mar. 30, 2002, at A2 (reporting conflict between Klamath Indian religious rights to take fish and farmers' interest in use of dammed water in Oregon). For a discussion of the cultural and religious importance of hunting and fishing rights to Indian tribes, as well as a sketch of the dimensions and intensity of the conflict over Indian reserved rights and their intersection with and opposition to non-Indian economic interests, see Shelley D. Turner, *The Native American's Right to Hunt and Fish: An Overview of the Aboriginal Spiritual and Mystical Belief System, the Effect of European Contact and the Continuing Fight to Observe a Way of Life*, 19 N.M. L. REV. 377 (1989).

310. Political and legal machinations of the so-called "iron triangle" — interlocking directorates of the Bureau of Reclamation, state officials, and corporate interests — have denied Indians the beneficial use of water rights and permitted appropriation by non-Indian interests. See LLOYD BURTON, *AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF THE LAW* 23 (1991). For a discussion of this contested Indian right, see Taiawagi Helton, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 TULSA L.J. 979 (1998).

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

312. See *Ward v. Race Horse*, 163 U.S. 504, 515 (1886) (holding Indian usufructuary rights are "temporary and precarious" privileges that do not survive admission of the state in which those rights are exercised into the Union).

313. Recent case law suggests that, while the standard for abrogation remains clear

trust doctrine, plenary power, and judicial review of Indian treaties in derogation of Indian rights are felt most acutely when tribes employ development methods that promote Indian culture, spirituality, and identity.<sup>314</sup> As Indian "ethnodevelopment"<sup>315</sup> threatens the regulatory jurisdiction, market power, and legal sovereignty of the states<sup>316</sup> and the United States,<sup>317</sup> federal Indian law has

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expression of congressional intent, legal protection of Indian reserved rights is backsliding. *See, e.g.,* Western Shoshone Nat'l Council v. Molini, 951 F.2d 200 (9th Cir. 1991) (upholding ICC finding that Shoshone reserved rights to hunt and fish were extinguished "by gradual encroachment by whites"); Crow Tribe of Indians v. Reppis, 73 F.3d 982, 994 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996) (treaty rights reserved "during the pleasure of the President" abrogated by equal-footing admission of Wyoming into the Union on ground that "*Race Horse* is alive and well") (citing *Race Horse*, 163 U.S. at 504); Minnesota v. Mille Lacs Band of Chippewa Indians, 562 U.S. 172, 224-25 (1999) (finding Indian reserved rights, where they can be construed to operate in derogation of state sovereignty, are mere privileges subject to state regulation) (citation omitted).

314. Indian culture is a meta-value informing and legitimizing Indian politico-economic organization. PROPERTY RIGHTS AND INDIAN ECONOMIES 246 (Terry L. Anderson ed., 1992). Preferences, institutions, and strategies are determined by Indian culture, and observers identify BIA failure to craft development plans that enjoy a cultural "goodness of fit" as a primary determinant of relative Indian deprivation. *See, e.g.,* Prince, *supra* note 55, at 19 (positing cultural fit as condition precedent to sustainable Indian development).

315. *See* Guzman, *supra* note 284, at 257 (defining "ethnodevelopment" as autonomous economic activity comporting with religious and cultural requirements of equatibility, sustainability, and, intergenerational responsibility). An accrediting body of CIL recognizes the right to ethnodevelopment. *See* Convention No. 169, *supra* note 37, art. 7 (recognizing right of indigenous people to control and participate in development process "as it affects their lives, beliefs, institutions and spiritual well-being"); United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. GAOR, 47th sess., Principle 10 U.N. Doc. A/CONF.151/5/REV.1 reprinted in, 31 I.L.M. 874 (1992) (emphasizing duty to protect ethnodevelopmental rights of indigenous peoples); Draft Declaration, *supra* note 192, art. 26 ("Indigenous peoples have the right to own, develop, control and use . . . the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or . . . used."). For Indian tribes, hunting, fishing, and other methods of ethnodevelopment are religious duties that reinforce stewardship.

316. Indian gaming, though but one of the economic modalities that generate competition and conflict with the states, is perhaps the most visible. *See* Mezey, *supra* note 291, at 736 (noting that states may soon enter the gaming market as competitors with tribes).

317. Profound polarization of belief systems and underdeveloped historical understandings conspire to deprive Indian tribes of ethnodevelopmental rights, as a recent case illustrates. In 1855 the Makah reserved the right to hunt gray whales as they had for millennia in traditional waters off the coast of Washington State. *See* Treaty Between the United States of America and the Makah Tribe of Indians, Jan. 31, 1855, 12 Stat. 939. By the 1920s, non-Indian whalers had hunted gray whales to near-extinction, and the Makah, motivated by a deep religious connection to gray whales, voluntarily ceased whaling. When by 1993 gray whales were no longer endangered as a matter of U.S. law, the Makah asked the United States to espouse their petition for an aboriginal subsistence exception to the international legal prohibition on whaling. *See*

been carefully crafted to check its expression.

### 3. *Forced Assimilation*

Early U.S.-Indian treaties did not contemplate incorporation of Indians as United States citizens, and later treaties incorporated only those individuals who had been objectively "detrIALIZED."<sup>318</sup> Against the force of a clear general preference for a primary affiliation with tribal institutions,<sup>319</sup> federal Indian policy, for more than a century, has subsumed individual Indians within the broader body politic, thereby facilitating seizure of tribal lands and resources, elimination of contending governmental entities,<sup>320</sup> and eradication of a critical mass of practitioners of alien cultures and religions "stand(ing) in the way of progress."<sup>321</sup> The first such assimilative measure, Allotment, divested many

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International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 stat. 1716 161 U.N.T.S. 72 (prohibiting whaling listed species without a permit). Although the United States assisted the Makah in receiving a quota to whale under international law, the 9th Circuit interpreted procedural provisions of U.S. environmental legislation narrowly so as to divest their substantive right to whale. See *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) (interpreting U.S. executive action in support of Makah petition prior to completion of Environmental Assessment as violation of timing requirements of NEPA); William Bradford, "Save the Whales" v. *Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Disputes in the New International Economic Order*, 13 ST. THOMAS L. REV. 155 (2000) (discussing case).

318. See Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER J. 107, 108-09 (1999) (discussing mechanisms whereby Indians became citizens prior to 1924, including acceptance of individual share of communal land holdings and assumption of "characteristics and mannerisms of a civilized person").

319. See SVENSSON, *supra* note 221, at 1 (noting Indian ambivalence to participation in U.S. polity and general preference for tribal affiliation over exclusive identification as U.S. citizens; see also Rosen, *supra* note 82, at 246 ("Many [Indian tribes] want true self-governance to the exclusion of any other polity; many do not want citizenship imposed upon them[.]").

320. See Herz, *supra* note 195, at 691-92 (stating indigenous groups "undermine political and social stability by creating an orthodoxy in competition with . . . the dominant culture" that "undermines the state's claim to territorial sovereignty as well as its status as the representative of all citizens[.]"). The solution to the problem of competing governance regimes is, for many states, the assimilation of indigenous peoples, whether through force or co-optation. *Id.*

321. LOPACH ET AL., *supra* note 179, at 20; see also DELORIA & LYTLE, *supra* note 280, at 24 ("American Indian[s] . . . have experienced cultural imperialism not merely as an unspoken [social] phenomenon . . . but through government policies that promoted their forcible assimilation[.]"); RUSSEL L. BARSH & JAMES Y. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* viii (1980) (chronicling "a history of attempts to subvert [tribal] consciousness and replace it with the naked, alienated individualism[.]"). As with many other dimensions of U.S. Indian policy, many assimilationists attach benign purposes to their proposals; "friends of the Indian" suggest assimilation is promotive of racial and ethnic harmony. See, e.g., ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA* (1992); J.

Indians of their lands and created great physical and social distance between them and their tribes.<sup>322</sup> The imposition of U.S. citizenship in 1924<sup>323</sup> added legal momentum to forced assimilation by foisting an awkward dual allegiance upon Indians and pressuring them to transfer loyalties from their tribes to the United States<sup>324</sup>

#### a) Termination

Although assimilationist pressure abated during the Depression and World War II, with the onset of the Cold War and mounting fears of enemies within,<sup>325</sup> the preservation of distinct political communities within U.S. boundaries became too offensive for many non-Indians to tolerate.<sup>326</sup> House Concurrent Resolution 108, known colloquially as Termination, exercised plenary power to "make the Indians . . . subject to the same laws and . . . responsibilities as are applicable to other citizens of the [U.S., and] to end their status as wards[.]"<sup>327</sup> Termination, under the direction of the former head of the War Relocation Authority,<sup>328</sup> ended

Harvie Wilkinson, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993 (1995). This "benign Indian assimilationism" flies in the face of culturally deprived, economically dependent urban Indians, who, as a consequence of their inability to participate meaningfully in either traditional tribal or majoritarian societies, suffer physical and mental ills. See WELLS, *supra* note 152, at 61 (correlating increased incidence of Indian social pathology with assimilationist policies that divided kinship groups and divested Indians of culture); LAURENCE FRENCH, *THE WINDS OF INJUSTICE: AMERICAN INDIANS AND THE U.S. GOVERNMENT* xvi (1994) (discussing challenges facing assimilated urban Indians).

322. See *supra* notes 175-87 and accompanying text.

323. See Act of June 2, 1924, ch. 233, 43 Stat. 253 (Indian Citizenship Act) (codified at 8 U.S.C. § 1401(b) (2000) (granting citizenship to all non-citizen Indians born within the territorial limits of the United States)).

324. See Joseph William Singer, *The Stranger Who Resides With You: Ironies of Asian-American and American Indian Legal History*, 40 B.C. L. REV. 171, 174 (1998). Although the Indian Citizenship Act ("ICA") provided that "citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property[.]" in practice Indian citizenship continued to be perceived by some in practice as less than fully compatible with U.S. citizenship, as it had, as a matter of law, prior to the ICA. See *e.g.*, *United States v. Celestine*, 215 U.S. 278, 291 (1909) (holding, in evaluating a 1906 amendment to the Allotment Act deferring grants of citizenship to Indians for a 25-year period, that "Congress, in granting full rights of citizenship to Indians, believed that it had been hasty."). *Id.*

325. LEGTERS & LYDEN, *supra* note 64, at 7.

326. DELORIA & LYTLE, *supra* note 280, at 111.

327. H.R. CON. RES. 108, 83rd Cong. (1953) (enacted), *repealed by* 25 U.S.C. § 2502 (2000).

328. Perhaps uncoincidentally, the BIA Commissioner responsible for executing Termination, Dillon Meyer, served as Head of the War Relocation Authority, the agency to which the power to intern Japanese-Americans was delegated under Executive Order 9066. See

the U.S. trust relationship with over 100 selected tribes,<sup>329</sup> curtailing federal benefits and services, forcing dissolution of tribal governments, and distributing former tribal lands and assets on a per capita basis.<sup>330</sup> By legislatively disappearing Indian tribes,<sup>331</sup> Termination stripped Indian people not only of primary sources of political allegiance and economic sustenance but of sacred sites and other fonts of cultural renewal. Assimilationist pressure mounted, and

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FRENCH, *supra* note 321, at 60; *see also* Pub. L. No. 100-383, 102 Stat. 903 (1988).

329. H.R. CON. RES. 108, 83rd Cong. (1953) (authorizing administrative and Congressional action to terminate tribes in California, Florida, New York, and Texas; the Flathead of Montana; the Klamath of Oregon; the Menominee of Wisconsin; the Potawatamie of Kansas and Nebraska; and the Chippewa of North Dakota); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977) (identifying 109 terminated tribes). Although the process whereby tribes were selected for Termination is a question beyond the scope of this Article, scholars note positive correlations with tribal wealth and political activism. CADWALADER & DELORIA, *supra* note 85, at 119.

330. H.R. CON. RES. 108, (1953).

331. Termination has been partially reversed: thirty-one previously terminated tribes have been reinstated to federally-recognized status. *See, e.g.*, Menominee Restoration Act of 1973, Pub. L. No. 93-197, 87 Stat. 770 (codified at 25 U.S.C. § 903-903 (2000)); Oklahoma Indians Restoration Act of 1977, Pub. L. No. 95-281, 92 Stat. 246 (codified at 25 U.S.C. 861-861(c) (2000)); Paiute Indian Tribe of Utah Restoration Act of 1980, Pub. L. No. 96-227, 94 Stat. 317 (codified at 25 U.S.C. 761-768 (2000)). However, many tribes remain terminated or unconstituted and therefore unrecognized, a status which precludes availment of the protective aspects of the trust doctrine as well as the legal entitlements that accrue as a result of recognition, such as, e.g., eligibility to game. *See* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (differentiating between recognized and unrecognized tribes for purposes of inclusion within protections of the trust doctrine); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), *cert denied*, 444 U.S. 866 (1979) (holding an Indian tribe may lose its tribal status by ceasing to function as a distinct, identifiable entity); 62 Fed. Reg. 55270 (1997) (listing, as required under 25 U.S.C.A. §479a-1, tribes recognized as eligible for federal services). Federal recognition can arise under a treaty, statute, executive or administrative order, or a course of dealings. *Passamaquoddy*, 528 F.2d at 370; *see also* 25 C.F.R. § 83.3 (2002) (requiring, for purposes of recognition, a "continuous tribal existence and . . . autonomous entit[y] throughout history until the present."). However, because the question of recognition is political and not subject to judicial review, terminated tribes, as well as those disbanded by other federal policies, have few options whereby to reclaim rights attached to tribalism. *See* Miami Nation of Indians Inc. v. United States Dept. of Interior, 255 F.3d 342, 347 (7th Cir. 2001) ("The second branch of the [political question] doctrine . . . is not engaged by a dispute over whether to recognize an Indian tribe. But the first branch . . . which asks whether the answers would be ones a federal court could give without ceasing to be a court . . . is engaged" by dispute over recognition) (citing Cherokee Nation of Okla. v. Babbitt, 117 F.3d 1489, 1499-1500 (D.C. Cir. 1997) (holding that review of grants or denials of recognition are limited to questions of whether Department of the Interior followed its own regulations and adhered to requirements of Due Process Clause).

in 1954 Public Law 280,<sup>332</sup> by according states extensive jurisdiction over Indian tribes and individuals, granted non-Indian institutions of social control the legal authority to adjudge and condemn Indian domestic relations and employment practices.<sup>333</sup>

### b) Relocation

Predicated upon the misapprehension that the emerging "Indian problem"<sup>334</sup> was rooted in segregation and parochialism rather than a cascade of assimilative legislation, Public Law 959, dubbed "Relocation,"<sup>335</sup> directed federal agencies to create "Indians who were Indian in appearance but not in culture"<sup>336</sup> and sap remaining tribal political strength. At a time when reservations were increasingly unable to provide material necessities,<sup>337</sup> Relocation, by portraying "contented Indian[s] working at good jobs and sitting beside televisions and

332. Act of Aug. 15, 1953, Pub. L. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2000), 25 U.S.C. §§ 1321-1322 (2000), 28 U.S.C. § 1360 (2000)).

333. Subsequent to Public Law 280, State Departments of Health seized Indian children and placed them with non-Indian parents at rates disproportionate to other races, relying on the culturally-bound theory that traditional Indian parenting, reliant on extended kinship groups for monitoring and nurturing children, was tantamount to neglect. BURNETTE & KOSTER, *supra* note 154, at 133; *see also* Pritchard, *supra* note 44, at 259 (noting long history of forced division of aboriginal families). Although legislation has heightened protection of Indian familial and tribal rights, the right of Indian children to be raised as Indians by Indian parents remains a focal point in the struggle to remedy the assimilative effects of Public Law 280. *See* Indian Child Welfare Act of 1970, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (2000)); *see also* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32-37 (1989) (interpreting Indian Child Welfare Act). Similarly, adult urban Indians experience considerably more contact with criminal justice systems than they did prior to the passage of Public Law 280. *See* JOSEPHY, *supra* note 63, at 75 (linking Indian maladjustment with federal Indian law and policy and stressing that "for the sake of our psychic stability as well as our physical well-being we must be free men and exercise free choices"); *see also* ERIC K. YAMAMOTO, *INTER-RACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 94-95* (1999) (linking cultural imperialism of federal Indian policies such as Public Law 280 with psychological trauma and social dysfunction, including substance abuse, incarceration, and domestic violence). By denying self-determination and pervading collective self-esteem, federal law served yet again as a determinant of Indian pathology.

334. The "Indian problem," viewed from the mid-twentieth century dominant perspective, consisted of (1) continuing tribal sovereignty on tribal land within U.S. borders, and (2) social and material maladjustment experienced by Indians forced from reservations by Allotment and Termination.

335. Act of Aug. 3, 1956, Pub. L. No. 84-959, 70 Stat. 986 (Relocation Act).

336. PEVAR, *supra* note 124, at 32.

337. *See* JOSEPHY, *supra* note 63, at 72 (noting that by the 1950s many reservations could not support their populations).

refrigerators [in Northern cities,]"<sup>338</sup> induced an exodus to magnet urban areas where a generation of the Indian best and brightest<sup>339</sup> were dumped into substandard housing<sup>340</sup> and menial employment<sup>341</sup> and subsumed in the American melting pot.<sup>342</sup>

By 1970 reservation populations had dwindled so far that a final solution to the "Indian problem" appeared to be at hand,<sup>343</sup> and yet the "stubborn [Indian] refusal to . . . become simply another American citizen"<sup>344</sup> has sustained Indian tribalism against a malign tide of assimilationism unto the present day.<sup>345</sup> Although Indian individuals currently possess both tribal and federal citizenship, federal Indian law treats Indian tribes as subordinate governments,<sup>346</sup> and thus meaningful "dual citizenship" — predicated upon the assumption that tribal and federal governments exercise separate, if overlapping, spheres of authority in "good faith"<sup>347</sup> — is a legal fiction. For many Indians, this forced "split identification of citizenship" was a genocidal act destructive of tribal political

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338. Russel L. Barsh, *Are We Stuck in the Slime of History?*, 15 AM. INDIAN Q. 59 (1991).

339. BURT, *supra* note 271, at 78 (identifying educated Indians with leadership skills as targets of Relocation). More than 35,000 Indians were relocated after signing an agreement that they would never return to the reservations to establish residence. Atkinson, *supra* note 54, at 409.

340. See BURNETTE & KOSTER, *supra* note 154, at 172 (noting institutionalized housing discrimination against urban Indians).

341. FRENCH, *supra* note 321, at 66.

342. Off-reservation Indians who do not enroll as tribal members are not only ineligible for reservation-based federal services: they are, for reasons of physical and social distance, unable to participate in the languages, lifestyles, and communities constituting Indian identity. WELLS, *supra* note 152, at 5-6.

343. See BROOKS, *supra* note 1, at 277 ("It is high time to stop treating the Indians as second-class citizens. Indians ought to be . . . assimilated into our population.") (quoting Sen. Henry "Scoop" Jackson (D.-Wash.), sponsor of ANCSA, *supra* note 38, at the time of its passage).

344. JENNINGS C. WISE, *THE RED MAN IN THE NEW WORLD DRAMA* 399 (Vine Deloria, ed., 1971). "While the years have shown . . . assimilation of other groups, only the red man has stood firm, resisting all efforts to merge him with the groups that surround him." *Id.*

345. Relocation continues as federal policy, albeit outside the legislative orbit of Public Law 959. See CADWALADER & DELORIA, *supra* note 85, at 121-22 (describing exercises of plenary power to relocate Indians within reservations to facilitate mineral extraction and corporate development).

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

347. *Id.* at 632.



identities,<sup>348</sup> and few believe that tribal and national political participation can coexist when Indian self-determination is construed to threaten U.S. territorial integrity.<sup>349</sup>

*D. Summary: The Claim for Indian Redress*

More than two centuries of genocide, land theft, and ethnocide, implemented by the brutal instrument of federal Indian law,<sup>350</sup> have depopulated and seized Indian land and eliminated rival polities within the colonial state constructed thereon. The historical review of U.S.-Indian relations has revised a mythical account in order to prepare the intellectual terrain for contemporary remediation. Although the role of the United States in the deliberate destruction of Indian populations, property rights, and cultural patrimonies is for most Americans a hidden history, it presents an archetype for the contemporary exposition, analysis, and redress of a gross human injustice. However, even if re-envisioning history instructs the non-Indian majority in its moral and legal obligations to redress Indian claims,<sup>351</sup> unless two fundamental, transformative principles guide and inform redress, it is foreordained to fail.

First, because a set of institutionalized legal impediments<sup>352</sup> runs through the domestic order and trammels Indian rights, it falls to a process of legal reform to make the nation safe for the peaceful coexistence of basic value-differences

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348. See Porter, *supra* note 318, at 166-68 (arguing that forcing Indians to accept U.S. citizenship, along with ongoing practices of forced relocation and assimilation, qualify as genocidal acts within the meaning of the Genocide Convention).

349. AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 99 (Vine Deloria, Jr. ed., 1985) [hereinafter AMERICAN INDIAN POLICY].

350. See Robert A. Williams, Jr., *Jefferson, The Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165, 167 (1987) (describing federal Indian Law as "a brute reflection of the interests of a conquering nation").

351. This is not an unrealistic proposition if one accepts that Indian claims are grounded in the same "aspirational principles of the American people: . . . self-governance, justice and fairness, civil rights and civil remedies, compensation for takings, similar treatment for those similarly situated, and avoidance of conflicting interests." Friedman, *supra* note 84, at 526 (citing DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)).

352. Taken together, the doctrines of discovery and conquest, as judicially incorporated in domestic law, as well as the trust doctrine, plenary power, and judicial subversion of reserved rights, constitute a matrix of legal disability that refers Indian rights to property, culture, religion, development, and self-government to interpretation and suppression by an often hostile non-Indian majority. Further, although it incorporates principles that are not "relentlessly hurtful" and provides internal resources with which to mount criticisms against it, federal Indian law is a contradictory maze, and the United States does not live up to its aspirations as to the best interpretation thereof. Letter, Joseph Singer, Professor, Harvard Law School, to William Bradford, Assistant Professor, Indiana University (Jul. 3, 2001)(on file with author).

between *people* as well as between *peoples*.<sup>353</sup> Necessary reforms will include legislation<sup>354</sup> to strengthen protection of Indian religious, cultural, and property rights;<sup>355</sup> create specific remedial programs;<sup>356</sup> tighten judicial canons of construction to resolve ambiguities and construe treaty terms in favor of tribal reserved rights; and incorporate those principles of conventional and customary international law protective of the rights of indigenous peoples.<sup>357</sup> A Constitutional amendment may be necessary to renounce plenary power<sup>358</sup> and

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353. The rights claimed by Indians as constituents of their cosmology — rights to property, religion, culture, and ethnodevelopment — are third-generation, collective entitlements. FREHLICH, *supra* note 9, at 44. By the late 1960s indigenous groups worldwide were struggling to secure these collective rights, yet extant international human rights laws were concerned mainly with individuals, and many states resisted the notion that rights might attach to groups. See Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739, 744 (1990) (identifying state resistance to indigenous rights in 1970s and 1980s); Yamamoto, *Racial Reparations*, *supra* note 12, at 509-10 (indicating that declarations of indigenous rights norms have long been devoid of functional utility in the courts of states that violate such norms). Until the 1980s, the UN placed little leverage upon states; however, in 1982 the U.N. Working Group on Indigenous Populations ("WGIP"), created by ECOSOC to enhance protection of indigenous peoples, launched a bolder generation of legal architecture upon rights to maintain and develop ethnic identity, improve social and economic conditions, security in traditional economic activities, and cultural and religious independence. See Report of the Working Group of Indigenous Populations, Fifth Session, at 3-7, U.N. Doc. E/CN.4/Sub.2 (1987). After the ILO further elaborated indigenous rights in Convention No. 169, WGIP began to extend these obligations to nonratifying states. Barsh, *Indigenous Peoples in the 1990s*, *supra* note 284, at 75. Several principles of the resulting Draft Declaration have been recognized by states as legally binding. See, e.g., Statement by Mr. Robert Tickner, Minister for Aboriginal and Torres Strait Islander Affairs, on behalf of the Government of Australia, U.N. WGIP, 10th Sess., at 2, 10-13 (July 28, 1992)(reporting measures to "address . . . aboriginal disadvantage and aspirations in relation to land, housing, law and justice, cultural heritage, education, employment, health, . . . [and] economic development") (referring to Draft Declaration). However, with indigenous groups as well as states pressuring to modify its terms, the Draft Declaration is in jeopardy. Karen Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia*, 30 COLUM. J. L. & SOC. PROBS. 529, 534 (1997); see also Daes, *supra* note 284 (critiquing Draft Declaration). The Permanent Forum for Indigenous Issues, a subsidiary organ established by ECOSOC on July 31, 2000, to give indigenous peoples a "unique voice" within the UN system and a primary goal of the International Decade of the World's Indigenous Peoples (1995-2004), may become the sole bulwark against state sovereignty and majoritarianism when it holds its initial conference in May 2002. Press Release 5932, ECOSOC, UN Establishes Permanent Forum for Indigenous Issues (Jul. 31, 2000)(on file with author).

354. See *infra* notes 752-53 and accompanying text.

355. *Id.*

356. See *infra* note 754 and accompanying text.

357. See *supra* notes 192, 232; see *infra* notes 592, 754 and accompanying text.

358. See *infra* note 757 and accompanying text.

restore Indian tribes to a position superior to states in the federalist hierarchy. Proposed reforms will "portend changes in power and well-being for specific persons or groups"<sup>359</sup> and may compromise the universalist approach to conceiving of, promoting, and protecting rights.<sup>360</sup> Redress thus invites contestation over its form, pace, and scope.<sup>361</sup>

Consequently, the second principle, a corollary to the first, is that the non-Indian majority must assist in the infusion of "Indian Self-Determination" with genuine meaning.<sup>362</sup> The United States and Indian tribes are not only

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

360. See Rupa Gupta, *Indigenous Peoples and the International Environmental Community: Accommodating Claims Through a Cooperative Legal Process*, 74 N.Y.U. L. REV. 1741, 1766 (1999) (noting even liberal states have been unable to resolve tension between majoritarianism and group rights of discrete and insular minorities); see also W. Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 YALE L.J. 401, 413-15 (noting that addition of indigenous rights to the equation complicates the intellectual and governance task of determining when, how, and to what extent minority groups claiming rights to self-determine may "discharge themselves from the reach of general community norms" without compromising the liberal project of promoting universal human rights).

361. Critics excoriate the call for legal reform as a "result-oriented modification of established legal doctrine" that would "deconstruct[ ] . . . neutral principles" to exempt minorities "from the ordinary application of the laws." Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism*, 40 B.C.L. REV. 787, 804 (1999). Talismanic fixation on a facially neutral legal order stymies reform on behalf of indigenous groups worldwide. See, e.g., *New President Submits Bill in Indian Rights*, BOSTON GLOBE, Dec. 6, 2000, at A16 (outlining etiology of legislative stalemate in Mexico over Indian rights bill); see also *infra* notes 455-456 and accompanying text (discussing conflict between liberal and critical jurisprudence).

362. An Indian tribe with a population, territorial base, government, and the capacity to enter into international relations could in theory declare independence and gain international recognition. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987) ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with such other entities."); Inter-American Convention on Rights and Duties of States, 1933, 49 Stat. 3097, T.S. No. 8811, 165 L.N.T.S. 19 (art. 3), T.I.A.S. No. 2361, 117 U.N.T.S. 3 (art. 9) (as amended by the Protocol of Amendment in 1967, 21 U.S.T. 607, T.I.A.S. No. 6487 (art. 12) (same)). Some ardent advocates suggest that only full tribal sovereignty as independent nation-states can overcome the disabilities imposed by federal Indian law and policy. See, e.g., Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439, 445-49 (1988); Paul H. Brietzke & Teresa L. Kline, *The Law and Economics of Native American Casinos*, 78 NEB. L. REV. 263, 338-39 (1999) ("[U.S.] notions of sovereignty echo those prevailing in international law prior to World War II: you

intertwined geographically and historically, they are interdependent. Indian autonomy and prosperity on the one hand, and U.S. legitimacy and global leadership on the other, are inseverable, with each a necessary condition for the full realization of the other.<sup>363</sup> Enhancement of the positive externalities of reciprocal transactions will serve both Indian and non-Indian peoples. If U.S.-Indian relationships advance on the basis of a recognition of, and respect for, mutual sovereignties, with differences and disputes attended not by coercion and domination but by negotiation and harmonization, a new era of domestic peace with justice, more worthy of emulation and export than earlier periods of American history, will follow.

The next section defines and contrasts the theories, procedures, assumptions, and remedies that distinguish reparations and reconciliation, the dominant contending modes of redress available to group victims of human injustice; bring each mode to bear upon the Indian claim; and evaluate the relative utilities and disutilities of each.

### III. *Reparations v. Reconciliation*

#### A. *Reparations*

##### 1. *Current Contestation over a Traditional Remedy*

Reparations<sup>364</sup> is grounded in the common law of torts<sup>365</sup> and in the

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cannot be a little bit sovereign, and entities like Indian tribes are entitled to little legal respect because they are not recognized as states."). However, most tribes desire not statehood but rather an intermediate status that would allow them to "challenge . . . intrusions across the full spectrum of locations at which . . . injury is felt." Herz, *supra* note 195, at 698. Issue-area autonomy, combined with representation in international organizations, departs sufficiently from the current statist international and domestic legal regime to satisfy most tribes. Suagee, *supra* note 9, at 692. Still, cultural barriers impede discovery of middle ground, and much cooperation will be necessary to define and implement Indian Self-Determination.

363. The concept of interdependence between nations is well-developed in international relations theory. See ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* (1989) (defining "interdependence" as a condition where the reciprocal effects of transactions across political boundaries constrain choices). Similarly, it is a cardinal tenet of liberal political theory that institutionalization of democratic principles enhances social stability and economic development. See, e.g., BOUTROS-GHALI, *supra* note 284, at 46-47 (linking economic development with democracy). If the economic development of "domestic dependent nations" is tied to U.S. leadership of the global political economy, so also is the moral legitimacy of the United States linked to its respect and promotion of the human rights of Indians.

364. See *supra* note 45 (defining reparations as employed in domestic and international law).

365. Neither constitutional (First, Fourth through Seventh, or Thirteenth through Fifteenth Amendments) nor statutory (42 U.S.C. §§ 1983-1985 (2000)) sources of law provide a remedy for their violation, and thus it is in tort in which a claim for reparations ultimately sounds. See

international law principle<sup>366</sup> that when an intentional wrong cannot be undone, justice requires compensation of victims for injuries and punishment of the wrongdoer.<sup>367</sup> Although reparations for aggrieved minority groups<sup>368</sup> can soothe damaged psyches and relegitimize nations,<sup>369</sup> reparations claims confirm the hoary remedial foundations of tort law,<sup>370</sup> in demanding damages<sup>371</sup> and

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Cato v. United States, 70 F.3d 1103, 1110-11 (9th Cir. 1995) (dismissing reparations claim alleging violations of constitutional and statutory sources as noncognizable); Jeremy Levitt, *Black African Reparations: Making a Claim for Enslavement and Systematic De Jure Segregation and Racial Discrimination Under American and International Law*, 25 S.U. L. REV. 1, 28 n.11 (1997) (rejecting all but tort as cognizable source of law for reparations claim).

366. State responsibility for acts or omissions breaching obligations and causing injury is a fundamental organizing principle of international law. See *Chorzow Factory*, 1928 P.C.I.J. (Merits), (ser. A) No. 17, at 29 (Sept. 13) (holding that violation of a rule of international law gives rise to a state obligation to provide remedies); *Velasquez Rodriguez Case*, 7 Inter-Am. Ct. H.R. (ser. C) para. 25 (1989) ("every violation of an international obligation which results in harm creates a duty to make adequate reparation"); International Law Commission, Draft Articles on State Responsibility, II Y.B. INT'L L. COMM'N 59-60 (1975) (codifying principle of state responsibility for repair of tortious acts or omissions of governments, organs, or agents); Theo Van Boven, *Study Concerning the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. GAOR 4th Comm., 45th Sess., Provisional Agenda Item 4, para. 48, U.N. Doc. E/CN.4/Sub.2/1993/8 (1993) (stating remedies must "wipe out" all consequences of illegal act or omission). Remedies include restitution (reestablishment of status quo ante), compensation (loss of earnings, medical expenses, pain and suffering), rehabilitation (medical, psychological, legal assistance), and satisfaction (public disclosure, apology, punishment, and measures in deterrence). See generally 2 F.V. GARCIA-AMADOR, *CHANGING LAW OF INTERNATIONAL CLAIMS* (1984).

367. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 26, 33-37 (5th ed. 1984) (positing compensation and retribution as tort law objectives); Richard Abel, *Pounds of Cure, Ounces of Prevention*, 73 CALIF. L. REV. 1003 (1985) (listing compensation, deterrence, and moral judgment as reparative functions); Tuneen E. Chisholm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 721 (1999) (propounding deterrent value of reparations).

368. Rights to justice inhere in the entity suffering harm; thus, aggrieved minority groups qua groups are bearers of the right to reparations. Yamamoto, *Racial Reparations*, *supra* note 12, at 519.

369. For reparationists, U.S. legitimacy hinges upon the bestowal of reparations to aggrieved minority groups. ROBINSON, *THE DEBT*, *supra* note 39, at 208 (contending that without reparations, "America can have no future as one people.").

370. Legislatures have proven friendlier to reparations claimants than courts, in part because the legislative approach is an equitable proceeding unencumbered by legal doctrines. See *United States v. Realty Co.*, 163 U.S. 427, 440-41 (1896) (Congress, under its Article I, § 8 powers, may legislate concerning any claim arising from an equitable obligation not cognizable in a court of law); *Ozer*, *supra* note 17, at 487 (suggesting Article I, § 8 power to pay reparations is augmented by powers to enforce the Fourteenth Amendment); *Jacobs v. Barr*, 959 F.2d 313, 322 (D.C. Cir. 1992), *cert. denied* 506 U.S. 831 (1992) (holding, even under strict scrutiny, that legislative reparations pass constitutional muster if Congress finds the United

concessions<sup>372</sup> from perpetrators,<sup>373</sup> so as to return victim-claimants to the status quo ante.

## 2. *Opposition to, and Limitations of, Reparative Justice*

Despite deep roots in the law of remedies, however, and notwithstanding the existence of precedents to which advocates can point,<sup>374</sup> reparations for the claims of aggrieved U.S. minority groups is, for a slew of reasons doctrinal, political, and practical, "one of the most perplexing, challenging,

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States harmed a recipient racial group). Despite this distinction, the approaches are parallel tracks fraught with different hazards: where legislative remedies are not forthcoming, judicial avenues remain open, if only in theory; conversely, exhaustion of judicial remedies is a condition precedent to legislative reparations. *Hohri v. United States*, 782 F.2d 227, 255, n.69 (D.C. Cir. 1986). Further, because both approaches posit historical injury as predicate to compensation *without reconciling perpetrators and victims*, conflation aids the contrast with reconciliation.

371. Cash is the central remedy in reparations theory. Harold S. Peckron, *Reparation Payments—An Exclusion Revisited*, 34 U.S.F. L. REV. 705, 707 (2000). Tax incentives, loans, and other indirect compensatory schemes occupy a lesser place. Yamamoto, *Racial Reparations*, *supra* note 12, at 519. Value consequences of forced labor, the present value of expropriated property, and opportunity costs of racism fall within the compensatory ambit. Verdun, *If the Shoe Fits*, *supra* note 42, at 608. Damage calculation is difficult, yet reparationists assert a U.S. obligation to transfer that share of national wealth with which victims would be endowed had they not been harmed. MUNFORD, *supra* note 39, at 425-29; *see also* Richard F. America, *Unjust Enrichment and Restitution: Defining and Measuring Current Benefits From Past Wrongs — Estimation and Policy Implications*, 5 N.Y.L. SCH. J. HUM. RTS. 413, 422-23 (1988) (proposing racialized wealth redistribution).

372. Reparations theory assumes that (1) state-structured wealth inequalities associate with race; (2) racial inequalities in wealth produce racial inequalities in political access; (3) elimination of racism will not undo these inequalities; and (4) state legitimacy and security is a function of the degree to which racial equality is achieved. Allen, *supra* note 44, at 12; *see also* Matsuda, *supra* note 51, at 391 (stating "violence" may result when uncompensated groups reject official process as illegitimate). To overcome tenacious racial hierarchy and secure structural economic reform, reparationists demand that redistricting and affirmative action accompany compensation. *Id.*

373. Although some include private entities within the wrongdoer class, reparationists typically cast the government — agent for the "dominant social group" — as "perpetrator," and the aggrieved minority group as "victim," in allocating moral and legal responsibility. *See* Allen, *supra* note 44, at 7-8, 14 (identifying state as agent of injustice and obligor); Verdun, *If the Shoe Fits*, *supra* note 42, at 636-38 ("Society," through its "governments, laws, courts, and . . . institutions . . . allowed the injury to take place[.]"); *id.* (analogizing dominant social group to a trustee holding the corpus of a trust and aggrieved minority group as beneficiary entitled to disgorgement of assets).

374. *See supra* note 28 (describing Japanese American reparations); *see also supra* notes 17-26.

and emotion-producing" issues in domestic law.<sup>375</sup> Given the magnitude of the claims presented, the scope of remediation necessary to effect full redress, and the redistributive effects, critics hasten to raise a series of interrelated doctrinal, politico-philosophical, and practical objections.

*a) Legal obstacles*

Numerous doctrinal objections, framed as dismissal motions or affirmative defenses, serve as roadblocks to justiciability or remediation of reparations claims. The standard set includes the doctrines of standing, proximate causation, time-bar, laches, res judicata, exhaustion of remedies, ex post facto application of the laws, sovereign immunity, and political question.

*(1) Standing*

Remedies law typically assumes the paradigm of a single plaintiff "A" seeking damages from a single defendant "B" for a palpable injury B is alleged to have recently inflicted upon A.<sup>376</sup> In tort actions, courts have been

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375. ROBERT S. LECKY & H. ELLIOT WRIGHTT, *BLACK MANIFESTO: RELIGION, RACISM, AND REPARATIONS* 1 (1969). Even if reparations is firmly rooted in the law of liberal Western states, no universal normative standard exists to resolve conflicts of values and differing conceptions of justice. Whereas many reparationists contend that aggrieved minority groups cannot expect existing remedies to reach every aspect of their claims, opponents deride reparations as a betrayal of core principles of liberalism. Matsuda, *supra* note 51, at 324. Proponents tend to spring from the ranks of aggrieved minority groups, whereas their adversaries affiliate with a largely white societal majority, and the two camps maintain diametrically opposed belief systems. Verdun, *Affirmative Action*, *supra* note 38, at 609-10 (contrasting the "dominant perspective" of the group that exercises "economic, political, and ideological control over society" and the "consciousness . . . spawned from generations of survival as an oppressed people in a hostile environment[.]"). Still, if the application of reparations to remedy the claims of aggrieved minority groups in the United States remains fraught with controversy and vituperation, recent scholarship has secured one of the primary goals of reparation theorists — the development of fresh, enriched, and interdisciplinary colloquium on the complex and painful subject of race relations. See Magee, *supra* note 38, at 866 (noting neglect by the legal academy of reparations for aggrieved minority groups); Westley, *supra* note 17, at 437 (stating reparations claims can "reinvigorate [interdisciplinary] discussions" about race); Levmore, *supra* note 44, at 1689 (suggesting that reparations provides a "fresh start for race relations and the law.").

376. The federal doctrine of standing encompasses the constitutional requirement of a "case or controversy" as well as prudential principles of judicial self-restraint. The constitutional foundation of the standing doctrine appears to permit adjudication of all federal questions while precluding justiciability only of requests for advisory opinions. See U.S. CONST. art. III, § 2 (extending judicial power of federal courts to "all Cases, in Law and Equity" as well as to

unwilling to permit parties other than the actual alleged individual victim standing to demand, from the actual alleged wrongdoer, compensation for injuries.<sup>377</sup> Reparations, in contrast, rejects the requirement of this immediate horizontal nexus between individual disputants in favor of a relaxed linkage that allows plaintiff class "A" (members of a victim group) to bring an action against defendant class "B" (descendants of a perpetrator group), consistent with the remedial theory that group responsibility and entitlement are appropriate when group characteristics are of primary relevance to the mechanism and nature of the injury alleged.<sup>378</sup> For racial reparatologists, the experience of racism<sup>379</sup> indivisibly welds members of the

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"Controversies[,]" thereby excluding advisory opinions). However, the prudential foundation of the standing doctrine operates to exclude many cases or controversies otherwise within the Article III grant of power to the federal courts but too costly in judicial resources. *Flast v. Cohen*, 392 U.S. 83 (1968). Standing, a potent bar to otherwise justiciable cases and controversies, requires a plaintiff to plead that he himself has suffered a recent injury "fairly traceable" to the challenged action which can be redressed by the judicial relief sought. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Absent a federal statute conferring standing or a special relationship to the plaintiff, federal courts reject assertions of violations of the rights of third parties. *Baker v. Carr*, 369 U.S. 186, 204 (1962) (holding a direct and immediate personal injury alleged to be the direct result of the challenged action — i.e., a "personal stake in the outcome of the controversy" — best assures the "concrete adverseness which sharpens" presentation of the issues); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding individual citizens have undifferentiated interest and thus lack standing to challenge regulation); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (restricting associational standing to cases where members themselves have standing, interest asserted is germane to associational purpose, and "neither the claim . . . nor the relief requested requires" membership participation).

377. See Magee, *supra* note 38, at 906-07 (noting that traditional remedies jurisprudence ignores group-based theories of redress despite evidence of group injury and group responsibility for that injury). Courts relax stringent standing requirements in class-action litigation, an important exception. See FED. R. CIV. P. 23(b). Still, the judicial avenue to redress, with its standing requirements, is obstructed to aggrieved minority groups, and demands for legislative reparations though they have fared better, are requests for political, rather than legal, redress. See, e.g., Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (permitting compensation of heirs of Japanese American internees who died prior to disbursement without requirement of legal standing); NANA SAGI, *GERMAN REPARATIONS: A HISTORY OF THE NEGOTIATIONS 172-74* (1980) (noting compensation of children of Jewish Holocaust victims despite absence of direct injury).

378. Chisholm, *supra* note 367, at 712-13.

379. International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(1), 5 I.L.M. 352, 353 (1966) [hereinafter *Racism Convention*] (defining racial discrimination as any "distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise . . . of human rights[.]"); WEBSTER'S NEW WORLD DICTIONARY 1170 (2nd ed. 1982) (defining "racism" as "any program . . . of . . . discrimination



victim group into a coherent legal entity,<sup>380</sup> just as the collective enjoyment of the benefits of past wrongs inflicted by society at large solidifies the perpetrator group as a collective defendant, even if some individual members currently decry racism and its legacy.<sup>381</sup>

Although reparationists concede that the categories of perpetrator and victim group are potentially overinclusive in that they impose obligations upon individuals who have not personally perpetrated any harmful acts<sup>382</sup> while compensating individuals whose injury status relative to the victim group is attenuated,<sup>383</sup> reparations theory maintains that because racism is animated by assumptions made about groups, and because the dominant racial group unjustly reaps the benefits of the harm inflicted upon the subordinated group,<sup>384</sup> whether individual members of the dominant group

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. . . that claims to find racial differences in character [or] intelligence [and] asserts the superiority of one race over . . . others").

380. Westley, *supra* note 17, at 448.

381. Matsuda, *supra* note 51, at 378-80.

382. Because they are paid through general revenues, legislative reparations impose financial obligations on all taxpayers, including individuals yet-unborn at the time of the injury, critics of the government policies that caused the injury, immigrants who arrived subsequent to the injury, and members of the injured group themselves. See, e.g., Levitt, *supra* note 365, at 36 (detailing categories of "innocent" groups in Japanese Civil Liberties Act). This question of redistributive fairness does not trouble reparationists, who note the common obligations of citizenship, privilege the duty of state officials to afford justice over the desire of citizens to avoid the onus of specific government expenditures, and stress the practical inability to collect reparations solely from supporters of the past injustice. See MICHAEL WALZER, JUST AND UNJUST WARS 297 (1977) (noting that because reparations cannot be levied solely upon "active supporters of the [injustice], . . . the costs are distributed . . . among all the citizens, often over a period of time extending to generations that had nothing to do with the [injustice]").

383. Critics of reparations build on standing questions by decrying inclusion of minority group members who do not experience relative material disadvantage in the victim group. Westley, *supra* note 17, at 471. Reparationists counter that to means-test reparations is to substitute class for race as the basis for remediation, obscure the intangible insults of state-sanctioned racism, and dismiss the group-centric nature of the entitlement. *Id.* In response to those who challenge inclusion of individuals of mixed racial background as victim group members, reparationists counter that the judicial and legislative branches can draw upon experience with "fluid recovery mechanisms," used in class-action litigation, to determine membership in the victim group in cases concerning racial reparations. See Chisholm, *supra* note 367, at 721-22 (citing *Simer v. Rios*, 661 F.2d 655, 675 (7th Cir. 1981)) (holding that a market system can be "used to fund a project" to benefit likely members of a class even where membership is uncertain).

384. See Verdun, *Affirmative Action*, *supra* note 38 (contending that, even if most white Americans did not participate in the particular acts of injustice, they continue, as members of the dominant social group, to reap most of the benefits of those acts). Critics of reparations, particularly those whose arrival post-dates slavery, find it difficult to accept that they bear

wish this to be so, racial groups are "morally relevant unit[s] and . . . appropriate subject[s] for compensation."<sup>385</sup>

For opponents, proceeding from what reparationists label the "dominant perspective" of Anglo-American jurisprudence, the inability of aggrieved minority groups to identify specific individual victims of any discriminatory acts or omissions of specific individual wrongdoers frustrates the requisite horizontal connection between plaintiff and defendant and renders suits demanding reparations "absurd, frivolous, or unworthy of serious consideration."<sup>386</sup> Critics attribute racial hierarchy to tough "luck"<sup>387</sup> while dismissing notions of collective harm and responsibility and asserting that reparationists invoke racial groups — human entities ontologically independent of individuals — simply to find a current victim for "ancient wrongs."<sup>388</sup> Anti-reparationists further insist that punishment of vast categories of individuals who lack responsibility for, or control over, the acts of long-dead individuals<sup>389</sup> would charge them with guilt by association.<sup>390</sup> Moreover, foes decry an undeserved "windfall" to

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responsibility for past injustice simply because they elected to join the social experiment called the United States. Reparationists counter that immigrants cannot select the actions and commitments of others when accepting citizenship, a restriction differentiable from participation in a market economy.

385. Brew, *supra* note 28, at 196.

386. Verdun, *If the Shoe Fits*, *supra* note 42, at 624.

387. See Wheeler, *supra* note 44, at 301-02 ("People's differing circumstances are matters of luck rather than the fault of some subset of their contemporaries[.]"); see also Delgado, *The Imperial Scholar*, *supra* note 12, at 571 (suggesting that reparations foes force aggrieved minority groups to prove overt past acts of discrimination due to their inability to recognize the more pervasive and invidious forms of present "social and institutional injustice" producing racial subordination).

388. Wheeler, *supra* note 44, at 301-02.

389. Under the doctrine of vicarious responsibility, legal obligations for the behavior of others extend only to individuals under the control of the person assuming the obligation. KEETON ET AL., *supra* note 367, §§ 69-70, at 499-509. Critics of reparations thus reject the notion that minority groups should have standing to sue the state on a theory of vicarious responsibility for the past actions of parties over which it lacked control. Chisholm, *supra* note 367, at 710.

390. Chisholm, *supra* note 367, at 711-12 (describing the dominant perspective, which posits that, with respect to African-American reparations, as all slaves and all slaveholders are now dead the notion that the "current generations of whites should pay for the sins of earlier generations of whites" violates the principle that only those parties that caused the harm should pay compensation.). *Id.* Anti-reparationists note that the wrongdoer class in the Civil Liberties Act of 1988 included people not born in 1941, people who strenuously objected to internment, and people who immigrated to the United States after internment was terminated. Verdun, *If the Shoe Fits*, *supra* note 42 at 652-54.

descendants of those long-dead individuals harmed in fact.<sup>391</sup> Unsurprisingly, standing, the doctrine imposing stringent criteria for evaluating the range of legal entities capable of inflicting and suffering injury, is a weapon wielded by reparations opponents.<sup>392</sup>

## (2) Causation

For a wrongful act to give rise to a basis for compensation of an injury, the tort law doctrine of causation imposes the requirement of a nexus between the act and the injury, as well as between the wrongful act and the wrongdoer. Legal causation — a doctrine related to standing — strictly limits the legal duty of parties and permits compensation only of those injuries identifiable as having been committed by a party as a matter of law and reasonably foreseeable as giving rise to the harm of an injured party.<sup>393</sup>

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391. Wittmer v. Peters, 87 F.3d 916, 919 (7th Cir. 1996).

392. In *Cato*, several plaintiffs sued the United States in forma pauperis for damages and an apology arising out of the enslavement of and subsequent discrimination against African Americans ("\$100,000,000 for forced, ancestral indoctrination into a foreign society; kidnaping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character."). *Cato v. United States*, 70 F.3d 1103, 1105-06 (9th Cir. 1994). When the District Court dismissed for failure to state a legal claim, the plaintiffs, on appeal, attempted to restate the complaint on more narrow civil rights and tort grounds but were precluded by threshold procedural obstacles, including, inter alia, a lack of standing. *Id.* Still, reparations plaintiffs possess standing to allege denial of equal protection, provided they allege they are being denied equal treatment solely as a result of the challenged classification. See *Heckler v. Mathews*, 465 U.S. 728, 738 (1984); *Jacobs v. Barr*, 959 F.2d 313 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 831 (1992) (holding the claim for declaratory relief of German Americans interned during WWII alleging the Civil Liberties Act of 1988 discriminated on the basis of national origin in violation of the Fifth Amendment satisfied standing requirements). By the same token, critics of legislative reparations would likely lack standing to challenge a reparations bill on taxpayer grounds, although standing might be proper with respect to the Due Process Clause of the Fourteenth Amendment. See, e.g., *United States v. Richardson*, 418 U.S. 166 (1974) (rejecting federal taxpayer standing to challenge validity of statutes governing the CIA).

393. The doctrine of causation shields parties against legal liability for harms not closely related to wrongful acts of which they are authors. Because the consequences of an act could theoretically be defined to extend forward into eternity, and the causes back to the origin or time, the question of causation in tort law is typically bifurcated into (1) *actual* and (2) *legal*, or proximate, cause, with legal cause requiring proof of specific acts or omissions in breach of a duty to the injured party that cause specific injuries reasonably foreseeable at the time the acts or omissions were undertaken. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) (establishing modern doctrine of legal causation). Determination of foreseeability typically rests on the question of whether a reasonable person contemplating the consequence of a particular act would have imagined the harm that in fact occurred: if a foreseeable harm occurs as a result

Furthermore, even when an act is the proximate cause of a foreseeable injury, liability does not necessarily attach where the injured party contributed to the injury or an intervening or confounding act can be linked causally thereto.<sup>394</sup>

The requirements of legal causation have not traditionally been satisfied solely by membership in aggrieved racial groups absent proof that commission of specific injurious acts by specific tortfeasors legally caused specific compensable injuries.<sup>395</sup> Critics, who do not accept a causative relationship between present manifestations of racially structured economic inequality<sup>396</sup> and past acts of racial injustice, contend that to permit relaxation of the doctrine of causation would be unjust and illogical.<sup>397</sup> Reparationists insist that to deny that racial disparities in economic status and political power are fairly traceable to past acts of injustice authored or approved by the state is a political determination shielding the perpetrator group against liability, rather than a result necessitated by the requirements

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of a breach of a duty to the injured party, the test for legal causation is satisfied; fairness considerations dictate rejection of claims where injury and harm are not so closely connected. *Id.*

394. See Aviam Soifer, *Redress, Progress, and the Benchmark Problem*, 40 B.C. L. REV. 525, 527 (1998) [hereinafter Soifer, *Redress, Progress*] (noting that with the passage of time events can intervene and obscure the chain of causation and that the "world is full of contingencies, and we cannot ignore multivariate causation"); see also Levitt, *supra* note 365, at 22 (conceding that "in the case of reparations the vertical gap of time" between the alleged act and the alleged injury admits the possibility of intervening and multivariate causation); Delgado, *The Imperial Scholar*, *supra* note 12, at 571 (identifying attempts to deflect liability by identifying a "scapegoat" from another time or place as an intervening cause).

395. With the Japanese Civil Liberties Act, the relatively brief period between internment and redress made connection of the wrongful act with the injury relatively easy, although linkage of the wrongdoer — the U.S. government — with all taxpayers was more difficult. See *supra* note 28.

396. See Chisholm, *supra* note 367, at 687-88 (noting that contemporary pathologies such as poverty, unemployment, and despair do not clearly relate back to past acts of injustice).

397. For foes, the argument for reparations is essentially predicated upon the "foiled hopes and frustrated dreams" of racial minorities rather than upon the demonstration of a causal connection between a wrongful act and an injury warranting relief. Verdun, *If the Shoe Fits*, *supra* note 42, at 643. Opponents argue that even if past acts of injustice were committed, intervening causes, many attributable to racial minorities themselves, abound. See *id.* at 620 (suggesting that reparations critics assume that present racial inequities reflect the true inherent abilities or disabilities of minorities). Thus, imposition of liability on a reparations theory would lead to blameless individuals compensating injuries of which their actions are not the proximate cause. *Id.* Reparationists counter with the suggestion that causation-based challenges arise from the "different perceptual world" that white Americans inhabit, preventing recognition of the self-evident relationship between persistent racial animus and past injustices. *Id.*

of law or justice.<sup>398</sup> For many mainstream jurists, gross human injustices justify bridging wide gulfs of time and space to join act and injury and impose proximate causal connection.<sup>399</sup> Still, establishing the causal linkage remains, as a matter of law, an obstacle for reparations claims.

### (3) *Time-Bar*

To serve the interests of procedural due process and substantive fairness, the doctrine of time-bar, as codified in state and federal statutes of limitations,<sup>400</sup> establishes an outer temporal limit between the accrual of injurious acts and the adjudication of claims lest defendants be precluded, by waning memories, lost documents, or deceased witnesses, from marshaling evidence in their defense.<sup>401</sup> Reparationists posit that statutes of limitations need not be construed to terminate the legal right of aggrieved minority groups to seek judicial relief because the injury of which such groups complain is the continuing stigma of racism and social deprivation; as such, their "wounds are fresh" and their claims are timely.<sup>402</sup> So long as a victim group suffering a stigmatized position caused or promoted by the harmful act can be identified, reparationists contend that litigation of a claim for relief from this harm offends neither the principle of procedural fairness nor any reasonable temporal limit.<sup>403</sup> Nonetheless, defenses based on

398. See KEETON ET AL., *supra* note 367, § 41 (noting that legal limitation on scope of tort liability arising under doctrine of causation, though it may bear a relationship to the nature and degree of connection in fact between the acts and injuries of which a plaintiff complains, is inherently associated with policy or administrative convenience rather than any self-evident requirements of justice); see also Matsuda, *supra* note 51, at 382 ("Even mainstream jurists . . . recognize that the proximate cause questions is essentially political.").

399. See *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 607 P.2d 924 (1980) (imposing market share liability despite lack of proof linking particular drug manufacturer to an injury).

400. See, e.g., *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946) (strictly enforcing statute of limitations where legislature "explicitly puts a limit upon the time for enforcing a right").

401. See *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) ("statutes of limitations are primarily designed to assure fairness to defendants . . . by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared"); *id.* ("the right to be free of stale claims in time comes to prevail over the right to prosecute them."); see also RESTATEMENT (SECOND) OF TORTS § 281 (1963) (explaining that time-bar and laches promote efficiency and certainty by ensuring claims are fresh and reasonably connected in time and space to a demonstrable act).

402. *Ozer*, *supra* note 17, at 494; see also *Singer*, *supra* note 133, at 529 (noting that critics of reparations, though they recognized and condemn the "original sins" of slavery and conquest, consign these sins to the past "with the pretense that we have gotten beyond them").

403. See Matsuda, *supra* note 51, at 381-82 (contending that, although it "allow[s] people to go about their business without waiting for the ax of the long-gone past to fall" and prevents

statutes of limitation have a successful history in reparations litigation.<sup>404</sup>

(4) *Laches*

Many of the acts of which reparationists complain accrued decades, even centuries, ago. Laches, the equitable analog of the time-bar doctrine<sup>405</sup> — provides a defense where rights long-neglected, or "slept upon," are sought to be enforced. Although reparationists insist that laches ought not be available to a government defendant that, under color of its own laws, prevented a class from suing it,<sup>406</sup> opponents argue that the doctrine promotes procedural fairness<sup>407</sup> and judicial economy.<sup>408</sup>

(5) *Res Judicata*

The common-law doctrine of res judicata prohibits judicial decision of a

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"sins of the past [from] . . . burden[ing] the innocent generations . . . into eternity[,]" the time-bar doctrine should not preclude claims that are not truly "sins of the past").

404. See *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part, rev'd in part*, 782 F.2d 227 (D.C. Cir. 1986), *vacated*, 482 U.S. 64 (1987), *on remand*, 847 F.2d 779 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 925 (1988) (time-barring class action lawsuit on a constitutional takings claim based on internment of Japanese Americans due to running of a six-year state statute of limitations); see also *Cato*, 70 F.3d at 1108 (time-barring, by applicable statute of limitation, suit for slavery and subsequent discrimination).

405. See DAN B. DOBBS, REMEDIES 43 (1973).

406. Reparationists suggest that equitable principles permit groups operating under legal disability to bring their claims once disabilities are removed, regardless of the running of an applicable statute of limitations. See *Matsuda*, *supra* note 51, at 382; see also *Holmberg v. Armbricht*, 327 U.S. 392, 397 (1946) (recognizing judicial power to read equitable tolling principles "into every federal statute of limitation"). However, application of the doctrine of federal equitable tolling is disfavored unless a plaintiff demonstrates that a defendant engaged in a conduct designed to conceal evidence of its alleged wrongdoing, that the plaintiff was not on actual or constructive notice of that evidence, and that the plaintiff did not "sleep on his rights." *J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1255 (1st Cir. 1996). Although reparations claims have evaded prior litigation due to legal disabilities arising directly from the injuries suffered — lack of legal personality and an unjust legal order — reparationists have difficulty establishing that the United States fraudulently concealed evidence of its very public, though unjust, acts. *Levitt*, *supra* note 365, at 23-24. Consequently, equitable principles do not require courts to treat reparations claims as timely after applicable statutes of limitations have run.

407. See *Dobbs*, *supra* note 405 at 43 (noting that passage of time incrementally severs perceived connection between a tortfeasor and its responsibility for a much earlier wrong).

408. See *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) ("Courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.").

matter subsequent to prior determination in another forum.<sup>409</sup> Res judicata precludes adjudication of claims that were or could have been advanced in an earlier proceeding.<sup>410</sup> A judgment for a plaintiff serves as the "full measure of relief to be accorded" between the parties and precludes pursuit of further relief on that claim in a separate action, whereas a judgment in favor of a defendant extinguishes the claim and acts as a bar to further litigation.<sup>411</sup> Furthermore, res judicata precludes relitigation of issues adjudicated, and essential to a judgment, in an earlier litigation between the same parties.<sup>412</sup> Underlying policies include conservation of judicial resources, finality in the resolution of disputes, and the fairness interest in preventing a plaintiff unsuccessful in a prior action from perpetually relitigating his claim until he achieves his desired result.<sup>413</sup> Reparations foes can point to historical mechanisms engineered to redress group claims to establish that these and related legal issues have, or should have, been advanced and determined in and by those mechanisms and are thus precluded and/or barred as res judicata.

#### (6) *Exhaustion of Remedies*

The doctrine of exhaustion requires that remedies under existing laws, where available, effective, and adequate, must be exhausted before resorting to judicial fora or arguing for extension of existing law.<sup>414</sup> International law similarly requires that available domestic remedies be exhausted prior to recourse to international tribunals.<sup>415</sup> Foes contend that if aggrieved groups

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409. See *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997) (establishing that an order is res judicata where it is a final judgment disposing of the controversy).

410. See *Kyler v. Montezuma County*, No. 99-1052, 2000 U.S. App. LEXIS 1145 (10th Cir. Jan. 28, 2000) (restating doctrine of res judicata and its preclusion of claims where a judgment is rendered).

411. *Kaspar Wire Works v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 536 (1978).

412. 18 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS* § 4402, at 8-11 (1981).

413. See *De Perez v. AT&T Co.*, 139 F.3d 1368, 1373 (11th Cir. 1998) (where a claim is precluded as res judicata, a plaintiff's current suit for the same claim is an "attempt to make an end run around the prior . . . adjudication").

414. *Ohio v. United States Evtl. Prot. Agency*, 997 F.2d 1520, 1528-29 (D.C. Cir. 1993) (discussing factors courts consider in applying exhaustion doctrine); 5 U.S.C. § 704 (2000) (establishing requirement of exhaustion of remedies under Administrative Procedures Act).

415. A general principle of international law provides that a local remedy with no prospect of success is neither adequate nor effective. *Kunzi-Brenzikofer and Others v. Denmark*, App. No. 12097/86, 53 Eur. Cm. H.R. Dec. & Rep. 210, 217. Claimants for reparations against the United States in an available international tribunal who can demonstrate the lack of a domestic forum on grounds of doctrinal preclusion of subject matter jurisdiction or other impediments

suffer discrimination they have recourse to administrative agencies that enforce antidiscrimination laws and available remedies to exhaust prior to initiating reparations claims.<sup>416</sup>

(7) *Ex Post Facto*

The United States Constitution, along with the constitutive documents of almost every other legal system, incorporates hostility to retroactive legislation,<sup>417</sup> as does federal jurisprudence interpreting the common-law doctrine proscribing *ex post facto* application of the laws.<sup>418</sup> Simply put, most of the more heinous acts of which reparationists complain — slavery, land theft, genocide, and ethnocide — were legal under international law, U.S. law, and the laws of the various states at the time of their commission.<sup>419</sup> As such, the doctrine prohibiting *ex post facto* application

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to justiciability may thus be released from the obligation to exhaust remedies. *Id.* However, a remedy is to be presumed available and effective unless attempts to exercise it would clearly be a "senseless formality" (such as where a domestic forum does not afford due process or denies access to remedies) or it is clearly incapable of producing the result for which it was designed. *Godinez Cruz v. Honduras*, Judgment of January 20, 1989, Inter-Amer. Ct. H.R. (Ser.C) No. 5 (1989), paras. 65-69. Still, a remedy is adequate provided only that it is "suitable to address an infringement of a legal right," and "the mere fact that a domestic remedy does not produce a result favorable to the [plaintiff] does not in and of itself demonstrate the inexistence or exhaustion of all domestic remedies." *Id.* at 70. Exceptions to the exhaustion requirements tolerated by general principles of international law are few and narrow. In interpreting Article 46 of the American Convention on Human Rights [hereinafter ACHR](Pact of San Jose, Costa Rica, O.A.S.T.S. No. 36 at 1, O.A.A. Off. Rec. OEA/Ser.L/V/II, 23, doc. 21, rev. 2 (English 1979)), the Inter-American Court held that after a defendant has made a showing of nonexhausted local remedies the plaintiff must prove that remedies are ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. *Velazquez Rodriguez v. Honduras*, Inter-American Ct. H.R. (Ser.C) No. 1 (1987) at paras. 86-96. U.S. law tracks closely with international law in waiving exhaustion requirements only in the strictest of circumstances. See *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995) (holding that "exhaustion of remedies in a foreign forum is generally not required when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile").

416. See *Verdun, If the Shoe Fits, supra* note 42, at 629.

417. See U.S. CONST., art. I, § 9, cl. 3 ("No . . . *ex post facto* Law shall be passed.")

418. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.

419. For official acts of genocide or conquest subsequent to the judgment at Nuremberg and the drafting of the UN Charter, analysis of the international legal obligations of states and individuals is much more complex, as claims arising from these acts may well be maintained



of the laws would preclude a reparations suit, at least where the acts in question pre-date adoption of the positive laws making such acts illegal.

### (8) Sovereign Immunity

The doctrine of sovereign immunity, a descendant of the English common-law principle that "the King can do no wrong," shields the sovereign from suit on the ground that "there can be no legal right as against the authority that makes the law on which the right depends."<sup>420</sup> Sovereign immunity thus precludes suit against the United States in an action to which the federal government is named as a party unless a waiver is unequivocally expressed.<sup>421</sup> Even under the Federal Tort Claims Act ("FTCA"), which gives federal courts jurisdiction over civil actions against the United States for money damages,<sup>422</sup> tort claims are barred unless the plaintiff brings a claim within two years of the accrual of the harm,<sup>423</sup> and the FTCA does not waive sovereign immunity for intentional torts.<sup>424</sup> Although several commentators suggest that the doctrine be abridged by legislation or judicial decision,<sup>425</sup> and although contemporary public opinion shuns many of the

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retroactively, without constitutional or other domestic impediment, as far back as 1939-1945, when certain norms of *jus cogens*, including the rights to be free from conquest and genocide, became nonderogable. Levitt, *supra* note 365, at 40 n.179; see also *infra* note 526 (discussing retroactive application of laws in context of norms of *jus cogens*).

420. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

421. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Under the Larson-Dugan exception, analysis as to the issue of sovereign immunity would theoretically be different with respect to individual defendants sued in official capacity. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) (raising "scope of authority" exception to immunity of individual government agents); *Dugan v. Rank*, 372 U.S. 609, 621-23 (1963) (same). Still, the immunity from suit for damages accorded to public officials of all three branches of government who act within the scope of their authority is nearly absolute. *Jones v. Clinton*, 72 F.3d 1354, 1356-66 (8th Cir. 1996). Injunctive relief is also presumptively barred by sovereign immunity. *Made in the USA Found. v. United States*, 242 F.3d 1300, 1311-12 (11th Cir. 2001). Moreover, any individual defendants that might be named in suits alleging historical injustices are likely long deceased, and it is substantially unlikely that relevant State laws would waive State immunity to permit actions for damages to be brought against States.

422. 28 U.S.C. § 1346(b) (2000).

423. 28 U.S.C. § 2401(b) (2000).

424. 28 U.S.C. § 2680(h) (2000). However, some commentators suggest that violation of a norm of *jus cogens* constitutes an implied waiver of immunity. See Levitt, *supra* note 365, at 26.

425. See Barbara L. Tang, *The Japanese Internment and Reparations: Creating a Judicial or Statutory Cause of Action Against the Federal Government for Constitutional Violations*, 21 LOY. L.A. L. REV. 979, 1027-28 (1988) (urging Supreme Court to amend common law of sovereign immunity to permit suit in cases alleging violations of human rights).

official acts it shelters from legal exposure,<sup>426</sup> sovereign immunity bars reparations suits in domestic courts.<sup>427</sup>

(9) *Political Question*

Mindful of the principle of separation of powers, courts have long abstained from the adjudication of cases or controversies more properly left to determination by the political branches of government.<sup>428</sup> Even where a dispute may constitutionally be subject to the judicial power under the requirements of Article III of the U.S. Constitution, courts both state and federal have long declined to address the merits of inherently "political questions" out of a respect for and deference to the coequal power of the legislature and the executive.<sup>429</sup> With the seminal case of *Baker v. Carr*,<sup>430</sup> the Supreme Court definitively expounded the characteristics of a political question that, upon their identification in suits before courts of the United States, necessitate judicial abstention: (1) a "textually demonstrable constitutional commitment" of an issue to a "coordinate political department[,]" (2) the "lack of judicially discoverable and manageable standards[,]" (3) the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion[,]" (4) the

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426. Levmore, *supra* note 44, at 1698. Domestic courts that address the moral dimensions of the acts of which reparations plaintiffs complain invariably condemn such acts while refusing to find a legally cognizable basis to permit adjudication of such claims in the face of sovereign immunity. See, e.g., *Cato v. United States*, 70 F.3d 1103, 1105 (9th Cir. 1995) ("Discrimination and bigotry of any type is intolerable . . . This Court, however, is unable to identify any legally cognizable basis upon which plaintiffs' claims may proceed against the United States[,]" an immune sovereign defendant).

427. See *id.* at 1107 (dismissing reparations suit under FTCA for slavery-related damages accruing in eighteenth and nineteenth centuries on ground the FTCA permits only claims brought against the United States accruing after January 1, 1945 and brought within two years of accrual); *Trice v. United States*, No. C94-1474 BAC, slip op. at 2 (N.D. Cal. May 6, 1994); *United States v. Hohri*, 482 U.S. 64 (1987) (barring, on ground of sovereign immunity, claims arising under First, Fourth, Sixth, Eighth, Ninth, Tenth, and Thirteenth Amendments).

428. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (Marshall, C.J.) ("Questions, in their nature political . . . can never be made in this court.").

429. See, e.g., *Coleman v. Miller*, 307 U.S. 433, 454 (1939) (determining existence of political question by evaluating the "appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination."); *Atlee v. Laird*, 347 F. Supp. 689, 701 (E.D. Pa. 1972) ("[E]ven though a dispute may constitutionally be subject to the judicial power, if a political question is present, a federal court should decline to reach the merits."); *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988) (same).

430. *Baker v. Carr*, 369 U.S. 186 (1962).

"impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government[.]" (5) an "unusual need for unquestioning adherence to a political decision already made[.]" and (6) the "potentiality of embarrassment from multifarious pronouncements by various departments."<sup>431</sup> Accordingly, courts scrupulously abstain from, and dismiss, foreign relations cases, particularly where such cases implicate one or more of the *Baker* characteristics.<sup>432</sup> Although international disputes may be "not as separable from politics as are domestic legal disputes,"<sup>433</sup> reparations claims, particularly those that trench in matters of foreign policy or international relations, are likely to trigger the political question doctrine to the detriment of even the most sympathetic plaintiffs.<sup>434</sup>

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431. *Id.* at 217.

432. *See, e.g., Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("[T]he conduct of the foreign relations of our government is committed by the Constitution to the executive and the legislative — the 'political' — departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry

*Id.*; *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990) (allocation of powers of war and foreign relations is, from both textual and structural standpoints, something the judiciary, a body neither equipped nor empowered for the task, cannot undertake); *United States v. Noriega*, 746 F. Supp. 1506, 1538 (S.D. Fla. 1990) (broad challenge to executive conduct of foreign policy is nonjusticiable political question).

433. Andrew M. Scoble, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CAL. L. REV. 127, 182 (1986).

434. *See, e.g., In re Nazi Era Cases*, 129 F. Supp. 2d 370, 372 (D.N.J. 2001) (holding that a claim seeking recovery against a German company and U.S. subsidiaries for damages resulting from plaintiff's forced labor in construction of military airbase in Nazi Germany presented a non-justiciable political question in light of creation, under German law, of claims mechanism the United States pledged, via executive agreement, to fully support as a bar to judicial resolution of such a claim); *Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248, 284 (D.N.J. 1999) (claims of World War II slave laborers present non-justiciable political questions); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999) (political question doctrine bars redress for slave labor claim); *In re Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 944 (N.D. Cal. 2000) (same). For a discussion of the political question doctrine and related defenses in the context of contemporary reparations cases, see Michael J. Bayzler, *Nuremberg*

(10) *Inability to Render Fair Damage Assessment*

Reparations foes suggest the practical impossibility of a fair damage assessment arising from the unprecedented scope of the harms alleged and the potential number of claimants. Implicit in this doctrinal objection is the claim that reparations breaches the obligation to avoid bankrupting the government while inflating actual injuries suffered.<sup>435</sup> Advocates scoff at the notion that reparations threatens the fiscal health of the nation and counter that imposing requirements of scientific precision in elaborating the individual value of the harms, along with membership in the remedial class, would establish more stringent standards than those applicable in other class-action litigation. In other words, because exactitude in the assessment of damages is less important than other social goals of the law, "better rough justice than no justice at all."<sup>436</sup> For reparationists, the common-law *cy pres* doctrine<sup>437</sup> establishes a permissible degree of misallocation of damages to afford compensatory justice even where establishment of class membership and/or the mechanism and scope of individual injuries is problematic.<sup>438</sup>

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*in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2000).

435. Reparations have been judicially barred by the doctrine on at least one occasion. See *Vigil v. United States*, 293 F. Supp. 1176 (D.C. Colo. 1968), *aff'd*, 430 F.2d 1357 (10th Cir. 1970) (denying reparations to Mexican-Americans promised by the United States in 1848 Treaty of Hidalgo ending Mexican-American War on ground of impossibility of calculating fair damage assessment).

436. Matsuda, *supra* note 51, at 386; see also *id.* (noting irony that racial minorities labor to disassociate from negative group stereotypes only to discover that reparations foes are all too eager to require proof of minority group membership and particularized damages).

437. "Cy pres que possible" is a trust doctrine allowing courts to accept a measure of inexactitude in affording relief provided the policy of the law is served. See *Evans v. Abney*, 396 U.S. 435, 439 (1970) (defining the application of the doctrine to effect racial justice).

438. Some domestic reparationists suggest that racial disparities in median per capita income serve as the basis for calculating and compensating the present economic effects of past racial discrimination. See, e.g., MUNFORD, *supra* note 39, at 430-34 (defining this figure as the Economic Exploitation Index). The precise amount of capital required to compensate this element of racial harm could be calculated as the product of the number of members in the group and the gap in median income between white Americans and the compensated group. BROOKS, *supra* note 1, at 372. This product would be recalculated each year until the debt was paid. Others argue for the direct redistribution of such funds as are necessary to accord each racial group resources commensurate with its proportional share of the population. See Pyle, *supra* note 361, at 818. International courts have employed prudent estimates, rather than rigid criteria, in calculating remedies. See *Aloeboetoe et al. v. Suriname*, Inter-Amer. Ct. H.R. (Ser. C) No. 15 (1994) (employing, in the case of a matriarchal and communal victim class for which it was difficult to establish membership due to lack of birth records and marriages and difficult to determine levels of compensation where the national currency was unstable, the principle *restitutio in integrum* to create a trust fund with sufficient present-value to provide

*b) Political Resistance*

Reparations sparks a series of perhaps unresolvable<sup>439</sup> debates over the nature of and remedy for minority disenfranchisement, the adequacy of existing civil rights legislation and liberal legal aspirations, the constitutionality of group entitlements, the ideal racial distribution of economic and social power, and the appropriate means to resolve conflicts between attainment of racial justice and preservation of social peace. Such debates underscore the fact that the demand for reparations is not exclusively a plea for a legal judgment but rather an argument for a formal acknowledgment of historic wrongs, a recognition of continuing injury, and a commitment to redress. In short, reparations is a political, as much as a legal, plea.

*(1) Nature of and Remedy for Minority Disenfranchisement*

For reparationists,<sup>440</sup> the continuing disenfranchisement of racial minorities is rooted in a hierarchical system preserved by a perpetrator group, which denigrates its racial "inferiors"<sup>441</sup> and systematically excludes them from political, economic, and social opportunities.<sup>442</sup> If modern forms

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indemnification over life of all potential class members) (citing ACHR, *supra* note 415, at art. 63(1) (providing that a remedy in financial compensation be available for a breach of right under ACHR and granting the Court broad authority to order compensation); Velasquez Rodriguez Case (Compensatory Damages), 7 Inter-Amer. Ct. H.R. (Ser. C) No. 25 (1989) ("[E]very violation of an international obligation . . . creates a duty to make adequate reparation[.]"). Still, no international tribunal has yet permitted a tribe to serve as the unit of remediation for the state breach of a tribal right, although scholars have urged courts to extend the Customary International Law ("CIL") of remedies. See, e.g., CECILIA MEDINA QUIROGA, *THE BATTLE FOR HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS OF HUMAN RIGHTS AND THE INTERNATIONAL SYSTEM* 16 (1988).

439. Heritage and life experience shape the analytical prism through which reparations is viewed, polarizing reparationists and anti-reparationists. See Verdun, *If the Shoe Fits supra* note 42, at 646 ("[w]hat is obviously right to the opponent of reparations is clearly wrong . . . [to the reparationist].").

440. Supporters of reparations include, inter alia, members of Congress, professionals, captains of industry, members of the academy, and legal practitioners. Verdun, *If the Shoe Fits supra* note 42, at 607.

441. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 400-01 (1978) (Marshall, J.) ("A whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.")

442. See BRIAN BURKITT, *RADICAL POLITICAL ECONOMY: AN INTRODUCTION TO THE ALTERNATIVE ECONOMICS* 3 (1984) ("Differential power and advantage create individual and class variations across the whole range of life chances . . . and establish future inequalities of

of racism<sup>443</sup> have become more subtle and procedural,<sup>444</sup> this "new racism" is just as causally related to original unremediated injustices, and just as immutable as its older, more overt variant: simply put, the United States is not "anywhere close to eradicating racial discrimination[.]"<sup>445</sup> Thus, until the perpetrator group obliterates all traces of racism from public and private life, race-conscious remedies, including affirmative action<sup>446</sup> and reparations,<sup>447</sup> will remain essential palliative measures, and the ongoing obstinacy of the perpetrator group suggests unconscious indifference<sup>448</sup> to

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opportunity. They prove resistant to change because the privileged possess both the motivation and the resources to maintain . . . and transmit [their position] to their offspring."); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987) (elaborating theory of a racially-ordered permanent underclass).

443. See *supra* note 379 (defining racism).

444. Westley, *supra* note 17, at 448.

445. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552 (Marshall, J., dissenting).

446. Broadly defined, "affirmative action" refers to public and private programs designed to remedy proportional under-representation of members of certain racial or ethnic groups in educational or employment venues through measures that consider group membership in selection of participants in those venues. Affirmative action programs include the active search for, and recruitment of, members of particular groups, as well as the evaluation of group identity in the favor of the applicant in admissions and hiring decisions. For a more detailed discussion of affirmative action, see generally Brest & Oshige, *supra* note 51, at 856. Reparationists are not of a single mind. Some, enamored of affirmative action in the belief that it infuses minority groups with wealth and political power while creating positive role models and altering perceptions of group inferiority, fear payment of reparations would terminate affirmative action programs on the theory that the remedies are mutually exclusive. MUNFORD, *supra* note 39, at 423. Others hail affirmative action as a complement to reparations in its capacity to advance institutional integration and attitudinal transformation. See, e.g., Magee, *supra* note 38, at 881 ("persistent race consciousness among people of different races . . . will continue to necessitate race-conscious policies within multicultural settings" even after an award of reparations). Still others are supportive in theory and critical in practice, suggesting that affirmative action serves less to transform the collective economic position of minority groups than to coopt and neutralize the cultural leadership of minority elites through closer, but more tightly manipulated, association with white society. Chisholm, *supra* note 367, at 703-04; see also TAKAKI, *supra* note 47, at 103 (contending that affirmative action forces minorities to trade elements of their culture for full participation in social activities); Magee, *supra* note 38, at 880 (noting the "warm glow of condescension that permeates affirmative action," a "demeaning form of racial tutelage"). For those chary of the limited remedial reach of affirmative action and mindful of the resentments it arouses, reparations is preferable. *Id.* at 880.

447. Some reparationists embrace race-conscious modification of legal doctrines and exempt certain issues and parties from the normal operation of the laws via hate speech legislation, affirmative action, and race-conscious sentencing guidelines. See, e.g., Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 844 (1997) (proposing that blacks should never receive capital punishment for killing whites).

448. For many reparationists, racism is understandable only as part of a collective

racial justice claims at best and racial antipathy at worst.

Some critics of reparations<sup>449</sup> challenge the bleak assumption that racism is singularly dispositive of the life chances of minorities and unremediable by social intercourse.<sup>450</sup> Others suggest alternative explanations for racial disparities in employment, healthcare, housing, education, and wealth accumulation: for some, the socioeconomic indicia of minority disadvantage relative to whites is ascribable to genetic intellectual inferiority,<sup>451</sup> while for still others, racial inequality, though not inherent in the nonwhite condition, can be ameliorated only by incremental policies of racial self-reliance — in essence, minorities must lift themselves up "by their own bootstraps"<sup>452</sup> and eschew external relief. To the extent that compensation in any form is owed to the victims of racial discrimination, anti-reparationists look to standard tort and civil rights remedies and insist that individuals, rather than groups, advance and prove their claims.<sup>453</sup>

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unconscious that reproduces racial hierarchy even in the absence of conscious discrimination. RICHARD DELGADO, *THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* 14-19 (1996); *see also* CHARLES LAWRENCE, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, in *KEY WRITINGS*, at 235, 237 ("[W]e are all racists. At the same time, most of us are unaware of our racism."); Magee, *supra* note 38, at 913 (racism "is grounded in the subconscious persistence of white supremacy as a normative principle in . . . judicial and legislative institutions"); RAYMOND S. FRANKLIN & SOLOMON RESNIK, *THE POLITICAL ECONOMY OF RACISM* 3 (1973) ("(T)he various forms of oppression within every sphere of social relations . . . together make up a whole interacting and developing process which operate(s) so normally and naturally and [is] so much a part of the existing institutions of the society that the individuals involved are barely conscious of their operation.").

449. Criticism of reparations is widespread and sharp. *See* Magee, *supra* note 38, at 913 ("As perhaps the most extreme expression of official responsibility for the continuing disparity of experience between [minorities] and whites, [reparations] are particularly susceptible to the disrespect and inattention of mainstream academics and politicians.").

450. *See* Pyle, *supra* note 361, at 795 (contending that reparationists "substitute subjective, personal and even fictitious 'narratives' as evidence of the permanence and prevalence of racism" and deem challenges to such narratives evidentiary of the challenger's racism).

451. *See* RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* 312 (1994) (noting comparatively low achievement of racial minority groups on standardized intelligence examinations). Others deny racial inferiority but promote the notion that past acts of racial injustice benefitted, rather than harmed, minorities. *See* David Horowitz, *Ten Reasons Why Reparations for Slavery are a Bad Idea for Black People and Racist Too*, *DAILY CALIFORNIAN*, Feb. 28, 2001 (claiming descendants of African slaves benefitted from slavery through coming to live in the United States and contending that because the "benefits" override the harms no injury or unjust enrichment requires repair).

452. *See* BOOKER T. WASHINGTON, *UP FROM SLAVERY* (1900) (elaborating racial self-help method of redress).

453. Verdun, *If the Shoe Fits supra* note 42, at 657-58.

(2) *Sufficiency of Existing Civil Rights Legislation and Broader Liberal Legal Aspirations*

Although self-help may complement reparations in dismantling subordination to and dependence upon whites, reparationists insist that self-help alone would delay racial equality without redressing unjust expropriations and denials of equal opportunity.<sup>454</sup> Moreover, the current approach to remediation proffered by mainstream theorists — integration and equal protection of the laws — is inherently unsuited to eradicating long-entrenched racial hierarchies.<sup>455</sup> For reparationists, many of whom subscribe to the tenets of Critical Race Theory, (“CRT”)<sup>456</sup> the “rights theory

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454. See Newburger, *supra* note 33, at 23 (suggesting that reparations is “so far from being achievable that it is a dangerous distraction from the concrete business of fixing our schools, defending civil rights protections, closing the opportunity gaps, and repairing the criminal justice system[,]” issues upon which “great black minds ought to be focused”). However, some are convinced that only reparations — not contemporary civil rights legislation — can reach the past acts of racial injustice that structurally deny minorities opportunities to compete as economic and political equals. See LECKY & WRIGHT, *supra* note 375, at 63 (“[The U.S.] was parceled out before minorities became legal persons, and the facts of . . . history preclude [them] from acquiring a stake and access to the levers of political power.”); Westley, *supra* note 17, at 444 (“Where the implementation of racist policies has a substantial and continuing impact on the ability of a social group to achieve equality . . . reparations is a just remedy.”).

455. See Magee, *supra* note 38, at 913-14 (contending that, while integration remains important, more “expansive” equitable approaches are required to address “institutionalized white supremacy”).

456. Critical Race Theory (CRT) is an offshoot of the Critical Legal Studies (CLS) movement, which suggests that, because the liberal law is manipulable in legitimization of existing maldistributions of wealth and power, it is necessary to “begi[n] all over again the fight over the terms of social life” by listening to the voices of socially disadvantaged groups. Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 583 (1983); Matsuda, *supra* note 51, at 324 (“[T]hose who have experienced discrimination speak with a special voice to which we should listen” in order to “defin[e] the elements of justice.”); Delgado, *When a Story*, *supra* note 359, at 95 (“some members of marginalized groups . . . are able to tell stories different from the ones legal scholars usually hear” and these “voices” must be heard to chart legal transformation). By deconstructing social hierarchy, CLS jurisprudence aims to transform the liberal order away from individualism and towards justice for disenfranchised groups. Matsuda, *supra* note 51, at 325. CRT extends the CLS critique in asserting that liberal legal reasoning systematically subordinates racial minority groups because racism, the single most pervasive and immutable social variable, creates a zero-sum conflict between powerful whites and powerless minorities that cannot be mitigated by commonalities or socialization. See Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 1998). CRT contends further that a “person’s position on the racial totem pole” is determinative of the degree of justice afforded him in a legal order that, as it legitimizes the unconstrained choices of racist white



of remediation" of liberal jurisprudence,<sup>457</sup> which purports to explain away the need for reparations once formal equality of rights are guaranteed by law, has delivered neither non-discrimination nor civil or political equality.<sup>458</sup> Thus, liberal law, a body of doctrine that constructs race and reproduces racial domination, is more problem than solution.

Reparations foes contend that existing civil rights laws<sup>459</sup> already afford minority individuals equal opportunity and equal protection.<sup>460</sup> If racism and

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legislators and judges, must yield to achieve racial liberation. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 364-68 (1992) (constructing theory of "racial realism").

457. Liberal jurisprudence accepts that individual interests expressed in a state of interdependence will conflict but assumes that a nomological jurisprudence can be introduced such that individual conflicts are resolved by rules and principles, rather than by the arbitrary decisions of man. See, e.g., HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1-15 (1958). The paramount principle — that "like cases be decided alike" the better to protect individual rights — guides and adapts liberal civil process to the progressive satisfaction of conflicting wants. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366 (1978) (describing adjudication as the process whereby "formal and institutional expression" is given to the "influence of reasoned argument in human affairs"). However, the precise meaning of rules in the liberal legal order is open to judicial subjectivity and choice, and doubts as to the validity of the rank-ordering of individual wants, as well as contending and equally authoritative principles and precedents applicable to specific disputes, introduce the potential for arbitrariness and abridgement of rights. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820 (1935). To resolve these threats to its theoretical coherence, liberal jurisprudence depends upon a judicial "Hercules" to search for and balance the principles that best fit positive rules to the institutional details and shared philosophical understandings of the political community. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1059, 1075, 1083 (1975). While the principles from which Hercules can draw — including representative democracy, formal equality, guaranteed individual liberties, and judicial review — are not self-enforcing, liberalism purports to offer all individuals not only the most rational, coherent, and compelling theory of governance but the greatest opportunity to "confront power-holders, such as legislators, judges or voters, with their failures to live up to the promises of the 'American Creed'." Pyle, *supra* note 361, at 787, 811.

458. See Magee, *supra* note 38, at 906 (suggesting that biased individual decision makers exploit prejudices and adjudicate cases arising under anti discrimination laws to the systematic detriment of racial minorities). Because liberal law is essentially politics, and because U.S. politics is essentially white supremacy, liberal law is structurally incapable of yielding racial equality even if it formally rejects malign racial classifications and hierarchies.

459. See, e.g., 42 U.S.C. § 1983 (2000); Civil Rights Act of 1964, 42 U.S.C. § 2000g; 42 U.S.C. §§ 2000 e; Fair Housing Act of 1968, 42 U.S.C. §§ 3601 -3631 (2000); 24 C.F.R. § 100, 103, 104 (2002).

460. Critics of reparations — a group that includes former President Clinton — are adamant in their defense of the sufficiency of existing civil rights laws. See Chisholm, *supra* note 367, at 704. Quoting Clinton response to question about his emphatic resistance to apologizing for slavery:

discrimination linger, a question upon which reasonable minds can differ,<sup>461</sup> adequacy of enforcement, rather than legislative sufficiency, is implicated. Moreover, critics decry the wholesale rejection of liberalism they perceive to inhere in claims for reparations as an "unprincipled, divisive and . . . unhelpful attack[.]"<sup>462</sup> By "succumb[ing] completely to post-modernist absurdity"<sup>463</sup> and rejecting the entirety of the liberal legal order with their "blame-game rhetoric," reparationists render reasoned discourse impossible while "alienat[ing] potentially helpful whites."<sup>464</sup>

### (3) *Constitutionality of Group Remedies*

Reparationists insist that just as past harms and present discrimination inure to the benefit of the dominant racial group, remedies must be accorded to harmed racial groups qua groups.<sup>465</sup> Refusing to accept group responsibility for ongoing racial inequities, critics reject the notion that rights are definable with reference to the relative social position of racial groups, affirming instead the liberal principle that individuals are the legitimate bearers of rights.<sup>466</sup> For critics, group membership imputes no

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Most of my African American friends and advisors don't believe that we should get into what was essentially a press story about whether there should be an apology for slavery in America. They think that that's what the 13th, 14th, and 15th amendment was [sic]; they think that that's what the civil rights legislation was; and they think we need to be looking toward the future.

461. See Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

462. See DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) (criticizing reparationists for "abandoning objectivity, reason, and truth[.]"). Reparationists do not take lightly the liberal criticism of group-centric legal remedies; at least one scholar warns that a "'never forget' view of history," though it accords appropriate recognition to the role of racial hierarchy in the United States, "can bolster the destructive side of identity politics by separating communities unnecessarily . . . and thereby poison reconciliatory possibilities." Yamamoto, *Race Apologies, supra* note 22, at 12.

463. Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40. Critics of CRT are hostile to the notion that knowledge is socially constructed, contextually subjective, and immune to objective evaluation, premises which, if true, would diminish the promise of liberalism for groups subordinated in a racial hierarchy. See Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 674 (1993); MARI MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 3* (1997) ("Critical race theorists embrace subjectivity of perspective and are avowedly political.").

464. Pyle, *supra* note 361, at 790.

465. Westley, *supra* note 17, at 448 (arguing group harms require group remedies).

466. The liberalism animating the U.S. Constitution does not easily incorporate such

blame and confers no entitlement, and reparations is an illiberal attempt to ascribe the sins of the fathers to their sons. Ironically, the U.S. political and legal order embraced colorblindness<sup>467</sup> just as critics of group remedies for past generations of racial harm assumed political and legal ascendancy.<sup>468</sup>

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concepts as group entitlements or wrongs:

[In the Western tradition[,] individuals voluntarily enter into a social compact in which individual autonomy is exchanged for peace, security, and protection provided by the sovereign . . . Rights are conceptualized as constraints on the government in favor of the individual . . . Good government is equated with regulating the state and not strengthening group affiliations.

Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J. L. REFORM 277, 297 (1993).

467. See Magee, *supra* note 38, at 900 (distinguishing current "colorblind model of constitutional construction" from older chain of racially "hyperconscious" precedents tracing to *Dred Scott*).

468. Tension between the integrationism of the Civil Rights Movement and the liberal aspiration to colorblindness has wracked affirmative action since the late 1960s. See Brest & Oshige, *supra* note 51, at 861 ("The essential wrong that . . . most antidiscrimination laws seek to prevent is the unequal treatment of individuals based on group membership . . . [I]t is precisely this tradition of liberal individualism that renders affirmative action . . . constitutionally problematic."). While some critique the susceptibility to characterization as a "handout," others, protesting "reverse discrimination," argue that affirmative action obscures causation of, and responsibility for, racial inequities while externalizing social costs. See *id.* at 865-66 (suggesting that institutions not acknowledged as wrongdoers confer benefits upon minority candidates, who need not show proof of individual injury, while imposing burdens on individually blameless but still "dispreferred candidates — those who, but for . . . affirmative action[,] would have gotten the position."); see also SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* (1990) (elaborating critiques of affirmative action). In 1995, after decades of wrangling, the Court sounded what proponents decried as the constitutional "death knell." See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (subjecting congressional race-based legislation to same strict scrutiny standard applied to state and municipal actors and providing that legislation for exclusive benefit of a racial group will ordinarily violate Fourteenth Amendment). However, *some* racial preferences, narrowly tailored by the government entity that itself discriminated, are yet permissible. See *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996) ("[reverse] discrimination [by the discriminating institution] is sometimes permissible to rectify past discrimination[.]"); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) (finding a properly designed race-conscious program violates neither the Fourteenth Amendment nor federal civil rights laws), *cert. denied*, 532 U.S. 1051 (2001). Nonetheless, State legislation is trumping affirmative action. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1491, 1519-20 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997) (rejecting claim that constitutional amendment eliminating affirmative action in public employment, education, or contracting denied equal protection and conflicted with federal statutes); *Smith*, 233 F.3d at 1192 (decertifying class after new State law prohibited affirmative action during pendency).

(4) *Resistance to Racial Redistribution of Economic and Social Power*

More than any other remedy, reparations transforms the material condition of recipients. Moreover, it connotes culpability:<sup>469</sup> for a majority that rejects group hierarchy, harm, and responsibility, reparations is a radical redistribution of wealth, rather than a disgorgement and reallocation of an unjust acquisition, that exacerbates unrest.<sup>470</sup> Reparations thus yields resistance,<sup>471</sup> backlash,<sup>472</sup> and "ethnic elbowing."<sup>473</sup> As it would strip their

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469. See LECKY & WRIGHT, *supra* note 375, at 57 (noting that reparations evoke painful, guilt laden images such as the Holocaust). While payment of reparations by a government does not imply that any particular individual citizen shares moral accountability for past acts of injustice, distribution of the costs of the remedy can be equated with distribution of guilt for the acts.

470. Some fear reparations will "bring forth rent-seeking" and wasteful litigation by racial minorities. Levmore, *supra* note 44, at 1698-99. Others fear that violence looms large behind every reparations claim. See, e.g., Yamamoto, *Racial Reparations*, *supra* note 12, at 497-98 (noting that President Johnson rescinded the Reconstruction policy of redistributing lands of wealthy Southerners to former slaves when opposition threatened the peace). Reparationists counter that remediation of racialized wealth inequities produced and maintained by the discrimination to which reparations is addressed may well be a precondition to stable social peace. Allen, *supra* note 44, at 5.

471. Politics is a numbers game, and because a white majority strongly disfavors reparations, all but the most intrepid judges and legislators blanch at its mention. See, e.g., Bill Moss, *State Refuses Rosewood Blame*, ST. PETERSBURG TIMES, Mar. 17, 1994, at 1 (1994 WL 4786463) ("The people who did the damage should pay for it, not today's taxpayers[.]"). Recently, the State Legislature, finding Oklahoma was not an official wrongdoer, refused to compensate black survivors of the Tulsa Race Riots and instead established a memorial and a scholarship fund. Chuck Ervin, *Divided Senate OKs Race Riot Bill*, TULSA WORLD, May 24, 2001 at 1 (2001 WL 6929550). In Duluth, Minnesota, after a local organization sculpted a memorial to draw attention to the lynching of three black men accused of raping a white woman in 1920, local officials discouraged further measures; as Mayor Doty noted, "Why would I want to tell the world that something horrible happened in my city?" Craig Gustafson, *Duluth Faces Up to Ugly Chapter*, BOSTON GLOBE, Jun. 16, 2001, at A3.

472. See Yamamoto, *Racial Reparations*, *supra* note 12, at 494 (noting that demands for reparations trigger "regressive reactions," rooted in fear of reduction in relative social advantage, by the dominant social group).

473. "Ethnic elbowing" is a divide-and-conquer strategy that foments fierce competition between nonwhite groups to keep all claims for redress of racial harms at bay. MUNFORD, *supra* note 39, at 118 (describing use of Indian trackers to capture runaway slaves and Buffalo Soldiers to combat Indian tribes); Delgado, *Derrick Bell Lecture*, *supra* note 48, at 291 ("while one group is gaining ground, another is often losing it"); Matsuda, *supra* note 51, at 351 (noting schismatic history of struggle against racism). Reparationists urge suppression of egocentrism in favor of a synergistic "united front." See *id.* at 397 (stressing that, even if some groups remain uncompensated, "[e]ach separate commitment to . . . reparations . . . [hastens] the end of . . . victimization"). Despite this admonition, reparations vaults a compensated group up the

racial privileges along with their currency, reparations is opposed by all but the most altruistic whites.<sup>474</sup>

### (5) Magnitude of Damages

Opponents aver the practical impossibility, given the scope of the harms alleged,<sup>475</sup> the status of claimants,<sup>476</sup> and the passage of time, of determining who should receive reparations and of establishing a measure of damages.<sup>477</sup> Although some assert that any debt owing from the dominant social group has been at least partially discharged through wealth transfer programs such as the Great Society, Social Security, public assistance, and affirmative action,<sup>478</sup> most concede that the amount demanded by aggrieved groups as-

ladder of racial hierarchy. Verdun, *If the Shoe Fits*, *supra* note 42, at 659. To wit: opponents of the Civil Liberties Act offered amendments blocking reparations until Indian tribes were compensated, as well as amendments blocking Indian reparations. See 134 CONG. REC. H6314 (daily ed. Aug. 4, 1988) (proposing no funds be appropriated for Japanese Americans until American Indians were compensated)(statement of Rep. Davis); 134 CONG. REC. S4397 (daily ed. Aug. 20, 1988) (rejecting claims by "any Indian tribe"). Uncompensated groups took umbrage; some whites, noting that injuries absorbed by these groups dwarfed compensated harms, denounced the Act. Brew, *supra* note 28, at 194 ("[blacks and Indians] have experienced greater . . . discrimination than Japanese Americans").

474. See Magee, *supra* note 38, at 908 (elaborating interest-convergence theory of Derrick Bell, who maintains that the rights of racial minorities are recognized by the dominant social group only when recognition benefits a larger interest of the latter); Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 19 B.C. THIRD WORLD L.J. 385 (1998) (creating concept of "model minority" that serves the interests of the dominant group and thus deserves reparations); Yamamoto, *Racial Reparations*, *supra* note 12, at 497 (referencing the interest convergence theory of Derrick Bell).

475. See, e.g., *Editorial*, N.Y. TIMES, Sept. 9, 1969 ("There is neither wealth nor wisdom enough in the world to compensate for all the wrongs done in history.").

476. See Minow, *Not Only for Myself*, *supra* note 32, at 679 (suggesting reparations can "encourage unmanageable numbers of claims" and "invite trivial claims").

477. Paradoxically, the compensation of beneficiaries can nevertheless redound to the benefit of those paying reparations, as the remedial method is susceptible to quantification and thus to *fixed* and *finite* limits: claims are ultimately extinguished. Meredith Lee Bryant, *Combating School Resegregation Through Housing: A Need for a Reconceptualization of American Democracy and the Rights It Protects*, 13 HARV. BLACKLETTER L. J. 127, 149-50 (1997).

478. While certain programs might be construed to offset a fraction of the compensation owed, most reject the claim that relief programs, the benefits of which may have accrued disproportionately to racial minorities, satisfy in any important measure the claim for reparations and suggest instead that such programs are part of the problem rather than the solution. See Pritchard, *supra* note 44, at 263 (estimating that wealth transfer programs account for no more than one-fifth of the racial debt); see also STEPHEN E. FERACA, WHY DON'T WE GIVE THEM GUNS? THE GREAT INDIAN MYTH 209 (1990) (arguing the "dole system," not genocidal war or

yet uncompensated might total several trillion dollars,<sup>479</sup> a sum that exceeds the reserves in the federal treasury<sup>480</sup> along with any conceivable boundaries of political possibility.<sup>481</sup> Moreover, many foes, already troubled by the redistributive effects of the remedy, find distasteful the notion that compensation might be paid directly to individual members of racial groups rather than invested in institutions, businesses, or communities.<sup>482</sup> Proposals to offer per capita compensation on the order demanded by reparationists would be born as political bogeymen, welcome nowhere and feared everywhere.

While many reparationists prefer to abstain from discussing the mechanisms<sup>483</sup> and scope<sup>484</sup> of compensation until a consensus in support of the remedy can crystallize, others reject bifurcation of issues and dismiss talk of fiscal crisis and paternalistic investment strategies with the following

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legal assault on culture and sovereignty, stands as the greatest harm inflicted on Indians).

479. No sum can restore aggrieved minority groups to the position in which they would have been but for past harms and the continuing effects of those harms: the magnitude of harms and effects is so overwhelming that any compensation offered is bound to provoke fiscal concerns. See 134 CONG. REC. S4329 (daily ed. Apr. 20, 1988) (suggesting a court might award "hundreds of billions of dollars" in damages to Japanese Americans if Congress failed to pass the Civil Liberties Act of 1988) (statement of Sen. Stevens); Susan Hansen, *Slavery Reparations Bill Moves Forward*, BALT. MORN. SUN, Oct. 25, 1990, at 3A (noting that the House Judiciary Committee considering the 1990 Conyers slavery reparations bill suggested that requested compensation could total \$4 trillion); MUNFORD, *supra* note 39, at 429 (stating claims are worth "hundreds of billions if not trillions").

480. The payment of reparations to Japanese Americans is simply of no value as a historical analogy whereby to predict the likely financial effects of reparations to other aggrieved racial groups. Total compensation to eligible class members did not exceed \$2 billion, an amount so small as to be fiscally insignificant. The value of claims for reparations arising out of slavery and federal Indian policies presents different questions entirely. See Yamamoto, *Racial Reparations*, *supra* note 12, at 515 (conceding that reparations to Japanese Americans, "were a small blip on the radar of the [U.S.] economy" and that reparations to other groups would have a much more profound effect).

481. See Bryant, *supra* note 477 at 151 ("[A]ny realistic attempt at putting a dollar figure on past racial harms often yields an amount too large or otherwise politically unfeasible.").

482. Matsuda, *supra* note 51, at 387.

483. Verdun, *If the Shoe Fits*, *supra* note 42, at 657-58. When reparationists respond to contentions that payment on a per capita basis to individuals untutored in financial management skills would open the door to inefficiency and waste, they note that investment counseling programs could accompany awards, which in turn could be structured as trusts or annuities. Matsuda, *supra* note 51, at 387.

484. Reparation is an inherently symbolic act that expresses the "deep regret and . . . continuing obligation" of the party making the award, and thus the exact dimensions of the award are less important than the sincerity of the reparative gesture. Matsuda, *supra* note 51, at 395.

postulates: (1) the scope of the remedy must comport closely with the scope of the harm; (2) just as tortfeasors do not determine the method of compensation, it falls to the victims of racial injustice, rather than to the government or the dominant social group, to determine the mode of reparation;<sup>485</sup> and (3) the U.S. economy is robust enough, and the perpetrator group numerous enough, to absorb, amortize, and discharge the entirety of the debt.<sup>486</sup>

*(6) Illusion of Progress Without Transformation of Racial Attitudes or Legal Structures*

Although invocations of state power in alteration of the established hierarchy are "intensely powerful . . . political acts that challenge racial assumptions underlying past and present social arrangements,"<sup>487</sup> reparations exposes its theoretical Achilles' heel in its inability to specify the conditions under which the satisfaction of the claims of aggrieved racial groups genuinely promotes progressive perfection of the social and legal order.<sup>488</sup> Although reparations enhances the possibility of institutional and attitudinal restructuring, it mandates neither result, and wary exponents fear the remedy may yield illusions of progress while stifling other remedies that might yield more, and more meaningful, redress.<sup>489</sup>

Specifically, reparationists and other critical legal scholars, contending that the dominant social and racial group has captured the state, posit that any statist remedy runs the risk of political tailoring so as to perpetuate

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485. Proponents of reparations are insistent that beneficiaries reacquire a positive sense of control over their lives; election of the method of redress comports with this understanding of the emancipatory purpose of the remedy. *See id.* at 387-88 ("Whatever the form and administration of an award, the choice does not . . . belong to the perpetrators."); *see also* LECKY & WRIGHT, *supra* note 375, at 56 (contending that, unlike other civil rights remedies which vest disposition of funds within the discretion and control of whites and thereby perpetuate minority financial dependence, reparations is uniquely empowering).

486. If the recent settlement of claims for indemnification of \$500 billion in federal and state payments to beneficiaries suffering from tobacco-related illnesses will not harm the future prosperity of tobacco companies, payment of racial reparations should not prove deleterious to U.S. financial health, particularly as funds will be reinvested in the domestic economy by compensated groups. Allen, *supra* note 44, at 153.

487. Yamamoto, *Racial Reparations*, *supra* note 12, at 479.

488. The ideal end-state of reparative justice is the public confirmation "that the Constitution works (if belatedly) and that the [U.S.] is far along on its march to racial justice for all." *Id.*

489. Advocates of racial redress highlight the significant expenditures of political and social capital that reparations claimants have been obliged to expend in questioning whether reparations ought to receive the lion's share of their attention to the detriment of other remedies. *See, e.g.*, Richard B. Collins, *Race and Criminal Justice*, 68 U. COLO. L. REV. 933, 935 (1997).

dominant group interests rather than those of the proclaimed beneficiary group.<sup>490</sup> Indeed, in consideration for a "one-shot" payment in satisfaction of past wrongs, the United States might claim a *res judicata* opportunity and dissociate from continuing obligations to enforce civil rights legislation<sup>491</sup> or to labor toward a racially neutral and egalitarian "fourth-tier" democracy.<sup>492</sup> Moreover, because financial compensation alone will not yield racial equality in the absence of genuine contrition and ongoing supervision, reparations threaten to reify the state as benign patron while assuaging white guilt and displacing the onus for continued racism from the dominant social group to the still-subordinated.<sup>493</sup> Furthermore, reparations "tokenism" co-opts the leadership of racial minorities by inducing their consent, on behalf of current and future generations, to racial hierarchy, albeit in slightly attenuated form, in exchange for few tangible benefits; consequently, "some thoughtful victim group members are inclined to reject reparations[.]"<sup>494</sup> Lastly, because reparations is a law-centric, adversarial means of redress, it tends to prolong interracial conflict by casting racial

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490. See Eric K. Yamamoto, *Friend, or Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT'L L. & POL'Y 223, 232 (1992) (arguing that because reparations is akin to other civil rights laws in that specific provisions require ongoing interpretation by majoritarian civil and political institutions alerted to and exploitative of issues of indeterminacy and contingency, the benefits promised are not immune from review and diminution).

491. See Matsuda, *supra* note 51, at 395 (warning payment of reparations might commodify harms and sever legal obligations to claimant groups by the doctrine of *res judicata*); Yamamoto, *Racial Reparations*, *supra* note 12, at 496 (cautioning that Japanese American reparations may have "let the government off the hook so that it no longer needed to vigorously oppose racism against Asian Americans.").

492. See Bryant, *supra* note 477, at 142-48 (elaborating theory of racial democracy categorizing social evolution of states from "first-tier" democracy, in which racial minorities lack legal rights, to the colorblind "second-tier," in which racial minorities enjoy only negative rights to be free from denial of equal protection, the remedial "third-tier," in which racial minorities possess the "positive right to reparation for present inequalities caused by the negative denial of rights," and ultimately the "fourth-tier," in which race is "taken into account as a positive factor in the ordering of our legal and social worlds" and "celebrated" by state and non-state actors).

493. Payment of reparations to Japanese Americans may have effected socioattitudinal transformation of white Americans less in the direction of greater racial tolerance and more toward the conclusion that "now the system works" and that if racial minorities are still struggling it is due to an inherent defect of character or intelligence. Yamamoto, *Racial Reparations*, *supra* note 12, at 496. For reparationists, the feared response from whites to continued racial hierarchy post-reparations is "We paid you, why are you still having problems? It must be in your genes." *Id.*

494. See Matsuda, *supra* note 51, at 395-96 (suggesting "[o]ne generation could sell away their claim at bargain-basement prices, to the detriment of future generations, . . . to cash in[.]").



groups in the roles of winners and losers in social combat and abnegating engagement in the polyracial dialogue necessary to creative synergy, moral instruction, and genuine remediation.<sup>495</sup>

### c) *Indian Reparations*

Tracking closely with the general theoretical form, the Indian claim for reparations for genocide, land theft, and ethnocide might take the form of a class action<sup>496</sup> in federal district court<sup>497</sup> with individual Indians suing the U.S. government and its agencies and instrumentalities in tort<sup>498</sup> demanding damages for ancestral wrongful deaths<sup>499</sup> and destruction of tribal integrity,<sup>500</sup> and Indian tribes suing under a constitutional theory for restitution and/or compensation of unlawful takings of lands.<sup>501</sup> In practice,

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495. See Magee, *supra* note 38, at 875-76 (contrasting reparations with a "cultural equity" method of racial redress that requires "acknowledgment of and respect for the cultural-experiential difference between whites and nonwhites" and offers not merely financial compensation but a "host of creative public and private policy initiatives," including enhanced minority access to political participation and multicultural approaches to economic and social policy).

496. Though their claims have been doctrinally precluded, aggrieved groups seeking reparations have had little difficulty satisfying federal class requirements. See FED. R. CIV. P. 23(b) (enumerating federal class requirements of numerosity, commonality, typicality, and adequacy); *Cato v. United States*, 70 F.3d 1103, 1110-11 (9th Cir. 1995) In recent years, plaintiffs alleging mass human rights violations in U.S. courts have not had difficulty establishing the requisite elements for class certification, particularly in light of a policy favoring the relaxation of the analysis where near-identical injuries were inflicted upon plaintiffs because of their group membership and where it is impossible, or at least impractical, to bring such cases individually. For a discussion of the relaxation of federal class certification requirements in human rights litigation, see Margaret G. Perl, *Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations*, 88 GEO. L.J. 773 (2000) (citing cases).

497. Assuming, *arguendo*, that it had subject matter jurisdiction over a cognizable federal claim or that it sat in diversity jurisdiction, the district court would exercise its supplemental jurisdiction to hear State law wrongful death claims. See 28 U.S.C. § 1367 (2000) (codifying basis for federal exercise of supplementary jurisdiction over State law claims).

498. See *supra* note 367.

499. See *supra* notes 90-110 and accompanying text. Even employing the lowest estimate of Indian victims — \$5 million — and a paltry sum for each decedent—\$100,000 — the compensation demanded by claimants for ancestral wrongful death might approach half a trillion dollars. *Id.*

500. See *Fort Sill Apache Tribe v. United States*, 477 F.2d 1360 (Ct. Cl. 1973) (holding that destruction of tribal physical integrity is theoretically actionable by affected individuals as an ordinary tort claim provided the federal action complained of is an explicit violation of a treaty or federal statute).

501. Presently Indian tribes control only fifty-two million, or 2.6%, of the more than two

however; such a claim is almost certainly neither cognizable nor justiciable in courts of the United States; moreover, for practical and aspirational purposes, there is a more prudent and productive avenue Indian claimants can take toward redress.

*d) Legal Obstacles to Indian Reparations*

*(1) Sources of Law and Subject Matter Jurisdiction*

Although federal jurisdiction is limited to those claims "arising under the Constitution, laws, or treaties of the United States,"<sup>502</sup> only those elements of the Indian claim arising under treaties are certain to satisfy the jurisdictional issue for purposes of litigation in federal courts. An absence of law with which to advance judicial claims renders much of the gravamen of any prospective Indian reparations claim noncognizable for a lack of subject matter jurisdiction and for failing to state a claim for which relief can be granted,<sup>503</sup> and elements not arising under treaties would be dismissed at the pleadings stage.<sup>504</sup>

*(a) Genocide*

Relief is unavailable in U.S. courts for the element of genocide in the Indian claim. The fundamental ordering principle of international law, sovereignty, protects state prerogative to engage in any unprohibited

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billion acres of the U.S. continental landmass. Although principles of equity proscribe the wholesale evacuation of millions of non-Indians many years after the facts of settlement, the enormity of the sum required to compensate takings of Indian land, even if set at a level far inferior to market rates as would be likely, would preclude its payment. *See* Newton, *Compensation*, *supra* note 167, at 460 (analyzing historical compensations of takings of Indian land and finding, based on historical experience, that nothing close to fair market value is likely to be accorded Indian claimants).

502. 28 U.S.C. § 1331 (2000).

503. *See supra* note 365 (rejecting, as bases for reparations claim, constitutional and statutory sources of law as failing to state cognizable claims and relying instead on common law of tort). Still, although the Alien Tort Claims Act provides district courts subject matter jurisdiction over torts in violation of the "law of nations," it neither defines the "law of nations" nor provides a forum for U.S. citizens, a status borne by individual Indians since 1924. *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (2000); *see also* Indian Citizenship Act, 8 U.S.C. § 1401(b) (2000) (conferring U.S. citizenship upon Indian individuals). Thus, a remedy for any putative violation of the "law of nations" is similarly unavailable to Indian reparations claimants in U.S. courts.

504. *See* FED. R. CIV. P. 12(b)(1) (providing for dismissal of claims over which the court lacks subject matter jurisdiction); FED. R. CIV. P. 12(b)(6) (providing for dismissal for failing to state a claim for which relief can be granted).

activity.<sup>505</sup> Although the practice of genocide attained categorical proscription<sup>506</sup> through crystallization as a violation of a norm of *jus cogens*<sup>507</sup> by the start of 1939,<sup>508</sup> at the time of the Indian Wars — generally, 1850-1890 — no such peremptory norm denounced the killing, in whole or in part, of Indians as Indians;<sup>509</sup> on the contrary, Indian mass murder was official U.S. policy. Although Indian claimants can easily prove the statutory requirements of genocide even under a narrow judicial interpretation,<sup>510</sup> ethnic cleansing of Indian land as prelude to annexation, as

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505. See Case Concerning the S.S. Lotus (Fr. v. Tur.), 1927 P.C.I.J. (Ser. A/B), No. 10.

506. See *supra* note 91 and accompanying text (defining genocide as killing or seriously harming, either physically or mentally, members of a national, ethnic, racial, or religious group as such).

507. A norm of *jus cogens*, or a peremptory norm, is recognized by the entire international community one from which no derogation is permitted and which cannot be modified save by a subsequent norm of this general character. Norms of *jus cogens* limit state sovereignty and immunity in that the general will of the international community takes precedence over the individual will of states to order their internal relations. See Vienna Convention, *supra* note 126; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. k; Reporter's Note 6 (1987) (defining *jus cogens* as narrow subset of CIL norms, including prohibitions against genocide, slavery, torture, and terrorism, that sit atop the international legal hierarchy, preempting conflicting treaties and norms).

508. Although the International Military Tribunal ("IMT") was an ad hoc judicial body confined as to subject matter, personal jurisdiction, territorial jurisdiction, and temporal domain, its jurisprudence established under international law that (1) a state, through its officials, could be held criminally liable for the treatment of its own citizens; (2) German crimes against its own citizens were retroactive; and (3) no defenses were available even where the genocide occurred entirely within the boundaries of one state. See Charter of the International Military Tribunal, of 8 August 1945 (Nuremberg Charter), confirmed by G.A. Res. 3, U.N. Doc. A/50 (1946) and G.A. Res. 95 (I), U.N. Doc. A/236 (1946); see also Trial of the Major War Criminals (Nuremberg Judgment) (Sept. 30, 1946), reprinted in LEON FRIEDMAN, THE LAW OF WAR: A DOCUMENTARY HISTORY 922-1026 (1972) (finding individual Nazis guilty of crimes against humanity (now chargeable as genocide), war crimes, and crimes against peace from 1939-45 despite defense that positive law of treaties did not proscribe such acts by individuals at the time of their commission); United States v. Alfried Krupp, IX Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10 (1950) (applying law retroactively to reach conduct of individual accused of crimes against humanity). However, because the United States does not directly incorporate international law, IMT judgments are emphatically *not* U.S. law.

509. See *supra* note 91 and accompanying text.

510. Several courts have circumscribed the definition of the crime by requiring proof of specific intent to commit a widespread, systematic pattern of genocidal acts; others have the issue before them. See, e.g., *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997); *Daishowa Inc. v. Friends of the Lubicon*, (1995), 30 C.R.R. (3d) 26, 184 (Ont. Gen. Div.) (Can.); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Yugoslavia, Serbia & Montenegro*), Application of the

it predates codification of international and domestic legal proscriptions,<sup>511</sup> is a misdeed beyond the purview of contemporary legal remediation.<sup>512</sup> International law sources, including human rights treaties,<sup>513</sup> and fora, although of increasing importance to prosecutions of genocide and other grave breaches,<sup>514</sup> are similarly inhospitable to Indian civil claims arising

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Republic of Bosnia, (filed in ICJ Registry March 20, 1993) (alleging pattern of widespread, systematic acts violative of the Genocide Convention); *id.* at Preliminary Objections, 11 July 1996 (finding jurisdiction based on article 9 while holding Convention is primarily designed to reach individual conduct).

511. Federal law incorporates the Genocide Convention, criminalizing genocide. *See* 18 U.S.C. §§ 1091-93, 3181 (2000) (punishing genocide with imprisonment and fines). However, the proscription entered positive law in 1988, and for genocide occurring pre-1988 a remedy is unavailable. Genocide Convention Implementation Proxmire Act of 1987, 18 U.S.C. § 1091 (2000). Moreover, federal law provides no civil remedy. U.S. Reservations and Understandings to the Genocide Convention, 28 I.L.M. 754, 782 (1989) (rejecting obligation to pass implementing legislation). Although the Alien Claims Tort Act ("ATCA") may confer subject matter jurisdiction upon federal courts for suits complaining of acts in violation of the "law of nations," it does not provide a forum for U.S. citizens, a legal status conferred upon Indians in 1924, and defenses apply. *See* 28 U.S.C. § 1350 (ATCA) (2000).

512. Although post-World War II treatment of Indians is colorable as a violation of several norms of *jus cogens*, such claims are conceptually distinct from genocide. *See* Hugo Princz v. Federal Republic of Germany, 26 F.3d 1166, 1179 (D.C. 1994) (holding that a state violates *jus cogens* if it practices or condones, inter alia, genocide, slavery, murder, arbitrary detention, or systematic racial discrimination) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987)).

513. Many human rights instruments proscribe the conduct at issue in the Indian genocide claim. *See, e.g.*, UDHR, *supra* note 3, at art. 3 (stating everyone has the right to life); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 75 U.N.T.S. 287 (prohibiting murder); ACHR, *supra* note 415 at art. 13(2) (protecting civilians from attack); ICCPR, *supra* note 3, at art. 6 ("No one shall be arbitrarily deprived of his life."). Still, although the United States signed several it has ratified few and, by entering reservations, has not assumed many legal obligations created therein. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701(4),(6)(1987) (rejecting binding character of much of UDHR); U.S. Senate Resolution of Advice and Consent to Ratification of [ICCPR], 138 CONG. REC. S4781-01 (1991) (attaching reservations); U.S. Reservations and Understandings to the Genocide Convention, *supra* note 511 (rejecting obligation to implement Convention). Moreover, the United States has not acceded to additional protocols to permit individual standing to claim violations. *See, e.g.*, Optional Protocol to [ICCPR], 999 U.N.T.S. 171, 6 I.L.M. 360, 383 (1967); U.S. Dept't of State, A List of Treaties and Other International Agreements of the United States in Force on January 1, 2002 (2002) (listing ratifications and reservations)[hereinafter *Treaties in Force*].

514. Two UN judicial bodies try individuals accused of, inter alia, genocide. *See* Statute of the International Tribunal for the Former Yugoslavia (ICTFY), S. C. Res. 827, U.N. SCOR, 48th Sess. 3217th mtg., at 1-2, U.N. Doc. S/Res/827 (1993), *reprinted in* 32 I.L.M. 1159, 1192; Statute of the International Tribunal of Rwanda (ICTR) S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., at 1, U.N. Doc. S/Res/955 (1994), *reprinted in* 33 I.L.M. 1598, 1602. One

from genocide.<sup>515</sup> Redress for ancestral murder would thus be forced into the framework of domestic wrongful death law and subjected to defenses.

(b) *Land Theft*

Plenary power and the political question doctrine preclude judicial undoing of even the most fraudulent, duressive, or unconscionable treaties<sup>516</sup>

defendant has been convicted; others are at trial. *See* The Prosecutor v. Jean Kambanda, ICTR 97-23-S (judgment and sentence) (Sept. 4, 1998) (convicting Rwandan Prime Minister of genocide); Prosecutor of the Tribunal v. Radislav Krstic, ICTFY, IT-98-33 (amended indictment) (Oct. 27, 1999) (charging genocide in destruction of Srebrenica); Prosecutor of the Tribunal v. Dusko Sikirica, ICTFY, IT-95-8 (amended indictment) (Aug. 30, 1999) (charging genocide in operation of Keraterm). Neither is competent to adjudicate Indian claims, however, and the International Criminal Court, while it will exercise universal jurisdiction over genocide, is barred from retroactive application of law. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC), art. 24, U.N. Doc. A/CONF. 1183/9 (1998), *reprinted in* 37 I.L.M. 999, 1016 (restricting jurisdiction of the ICC to criminal conduct occurring after the entry into force of the Statute).

515. International law recognizes treaties as creating obligations owing between sovereigns. *United States v. Noriega*, 746 F. Supp. 1506, 1533 (S.D. Fla. 1990). Individuals thus lack standing to challenge violations of treaties "in the absence of a protest by the[ir] sovereign[.]" *United States v. Hensel*, 699 F.2d 18, 30 (1st Cir.), *cert. denied*, *Hensel v. United States* 461 U.S. 958 (1983). Thus, a treaty creates enforceable private rights only if the text so provides. *See* *Head Money Cases*, 112 U.S. 580, 598-99 (1884). The United States generally considers treaties non-self-executing promises to enact domestic implementing legislation absent which courts lack subject matter jurisdiction to hear, and individuals lack standing to bring, claims alleging violations of rights granted or safeguarded therein. *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (D.C. Cir. 1976) (citing *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 311-14 (1829)), *cert. denied*, 429 U.S. 835 (1976); *see also* *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 719-20 (9th Cir. 1992) (terming both UN Charter and UDHR proclamations of aspirations that do not waive requirement of implementing legislation and confer no subject matter jurisdiction); *Kadic v. Karadzic*, 70 F.3d 232, 238 n.1 (2d Cir. 1995) (holding, even if non-self executing treaties are evidentiary of *jus cogens* norms, no subject matter jurisdiction in U.S. courts exists independent of an implementing statute); *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981), *aff'd*, 726 F.2d 774, 808-09 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (non-self-executing treaties, absent implementing legislation, confer no individual standing); Scoble, *supra* note 433, at 132 (indicating all U.S. human rights treaties are non-self-executing). Because the Genocide Convention as implemented does not create a civil remedy or confer standing, it is unavailable to plaintiffs seeking redress for genocide; identical conclusions attach to complaints of crimes against humanity arising from violations of other human rights instruments.

516. In 1855 Congress created the Court of Claims to award compensation for property seized by the United States. *See* Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. Congress soon precluded claims based on Indian treaties from its jurisdiction. Act of Mar. 3, 1863, ch. 92, §9, 12 Stat. 765, 767. Indians remained without a forum until 1946, when, embarrassed by Nazi comparisons of *Lebensraum* and death camps to Manifest Destiny and reservations, Congress

and proscribe review of takings, as well as express and intentional violations of treaty provisions. Indian real property is thus without the full protection of Constitutional law,<sup>517</sup> and with both restitution and compensation within the exclusive power of Congress, domestic law is a barren source for framing Indian claims for land seizure. The question of whether such claims are responsive to international sources of law in domestic courts is considerably more complex,<sup>518</sup> as the precise body of applicable law remains

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created the Indian Claims Commission ("ICC"). Atkinson, *supra* note 54, at 399. The ICC body provided a forum for adjudication of U.S. treaty violations and broad moral "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." 25 U.S.C. § (70-70(v))(3)(2000). The ICC was charged with assessing damages in accordance with the specific factual history of the tribe, relative U.S. responsibility, and price per acre at the time of expropriation. *Id.* Although the ICC found that 35% of the continental United States — 750 million acres — is legally Indian land, it adopted procedural and evidentiary rules favoring the United States, which defended each claim as an adversarial, rather than a remedial, proceeding. Newton, *Courts of the Conqueror*, *supra* note 38, at 776-84. By not ensuring the skill or integrity of the non-Indians providing legal representation, the ICC further stacked the deck. DELORIA, *BEHIND THE TRAIL*, *supra* note 164, at 226. Moreover, the ICC read the "fair and honorable dealings" clause out of its organic statute, the text of which prohibited in natura restitution. *Id.* at 227. Ultimately, the ICC redressed less than one-third of land seizures, most at rates far below a just level of compensation. See BURNETTE & KOSTER, *supra* note 154, at 121 (calculating median payment at \$225 per Indian individual). Equation of money with justice soon cast the ICC as another assimilative vehicle, and many defiant tribes "refused to touch a cent [.]". Atkinson, *supra* note 54, at 400-03. With the legislative demise of the ICC in 1978, Indian tribes lack a judicial forum for redress of treaty violations, and special jurisdictional acts are required to close the jurisdictional hole in the organic statute and allow adjudication in the Court of Claims. See, e.g., 28 U.S.C. § 1362 (2000) (authorizing federal jurisdiction over claims brought by federally recognized Indian tribes). Claims that Indian treaties are voidable due to conditions surrounding their negotiation are nonjusticiable, a legal result buttressed by the myth that acquisition of Indian lands was legitimate. See ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 13-14 (1990) ("The property-owners of the [U.S.] are not the legitimate heirs of Lockean individuals who performed. . . . acts of original acquisition; they are the inheritors of those who . . . used violence to steal . . . vast tracts [.]"). For a discussion of the ICC, see HARVEY D. ROSENTHAL, *THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION* (1990).

517. Newton, *Compensation*, *supra* note 167, at 453, 457-58 (noting that for all parties save for its indigenous peoples, the United States accepts the constitutional obligation to remedy takings of land in violation of law by restitution either in natura or in damages).

518. The very question of whether the collective rights, for the putative violation of which Indian claimants seek relief, are indeed legal formulations that impose duties on states is unresolved. A number of declarations and conventions purport to codify an obligation incumbent upon states to afford indigenous peoples a forum for settlement of disputes and remedies for redress. See, e.g., Draft Declaration, *supra* note 192, at art. 39 ("Indigenous peoples have the right to have access to prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective

actively contested.

Treaties of the United States are on a par with the U.S. Constitution itself as the "supreme Law of the Land."<sup>519</sup> However, although Indian treaties were understood to be interstate treaties at the time of their conclusion, and although a well-settled principle requires courts of the United States to interpret U.S. law consistently with international law and provides that an act of Congress or a Supreme Court decision ought never be construed or rendered so as to violate international law "if any other possible construction remains,"<sup>520</sup> the introduction of plenary power established long ago that Indian "treaties," if only as a matter of domestic law, are not interstate agreements within the meaning of the Constitution. Consequently, the United States does not recognize any obligations arising under Indian treaties as arising under international law.<sup>521</sup> Similarly, other sources of conventional international law<sup>522</sup> are almost unequivocally unavailable to the

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remedies for all infringements of their individual and collective rights[.]" ). Very few states, however, have accepted the binding character of these declarations and conventions, and courts of the United States have been particularly unreceptive to the incorporation of such obligations. See Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 372 (1990) (noting that U.S. courts reject international legal sources purporting to impose obligations with regard to the promotion or protection of group rights).

519. See U.S. CONST. art. VI, § 2.

520. See *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . .").

521. International law does not recognize treaties between indigenous peoples and states as creating any enforceable legal obligations, although a recent series of WGIP exhortative declarations has called upon states to accord treaties with indigenous peoples the character of interstate agreements. See, e.g., *Study on Treaties, Agreements and Other Constructive Agreements Between States and Indigenous Populations: First Progress Report* submitted by Mr. Miguel Alfonso Martinez, Special Rapporteur: E/CN.4/Sub.2/1992/32 (1992); Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples, Eur. Parl. Doc. (PV 58) (2), para. 10, at 4 (1994) (calling upon states "in the strongest possible terms" to honor treaties signed with indigenous peoples). Although for many indigenous rights advocates the question of "whether or not treaties or agreements with indigenous peoples have the same juridical status as interstate treaties is not in itself an issue of much practical importance[.]" particularly if these agreements are accorded respect and mechanisms to ensure their effectiveness, the "international character" of these agreements is largely unacknowledged in U.S. courts. ANAYA, *supra* note 37, at 131.

522. Traditional sources of international law include

- (i)(a.) international conventions, whether general or particular, establishing rules expressly recognized by states;
- (b.) international custom, as evidence of a general practice accepted as law;
- (c.) the general principles of law recognized by civilized nations;
- and (d.) subject to the provisions of Article 59, judicial decisions and the

redress of Indian land claims in courts of the United States<sup>523</sup> Although the Vienna Convention on the Law of Treaties<sup>524</sup> categorically proscribes the very sort of fraudulent, duressive, and bad-faith conduct appurtenant to the drafting, implementation, and unilateral United States abrogation of Indian treaties for the last two centuries,<sup>525</sup> it does not reach the conduct of parties prior to its entry into force.<sup>526</sup> Moreover, it is not applicable to treaties concluded "between States and other subjects of international law,"<sup>527</sup> nor is the United States a party,<sup>528</sup> and there is heated debate as to whether the legal terrain mapped by the Vienna Convention is declaratory of customary international law<sup>529</sup> or merely a step in the progressive development of

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teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38, 59 Stat. 1055, T.S. 993 (1945).

523. Although humanitarian law yielded conventions purporting to renounce aggressive war, 1907 Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, art. I, 36 Stat. 2261, T.S. 538, and the use of force as a policy instrument, Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Peace Pact or Pact of Paris), Aug. 27, 1928, art. 1 46 Stat. 2343, 94 L.N.T.S. 57, both texts post-date the Indian Wars, and thus neither is a valid legal source upon which to base an Indian claim for land seizure in the course of aggressive wars.

524. See Vienna Convention, *supra* note 126.

525. *Id.* at art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); *id.* at art. 49 ("If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound[.]"); *id.* at art. 52 ("A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the [UN Charter.]").

526. *Id.* at art. 28 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force . . . with respect to that party."). Even in the post-Nuremberg era, sovereignty remains an imperfect trump card that states employ to shield their historical, particularly pre-twentieth century, aggressive territorial acquisitions. Although the IMT determined that all civilized nations had come to recognize the CIL principle proscribing acquisition of land by force as of 1939, it did not apply this principle retroactively. See Nuremberg Judgment, IMT, Cmd. 6964 at 65 (Oct. 1, 1946) [hereinafter IMT], reprinted in 41 AM. J. INT'L L. 172 -333 (1947); see also GEORG SHWARZENBERGER, 2 INTERNATIONAL LAW 165 (1965) ("By 1939, the rules on belligerent occupation [that it does not transfer sovereignty] had been recognized by all civilised nations . . . as being declaratory of the law and customs of war.").

527. Vienna Convention, *supra* note 126, at art. 3.

528. See United States, Treaties In Force, *supra* note 513 (listing treaties of which the U.S. is a party).

529. Customary international law (CIL), just as its domestic analogue, common law, is more difficult to identify and interpret than conventional sources. CIL evolves from the practice of states, as reflected in official statements and acts, court decisions, and legislation, in a manner



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consistent with the subjective understanding that such practice is legally obligatory — the requirement of *opinio juris sive necessitatis*. See *North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 4 (holding that a practice does not become CIL merely because it is widely followed but rather because it is also deemed legally obligatory by many states). State practice, particularly by major powers and directly affected states, is the most concrete element of CIL. Michael Akenhurst, *Custom As A Source of International Law*, 47 BRIT. Y.B. INT'L.L. 18 (1977). To become binding, the practice must be consistent, settled, and uniform, but need not be universal. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L.L. 413, 433 (1983). The key to understanding its formation lies in the distinction between "custom" and "usage." 1 OPPENHEIM, *supra* note 83, Vol. I at 26. "Custom" requires a clear and continuous habit of doing certain acts under the conviction that they are obligatory. *Legal Status of Eastern Greenland* (Nor. v Den.), 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (June 18). "Usage" refers to a habit of doing certain acts without a conviction that the conduct is required, whether as a matter of courtesy, habit, or policy. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW 25 (1987). To be considered CIL, a practice should reflect wide acceptance among states involved in the relevant activity as obligatory. *Id.* In some instances, a practice followed by a few states can create a rule of CIL absent conflicting practice; by the same token, as international law is based on the consent principle, and because a practice need not be universally accepted to become CIL, a state that has consistently rejected the practice before it became CIL is not bound. *Anglo-Norwegian Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116. Although the Supremacy Clause on its face appears to require incorporation only of conventional sources — i.e., treaties signed by President and consented to by the Senate, see U.S. CONST. art. VI, cl. 2, judicial decisions and executive practices subsequent to the framing of the Constitution suggest strongly that CIL is part of the "law of nations" and therefore federal law, see, e.g., *The Nereide*, 13 U.S. (9 Cranch.) 388, 422-23 (1815) (stating that United States courts "are bound by the law of nations, which is part of the law of the land."); *The Paquete Habana*, 175 U.S. 677, 707 (1900) (holding that CIL is a source of international law found in "the customs and usages of civilized nations as evidenced by jurists and commentators" that binds U.S. courts unless explicitly contradicted by legislation or executive order); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (holding CIL is federal law); 11 Op. Att'y Gen. 297, 299-300 (1865) ("The framers of the Constitution knew that a nation could not maintain an honorable place amongst the nations of the world that does not regard . . . the law of nations as part of the law of the land."). Despite these pronouncements, delineation of the substantive boundaries of the "law of nations" is contested. Human rights advocates insist that the expanding body of human rights norms and principles articulated in declarations and working groups constitute a body of CIL directly enforceable in U.S. courts. See, e.g., ANAYA, *supra* note 37, at 49. Critics of direct incorporation insist that rights under CIL belong to sovereign nations and CIL does not by its judicial discovery create a private remedy in U.S. courts; rather, as with treaties, domestic implementing legislation is necessary to create not only a remedy but, *a priori*, subject matter jurisdiction and standing to adjudicate alleged violations. Federal courts have been arid terrain for the direct incorporation argument: even where the CIL principle at issue is "universal, definable, and obligatory," such as prohibitions against genocide and torture, legislative, rather than judicial, incorporation remains orthodox jurisprudence. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 n.4 (D.D.C. 1984) (holding that absent a clear grant of a cause of action manifested by express Congressional intent, doctrines of judicial abstention and separation of powers prohibit

general principles regarding formation and interpretation of interstate treaties.<sup>530</sup>

Furthermore, although the Draft Declaration defines ethnocide as including "any action which has the aim or effect of depriving [indigenous peoples] of their lands, territories or resources"<sup>531</sup> and provides that Indian tribes have the right to "restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent" or to "just and fair compensation" in the form of "lands, territories and resources equal in quality, size and legal status,"<sup>532</sup> U.S. courts<sup>533</sup> do not recognize this or other CIL sources regarding

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creating a forum in U.S. courts to adjudicate alleged violations of human rights); Scoble, *supra* note 433, at 132 (noting that even where a substantive human right "possess(es) the requisite degree of consensus, specificity of definition, and obligatory nature to be judicially cognizable[.]" implementing legislation is required to confer jurisdiction and standing). In short, recourse to CIL in domestic litigation of human rights claims is largely fruitless, as obligations arising under CIL are as yet essentially moral and as such do not satisfy *opinio juris* – the essential subjective component of CIL. Thus, rather than bring claims of its alleged violation before domestic tribunals, a claimant must "exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal." *Tel-Oren*, 726 F.2d at 817.

530. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW introductory note (1987).

531. Draft Declaration, *supra* note 192, at art. 7(b).

532. *Id.* at art. 27.

533. Although the UN Human Rights Commission ("UNHRC") acknowledges the importance of land to the cultural survival of indigenous peoples, and despite its competence to question states regarding treatment of indigenous populations, it is a quasi-judicial organ: its findings are not legally binding, and access is checked by consent principle and other attributes of state prerogative. See AKERMARK, *supra* note 10, at 139-47 (discussing limitations of UNHRC relative to investigation of state treatment of indigenous peoples); Newton, *Courts of the Conqueror*, *supra* note 38, at 478 (noting that prudential barriers — i.e., standing — frustrate tribal attempts to bring land claims before UNHRC); Tsosie, *Sacred Obligations*, *supra* note 49, at 1649 (noting failures of Lakota and Seneca to attain redress before UNHRC); San Kronowitz, *supra* note 158, at 604-06 nn.516-30 (noting unsuccessful Hopi efforts to attain redress for land claims before UNHRC). U.S. refusal to sign the Optional Protocol to the ICCPR, the sole instrument that might confer standing upon Indian claimants in the UN system, is the most significant impediment. Brian B.A. McAllister, *The United Nations Conference on Environment and Development: An Opportunity to Forge a New Unity in the Work of the World Bank Among Human Rights, The Environment, and Sustainable Development*, 16 HASTINGS INT'L & COMP. L. REV. 689, 729 (1993) (noting "communications" from non state parties may only be considered by UNHRC if the state party concerned has recognized UNHRC competence by ratifying the optional Protocol). Although adjudication and redress of indigenous claims in international fora with the power to bind states is a controversial subject, the framers of the indigenous rights regime are committed to the development of sources of law, and forums in which to apply that law, whereby and wherein protection of indigenous peoples and cultures can

disposition of indigenous lands<sup>534</sup> as creating legal obligations that bind the political branches of government.<sup>535</sup> In sum, any remedies for Indian land theft cannot issue from the judiciary: special legislation is necessary to compensate takings of Indian land<sup>536</sup> absent which restitution requires either direct purchase or grant from the United States<sup>537</sup>

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be accorded. Anaya, *supra* note 37, at 129-30; *see also* Levitt, *supra* note 365 (suggesting the domestic analog of diversity jurisdiction might support litigation of indigenous claims against states in international tribunals); *see also* Stuart Ford, *OSCE National Minority Rights in the United States: The Limits of Conflict Prevention*, 23 SUFFOLK TRANSNAT'L L. REV. 1, 1, 43, 48-50 (1999) (suggesting formation of international organization with competence over protection of indigenous rights and powers to investigate and adjudicate claims against states). Still, domestic legal systems and institutions remain authors of law and arbiters of claims, and the fate of international judicial bodies with competence to take meaningful action with respect to breaches of indigenous rights instruments is linked to the fate of those instruments within the established canon of public international law: interposition of an "international civil society" between international law and indigenous peoples that modifies domestic and international laws and processes may prove the best hope for indigenous rights advocates. *See* Paul H. Brietzke, *Insurgents in the "New" International Law*, 13 WIS. INT'L L.J. 1, 55-56 (1994) (discussing international civil social "insurgency").

534. *See, e.g.*, IMT, *supra* note 526, at 65 (holding that a CIL principle proscribed acquisition of territory by force as of 1939); UDHR, *supra* note 3, at art. 17(2) ("No one shall be arbitrarily deprived of his property."); ICCPR, *supra* note 3, at art. 1(2) ("In no case may a people be deprived of its own means of subsistence."); Racism Convention, *supra* note 379, art. 5(d)(v) (guaranteeing, without discrimination based on race, the right to own property individually and collectively); ACHR, *supra* note 415, art. 21(2) ("No one shall be deprived of his property except upon payment of just compensation[.]"); Convention No. 169, *supra* note 37, 6th preambular para. (providing enhanced protection of indigenous lands and resources); Quito Declaration On the Enforcement and Realization of Economic, Social, and Cultural Rights in Latin America and the Caribbean, at pt. II, § A (July 24, 1998), *reprinted in* 2 YALE HUM. RTS. & DEV. L.J. 215, 218-19 (1998) ("The obligations of the State [include] . . . noninterference . . . in the use of the resources of each . . . group[.]")

535. *See supra* note 528 (discussing CIL incorporation in U.S. legal system); *see also* Beanal v. Freeport-McMoran, 969 F. Supp. 362, 373-74 (E.D. La. 1997) (dismissing, without prejudice, claim for "cultural genocide" brought by indigenous Indonesian tribe against U.S. corporations under ATCA and TVPA for failing to state a claim for which relief could be granted). Although the United States purports to share with Indian tribes the "fundamental goal of preserving indigenous history, language, and tradition," it contends that this objective can "best be achieved by protecting the right of individuals to take the necessary steps by themselves and in community with others[.]" Suagee, *supra* note 9, at 509 (quoting U.S. delegation statement at 1997 Session of WGIP at UNHRC) (emphasis added). Although the United States admits certain legal obligations to Indians, rather than recognize the Draft Declaration as constitutive of international law the United States encourages textual redrafting to "harmonize [it] with existing international law." *Id.*

536. *See supra* note 191.

537. Carter D. Frantz, *Getting Back What Was Theirs? The Reparations Mechanisms for the Land Rights Claims of the Maori and the Navajo*, 16 DICK. J. INT'L L. 489, 518-19 (1998).

(c) *Ethnocide*

Just as genocide and land theft are not actionable due to an absence of justiciable law, an Indian claim for ethnocide would fail to state a claim for which relief can be granted in courts of the United States. Although nineteenth century Christian messianism<sup>538</sup> would, if committed at present, violate a host of human rights instruments protective of cultural, linguistic, and religious expression<sup>539</sup> and particularly defensive of the rights of children<sup>540</sup> and their tribal affiliations,<sup>541</sup> this body of "soft law" consists

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538. See *supra* notes 213-14 and accompanying text (detailing forcible removal of Indian children from parents, punishment for religious and linguistic expression, and criminalization of Indian religion and culture).

539. See UDHR, *supra* note 3, art. 18 ("Everyone has the right to freedom of thought, conscience, and religion"); ICCPR, *supra* note 3, art. 18(2) ("No one shall be subject to coercion which would impair his freedom to have . . . a religion or belief of his choice."); Racism Convention, *supra* note 379, at art. 5(d)(vii) (obligating states parties to observe, without discrimination, freedom of thought, conscience, and religion); ICCPR, *supra* note 3, at art. 18(1) ("Everyone shall have the right to freedom of thought, conscience and religion."); ACHR, *supra* note 415, at art. 12 (3) ("Freedom to manifest one's religion and beliefs may be subject only to the limitations . . . necessary to protect public safety, order, health, or morals, or the rights or freedoms of others."); Convention No. 169, *supra* note 37, at 5th preambular para. (recognizing "aspirations of peoples to . . . maintain and develop their identities, languages and religions, within . . . States in which they live."); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135, art. 2 ("Persons belonging to national or ethnic, religious or linguistic minorities . . . have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language . . . without interference or . . . discrimination."); Draft Declaration, *supra* note 192, art. 7 ("Indigenous peoples have the . . . right not to be subjected to ethnocide and cultural genocide, including the prevention of and redress for: (a) Any act which has the aim or the effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic characteristics or identities"); *id.* art. 32 (guaranteeing indigenous rights to enjoy their own culture and to preserve customs and legal traditions).

540. See Convention on the Rights of the Child (Children's Convention), Nov. 20, 1989, art. 3(1), 28 I.L.M. 1448 (requiring the "best interests of the child" be a primary consideration in all actions taken by public and private actors); *id.* at art. 9(1) (ensuring that a child shall "not be separated from his or her parents against their [sic] will" except in case of abuse); *id.* art. 9(3) (requiring state parties to permit a separated child "direct contact with both parents on a regular basis"); *id.* art. 10 (requiring provision of information regarding whereabouts of parents unless contraindicated); *id.* art. 13 (1) (guaranteeing children the right of freedom of expression); *id.* art. 14(1) (requiring state parties to respect the right of the child to freedom of thought, conscience, and religion); *id.* art. 30 (guaranteeing the minority child the right to participate in the cultural, religious, and linguistic life of the minority group).

541. See ACHR, *supra* note 415, at art. 12(4) ("Parents . . . have the right to provide for the religious and moral education of their children[.]"); Children's Convention, *supra* note 540, art.

largely of treaties the United States has not ratified and declarations of CIL unimplemented in U.S. law and therefore carries mere moral — not legal — force.<sup>542</sup> Just the same, imposition of legal disability upon Indian religion<sup>543</sup> is without remedy, and recourse to domestic courts for relief from legal imperialism, political domination,<sup>544</sup> and suppression of ethnodevelopment,<sup>545</sup> is just as certainly futile.<sup>546</sup> Despite a proliferation of hortatory

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14(2) (requiring states to respect parental rights to guide children's exercise of religious rights).

542. Separation of indigenous children from their families in order to destroy their enculturation and replace it with majority values and beliefs — an ongoing global practice — generates intense moral opprobrium. See Pritchard, *supra* note 44, at 259. However, although it is far more protective of Indian children than it once was, federal law adheres to a negative conception of rights that disavows the full protections of the Children's Convention. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195-97 (1989) (limiting affirmative State obligation to ensure children against deprivations of life or liberty).

543. See *supra* notes 215-22 and accompanying text (highlighting denial of constitutional protection to Indian religions).

544. See *supra* notes 267-84 and accompanying text (detailing U.S. policies of political domination of Indian tribes).

545. See Ved P. Nanda, *Development as an Emerging Human Right Under International Law*, 13 DEN. J. INT'L. & POL'Y 161 (1984) (noting languid incorporation of ethnodevelopment as a right).

546. The United States may have accepted a CIL obligation to promote Indian self-determination. See *Nuclear Tests (Austl. Fr.)* 1974 I.C.J. 252 (Dec. 20) ("declarations made by way of unilateral acts, concerning legal or factual situations, may . . . creat[e] legal obligations" when the declaration is "specific, public, and intended to create binding obligations"). The United States has long conceded that Indian tribes are indigenous "peoples" within the meaning of international law. Bravo, *supra* note 353, at 560. Moreover, the U.S. delegation to the WGIP expressed support for the "basic goals" of the Draft Declaration and stressed that "[s]ince the 1970s, the U.S. . . . has supported . . . self-determination for Indian tribes[.]" See Observer Delegation of the United States of America, Statement to the Working Group on Indigenous Populations, Geneva (July 26, 1994). Likewise, in its official report to the UNHRC submitted pursuant to obligations under the ICCPR, the U.S., attempting to establish compliance with rights affirmed in Article 1, offered an extensive discussion of federal Indian laws and policies ostensibly supportive of Indian Self-Determination. U.S. Department of State, Civil and Political Rights in the United States: Initial Report of the United States of America to the U.N. Human Rights Committee under the ICCPR, Jul. 1994, at 36-46, Dept. State Pub. 10200 (1994). Still, the argument that the indigenous rights regime is binding as CIL would be stillborn in U.S. courts, for, although the political branches have solemnly vowed to respect tribal sovereignty, translation of expressed political intent into protective legal instruments for the violation of which judicial remedies are available is but a dream. See William J. Clinton, Remarks to Indian and Alaskan Native Tribal Leaders, 30 WEEKLY COMP. PRES. DOC. 941, (May 9, 1994) (pledging support for Indian "values, . . . religions, . . . and . . . sovereignty.") [hereinafter Clinton Remarks]; Janet Reno, Speech to American Indian Sovereignty Symposium, Tulsa, Oklahoma (June 7, 1994) (advocating support for tribal "self-management").

declarations excoriating forced relocation and assimilation,<sup>547</sup> nonjusticiable law fails would-be Indian plaintiffs in checking the crush of these practices.<sup>548</sup>

(d) *Breach of Trust*

As the United States perpetuates the status of Indian tribes and people as wards of the state under the trust doctrine,<sup>549</sup> an Indian claim for reparations could conceivably suggest that domestic<sup>550</sup> and international<sup>551</sup> legal

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547. International law waxes critical of state assimilative policies. See Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 6 U.S.T. 3516 (outlawing "mass forcible transfers"); ICCPR, *supra* note 3, art. 27 (requiring states to not interfere with rights of minorities "to enjoy their own culture, . . . practise their own religion, [and] use their own language"); Racism Convention, *supra* note 379, art. 5(d)(i) (committing parties to guarantee rights to freedom of movement and residence); Draft Declaration, *supra* note 192, art. 7(d) (recognizing indigenous right to protection from "assimilation or integration"). However, even as states abandon forced relocation, "indigenous cultures remain[n] threatened as a result of [its] lingering effects[.]" ANAYA, *supra* note 37, at 56. Assimilationists still harry indigenous self-determination. See C. Tomuschat, *Protection of Minorities Under Article 27 of the ICCPR*, in RAINER BERNHARDT ET AL., VOLKERRECHT ALS RECHSTORDNUNG INTERNATIONALE GERICHTSBARKEIT MENSCHENRECHTE 971-74 (1983) (denying group rights to separate schools, languages, and habitation). Further, CIL declarations of indigenous rights are still supportive more of participation than dissociation, while their legal force in U.S. courts is nil. Daes, *supra* note 284, at 9.

548. International law has evolved to recognize duties to protect conquered and occupied populations against forced relocation and internal displacement, obligations heightened during times of internal conflict. See, e.g., Prosecutor v. Slobodan Milosevic, ICTFY99 (Indictment) (May 22, 1999), at count 1 (charging Yugoslav "deportation" of Kosovar Albanians as grave breach of Fourth Geneva Convention requiring humane treatment of noncombatants during armed conflicts "not of an international character" and prohibiting "forcible transfers, as well as deportations of protected persons[.]" and as a crime against humanity under Article 5(d) of Statute of the Tribunal); UN ECOSOC Res. 1999/47, E/CN.4/RES/1999/47 (Apr. 27, 1999) (confirming forced relocation and "ethnic cleansing" as matters of grave international concern); *Internally Displaced persons*, G.A. Res. 48/135, 48 U.N. GAOR Supp. (No. 49) at 254, U.N. Doc. A/48/49 (1993) (calling for comprehensive solution to problems of internally displaced persons). Nevertheless, even if Congress implemented such instruments, the original acts of forced deportation and assimilation of Indians occurred long ago, and the doctrinal defense of ex post facto would preclude litigation in U.S. courts. See *supra* notes 417-19 and accompanying text.

549. See *supra* notes 298-99 (outlining theory and practice of the trust under federal Indian law).

550. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 416 (1980) (holding that a tribe can sue United States for compensation of land taken in breach of the trust doctrine, and interest is paid on such claims).

551. The international law of trust responsibility provides much to which to aspire but little enforceable law for citizens seeking positive rights to benefits from states in their own domestic

obligations consistent with assumption of that responsibility provide a cause of action for breach of that trust. However, given a reliance on nonjusticiable "soft law" and a presumption that seizure of Indian land is undertaken with the federal government acting as faithful trustee, this argument, however artfully presented, is unlikely to persuade a domestic court to grant relief.

## (2) *Doctrinal Obstacles to Indian Reparations*

### (a) *Standing*

As its gravamen would allege a series of interrelated group harms committed by the U.S. government against Indian tribes and individuals, the claim for Indian reparations would be tailored with the latter as members of the plaintiff class seeking relief against the U.S. government as perpetrator. Indian claimants, alleging that every non-Indian citizen has benefitted from expropriation of Indian lands and resources and the continuing effects of land theft and genocide-at-law, to the detriment of every Indian person and group, would assert standing to sue in reliance upon the theory of group responsibility and entitlement.<sup>552</sup> Foes of Indian reparations, whether captive to a binary view of race, ignorant of the harms inflicted by federal Indian policies past and present, or hostile to race-conscious remedies, will

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courts. See, e.g., UDHR, *supra* note 3, at art. 25 ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, medical care and necessary social services . . ."). At a minimum, recent cases indicate that the law is ripe for restatement of greater protection for those recognized by states as entitled to special provisions of benefits. See *Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru*, Aug. 10, 1993, 32 I.L.M. 1471 (suggesting that had the Court reached the merits it might have pronounced a CIL principle, based on the Trusteeship Agreement and the U.N. Charter, art. 76, that a trustee is required to discharge an "international fiduciary duty" to the benefit of the beneficiary); see also *Guerin v. R.*, (1984) 2 S.C.R. 335 (Can.) (finding a judicially enforceable fiduciary relationship with respect to management by Canada of the lands of its First Nations). Still, it is unclear whether a future restatement, even if predicated upon the principle of international fiduciary duty, would redound to the benefit of Indian claimants in U.S. courts.

552. *Matsuda*, *supra* note 51, at 378-80. As *Mezey* notes, Indians present perhaps the strongest case for standing of any aggrieved racial minority group as

[t]he historical abuses are well-documented, the victimized group is identifiable because it has remained largely unassimilated both culturally and geographically, and the current members of the group continue to suffer harm in that the vitality of each tribe's cultural identity and autonomy is threatened by the social and economic desperation of life.

*BROOKS*, *supra* note 1, at 300.

assert that present-day members of Indian tribes cannot prove a nexus between any injury in fact and any specific individual wrongdoers. Courts, unwilling to stretch back in time to link the problems bedeviling contemporary Indians with acts of genocide, land theft, and ethnocide, will likely follow precedent and grant a defense motion to dismiss for a lack of standing to sue.<sup>553</sup>

*(b) Causation*

Even if opponents of Indian reparations lost a dismissal motion asserting a lack of standing, they would challenge the causal link between the acts and injuries alleged, deny the foreseeability of the injuries,<sup>554</sup> and assert the interposition of intervening or confounding acts on the part of Indian plaintiffs.<sup>555</sup> While exposition of the historical record by Indian plaintiffs ought to compel an impartial jury to conclude that genocide, land theft, and ethnocide are the proximate causes of the depopulation and seizure of Indian land, the denial of Indian self-determination, and the marked disparities between non-Indian and Indian socioeconomic status, there are legal and political limits to the temporal and remedial gap the doctrine of causation is permitted to cross: membership in a aggrieved racial group is simply a bridge too far. Absent proof that commission of specific injurious acts by specific tortfeasors legally caused specific compensable injuries, critics will attack the theory of causation offered by Indian plaintiffs they may accuse of "playing the race card,"<sup>556</sup> and, resting on the twin cushions of precedent and administrative convenience, courts will be favorably inclined to tilt the legal

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553. See *Cato v. United States*, 70 F.3d 1103, 1105-09 (1995) (dismissing African American claim for reparations on ground of, inter alia, lack of standing).

554. See *supra* notes 393-95 and accompanying text.

555. Claims of intervening or confounding acts, though baseless, are effective. Thus, to the claim of genocide, critics of Indian reparations might assert that many deaths occurred in conflicts conducted without violation of the laws of war as they then existed; to the claim of land theft, they might counter that government negotiators were simply more shrewd or ruthless than their Indian counterparts; to the claim of ethnocide, they might explain circumscription of tribal governments, religions, and resources with claims of tribal mismanagement, the incompatibility of Indian culture with bureaucratic capitalism, a lack of bad intent on the part of the government, or the inherent inferiority of Indian culture in a competitive marketplace of ideas.

556. See LINDA WILLIAMS, *PLAYING THE RACE CARD* (2001) (suggesting that the dominant perspective is inclined to view a claim for racial remediation as unfounded attempts to browbeat whites and exploit old persecutions to secure unwarranted benefits for racial minority groups in the present — a gambit termed "playing the race card").



playing field in favor of the dominant political actor, the United States.<sup>557</sup>

(c) *Time-Bar and Laches*

Much of the Indian claim for reparations would be predicated upon actions plaintiffs would allege to have occurred in past centuries. Claiming an inability to defend an action that accrued so long ago that it is now impossible to marshal evidence, including long-dead witnesses and vanished documents, the United States will assert that the doctrine of laches<sup>558</sup> and the equitable principle of procedural fairness<sup>559</sup> require that the claim be forfeited for a failure to be brought during the period established by applicable state and federal statutes of limitations.<sup>560</sup> Indian claimants will counter that the federal equitable tolling doctrine should permit adjudication despite failure to sue within the time period established by law, particularly because the defendant was solely responsible, through its failure to provide a forum<sup>561</sup> and sources of law,<sup>562</sup> for the delay and because the defendant "fraudulently concealed"<sup>563</sup>

557. See *supra* note 398 and accompanying text.

558. See *supra* notes 405-08 and accompanying text.

559. See *Landgraf v. U.S.I. Film Prod.*, 511 U.S. 244, 265 (1994) (elaborating equitable principle of procedural fairness to defendants served by judicial refusal to hear claims that should have been brought earlier).

560. See *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946) (holding that precedent and equity require that a statute of limitations be strictly enforced where the legislature "explicitly puts a limit upon the time for enforcing a right which it enacted").

561. The argument for federal equitable tolling is particularly sound with respect to Indian land claims, which the United States statutorily precluded from adjudication in the federal Court of Claims for nearly a century. See *supra* note 406 and accompanying text.

562. See *supra* note 516 (noting absence of judicial forum for Indian plaintiffs).

563. To access federal equitable tolling, plaintiffs are required to demonstrate the following: (1) that the defendant engaged in a course of conduct designed to conceal evidence of his alleged wrongdoing; (2) that the plaintiff was not on actual or constructive notice of that evidence; and (3) that the plaintiff exercised due diligence and did not "sleep on his rights." *J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1255 (1st Cir. 1996). Satisfaction of the first prong, the "fraudulent concealment" test, has long required the plaintiff to demonstrate with substantial particularity the affirmative actions whereby the defendant fraudulently concealed his whereabouts.

A complainant, (to avoid the statute of limitations), must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment, must specify how, when, and in what manner, it was perpetrated . . . And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made.

*Stearns v. Page*, 48 U.S. (7 How.) 819, 829 (1849). Federal case law with respect to this

his whereabouts for purposes of suit while preventing, by the very acts of which plaintiffs complain, the gathering of necessary evidence with which to develop a theory of the case.<sup>564</sup> However, federal courts have held that equitable tolling is an extraordinary remedy to be "used sparingly"<sup>565</sup> and without regard to "sympathy . . . for particular litigants,"<sup>566</sup> and it is altogether forbidden where "inconsistent with the legislative purpose."<sup>567</sup> Although Indian plaintiffs could prove specific U.S. conduct that constitutes fraudulent concealment that prevented the gathering of evidence as the basis for equitable tolling of the FTCA,<sup>568</sup> the FTCA and applicable state statutes clearly demonstrate legislative intentions to limit the period in which claims may be brought upon accrual, and Indian claimants have had notice<sup>569</sup> of their claim for at least several generations. Although no credible argument that Indian claimants have slept upon their rights could be sustained, case law is unkind to reparations litigants seeking to toll statutes of limitations.<sup>570</sup>

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requirement comports with FED. R. CIV. P. 9(b), requiring the plaintiff who seeks to prove the fraudulent concealment necessary to toll a statute of limitations, to plead "all averments of fraud or mistake . . . with particularity" lest dismissal be otherwise required. *J. Geils*, 76 F.3d at 1255.

564. See *Bell v. Fowler*, 99 F.3d 262, 266 n.2 (8th Cir. 1996) ("[E]quitable tolling is appropriate when the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his claim."); *Seattle Audubon Soc. v. Robertson*, 931 F.2d 590, 595 (9th Cir. 1991), *rev. on other grounds*, 503 U.S. 429 (1992) (equitable tolling permissible where extraordinary circumstances beyond plaintiff's control made it impossible to file timely claims).

565. *Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

566. *Portis v. World Omni Finance*, 2000 WL 726220, at \*4 (S.D. Ala. May 16, 2000).

567. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974); see also *Cook v. Deltona*, 753 F.2d 1552, 1562 (11th Cir. 1985) ("equitable tolling is a matter of congressional prerogative and can be read only in the absence of congressional intent to the contrary").

568. See 28 U.S.C. § 2401(b) (2000) (providing for a two-year statute of limitations under FTCA).

569. *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir. 1984) ("a claim does not accrue until the plaintiff knows, or in the exercise of reasonable diligence should know, of both the injury and its cause."); *Oneida County, N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 255, 266-73 (1985) (Stevens, J. dissenting) (suggesting the Oneida did not "adequately justify their delay" in bringing a claim nearly two centuries after its accrual).

570. See *Hohri v. United States*, 586 F. Supp. 769 (1984) (barring reparations claim due to running of statute of limitations); see also *Cato v. United States*, 70 F.3d 1103, 1108 (9th Cir. 1995). Time may work against Indians with respect to their legal capacity to assert rights in land, particularly if the claims are not recognized by treaty. See *Oneida Indian Nation*, 470 U.S. at 266-73 (Rehnquist, C.J., dissenting) (finding nearly two centuries of delay in bringing a claim to quiet title coupled with the "legitimate reliance interests" of owners of property on disputed Indian lands was sufficient to bar a claim by the doctrine of laches); *State v. Elliott*, 616 A.2d 210 (Vt. 1992), *cert. denied*, 507 U.S. 911 (1993) (holding that Indian title is extinguishable by the "increasing weight of history" and that the longer tribal rights are ignored,

*(d) Res Judicata*

As the doctrine of res judicata prohibits subsequent decision of claims and issues that were or could have been raised and decided in a prior forum,<sup>571</sup> the United States may argue that payments made under treaties and statutes,<sup>572</sup> the IRA,<sup>573</sup> and the Indian Claims Commission<sup>574</sup> prohibit adjudication of the Indian claim for reparations, particularly with respect to land theft.<sup>575</sup>

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the greater the reason for construing [U.S.] failure to protect Indian interests as an affirmative intent to extinguish Indian title); *see also* United States v. Washington, 157 F.3d 630, 649 (9th Cir. 1998) (holding laches can defeat Indian rights in land not recognized by treaty).

571. *See* *Kyler v. Montezuma County*, No. 99-1052, 2000 U.S. App. LEXIS 1145 (10th Cir. Jan. 28, 2000).

572. *See* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831) (noting that although they ceded Indian territories to the United States, many Indian treaties either recognized Indian title to unceded lands, provided tribes in lieu lands west of the Mississippi River, and granted compensation); *United States v. Sioux Nation of Indians*, 448 U.S. 372, 424 (1980) (holding that 1877 act removing Black Hills from Lakota ownership was a taking of recognized title under the Fifth Amendment and upholding Court of Claims judgment for monetary damages); ANILCA, *supra* note 38 (providing \$1 billion compensation to Alaskan Natives for takings of 335 million acres); Yamamoto, *Racial Reparations*, *supra* note 12, at 484 n.22 (listing compensations of takings of Indian lands including \$32 million to Ottawa, \$81 million to Klamath, \$31 million to Chippewa, \$12.3 million to Seminole, and \$105 million to Lakota). However, for at least one tribe res judicata may not preclude a claim for land theft even though compensation was ordered. *See* Tsosie, *Sacred Obligations*, *supra* note 49, at 1621 (noting that the Black Hills Treaty Alliance, a Lakota NGO, asserts that the 1868 Treaty guaranteeing use and occupancy of the Black Hills in perpetuity, is still good law and refuses to accept compensation from Court of Claims). Taking an expansive view of res judicata, some commentators suggest that passage of IGRA — federal legislation simplifying and standardizing the process whereby Indian tribes can secure the permission of States to operate reservation gaming operations — is a form of reparations preclusive of subsequent litigation of Indian claims as matters res judicata. *See* Stephanie Dean, *Getting a Piece of the Action: Should The Federal Government Be Able To Take Native American Gambling Revenue?*, 32 COLUM. J.L. & SOC. PROBS. 157, 180 (1999) (noting that the Pequot totaled gross profits of \$800 million in 1994 and have guaranteed every member a house, an salary of more than \$50,000, and lifelong paid education). However, if only because relatively few tribes operate gaming enterprises and even fewer earn profits, this is an exceedingly weak legal argument. *See* Mezey, *supra* note 291, at 713 (evaluating Indian gaming).

573. *See* *Bryant*, *supra* note 477, at 151 (noting that the IRA provided for limited reparations to Indian tribes in the form of recognition of mineral and other resources rights).

574. *See supra* note 516.

575. The organic statute creating the ICC provided that any individual tribal member had standing to sue on behalf of the entire tribe. *See* Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (formerly codified at 25 U.S.C. (70-70(v)(3)) (expired Sept. 30, 1978). As a result, the adjudication of a tribal claim is arguably res judicata, and where one tribal member has accepted compensation offered by the ICC, it is likely that that tribe is estopped from bringing

Although Indian claimants will likely assert that prior payments were partial, expedient settlements paid to desperate individuals rather than reparations oriented toward affording justice to tribes, *res judicata* is an imposing doctrinal hurdle susceptible to clearance only by political, rather than judicial, machinery.

(e) *Stare Decisis*

Not only does the settled corpus of federal Indian law generally militate against the interests of would-be Indian claimants,<sup>576</sup> but where there are conflicting precedents, courts of the United States, and parties who litigate before them, are effective in exploiting "convenient ambiguities" to narrow interpretations of Indian rights while offering up those very precedents as a scapegoat for such judgments.<sup>577</sup> In so doing, courts, wittingly or no, extend the "racist legacy" of federal Indian law<sup>578</sup> and further marginalize the underprivileged position of Indian rights within the domestic hierarchy.<sup>579</sup> Even if the quest for Indian reparations is not inescapably a rigged game,<sup>580</sup> selective judicial wielding of precedent will render this result.<sup>581</sup>

(f) *Exhaustion of Remedies*

In addition to the other legal impediments, claimants for Indian reparations must first exhaust administrative remedies ostensibly available through recourse to the various federal agencies that administer organic statutes and

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a separate action.

576. See Williams, *Algebra of Federal Indian Law*, *supra* note 158, at 363 (branding federal Indian law an "instrument of racial domination and discrimination against indigenous tribal peoples' rights of self-determination").

577. Singer, *supra* note 133, at 529-30 (applying CLS critique of liberalism to federal Indian law).

578. Williams, *Algebra of Federal Indian Law*, *supra* note 158, at 363 ("Because of their lack of familiarity with the racist origins of the core doctrines of . . . Federal Indian law, most . . . do not realize that every time the . . . Supreme Court cites to any of the core principles to uphold one of its Indian law decisions, it perpetuates and extends the racist legacy brought by Columbus to the New World[.]").

579. See Resnik, *supra* note 9, at 686 (demonstrating the marginal position of federal Indian law and Indian rights scholarship in both federal jurisprudence and scholarly literature).

580. See Newton, *Courts of the Conqueror*, *supra* note 38, at 759-60 ("[The] perception among some Indian people and advocates for Indian tribal rights [is] that the . . . court system is rigged . . . to favor the [U.S.]").

581. Legal maneuvers of this sort — the hallmark of the Rehnquist Court for a quarter-century — has left Indian tribes little hope for legal remediation. See WELLS, *supra* note 152, at 18.

programs governing Indian affairs, even if any such remedies are rendered either unavailable or illusory by the plenary power of Congress and its immunity from judicial review in disputes between Indian tribes and the United States. Moreover, Indian claimants alleging present-day effects of past acts of injustice would be obligated to exhaust available civil rights remedies prior to filing a reparations claim.<sup>582</sup>

(g) *Ex Post Facto Application of the Laws*

Because genocide, land theft, and ethnocide were legal as a matter of international and domestic law at the time of their commission,<sup>583</sup> constitutional hostility to retroactive legislation,<sup>584</sup> coupled with the common law doctrine proscribing *ex post facto* application of the laws,<sup>585</sup> will conspire to deprive federal courts of subject matter jurisdiction to hear a cause of action for Indian reparations alleging these acts as the basis for the claim.

(h) *Sovereign Immunity*

Although the historical conduct of the United States towards Indian tribes and individuals inspires many Americans to harsh moral criticism, the doctrine of sovereign immunity,<sup>586</sup> a prerogative codified in federal law cloaking the federal government with near-absolute legal immunity for its intentional torts,<sup>587</sup> will preclude claims for Indian reparations under the FTCA unless Congress unequivocally consents to suit.<sup>588</sup> Consent would be as remarkable as it is unprecedented.

(i) *Political Question*

An Indian claim for reparations triggers several *Baker* characteristics and

582. See *supra* note 414 (discussing domestic requirement of exhaustion of remedies).

583. See *supra* notes 167, 510, 539-545. (While a cause of action could be maintained for conquest and genocide had such acts been committed subsequent to their formal proscription, the Indian claim for reparations is predicated primarily upon acts that occurred prior to that date).

584. See U.S. CONST. art. I, § 9, cl. 3 ("No . . . *ex post facto* law shall be passed.").

585. See *supra* note 417 and accompanying text.

586. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

587. See 28 U.S.C. § 2680(h) (2000).

588. See *United States v. Hohri*, 482 U.S. 64 (1987) (holding recovery on a reparations suit barred by federal sovereign immunity with exception of a takings claim under the Fifth Amendment). The Indian claim for land theft, though it would perhaps not be precluded by a defense of sovereign immunity if pled under the Takings Clause of the Fifth Amendment, would succumb to Congressional plenary power and the trust doctrine.

constitutes perhaps the archetypic case for reflexive judicial abstention and dismissal under the political question doctrine.<sup>589</sup> Although international disputes may arguably be "not as separable from politics as are domestic legal disputes,"<sup>590</sup> many Indian claims arise from official acts committed during an era when Indian sovereignty had not been entirely extinguished and relations with tribes not yet conquered were indisputably a matter of foreign relations.<sup>591</sup> U.S. courts have reinforced the absolute power of the political branches over tribes along with the immunity of such actions from judicial review.<sup>592</sup> In a real sense, *Lone Wolf v. Hitchcock*<sup>593</sup> — the intractable *Dred Scott* of federal Indian law<sup>594</sup> — diminishes the meaning of citizenship for Indians.

(j) *Inability to Render Fair Damage Assessment*

Although the United States is experienced in determining eligibility and methods with respect to Indian redress,<sup>595</sup> a court may find it impossible to attach a monetary value to the welter of damages — the murder of millions, the seizure of billions of acres, and ongoing cultural suffocation — arising from genocide, land theft, and ethnocide. Any cash payment, no matter how large, will grossly undervalue the injuries suffered. Still, even if the Indian reparations claim is advanced solely through tribes, thus disposing of some

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589. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing prongs under which the political question doctrine is triggered, requiring judicial abstention and dismissal, including, inter alia, invocation of issues constitutionally committed to determination, and previously decided by, political branches).

590. See Scoble, *supra* note 433, at 182.

591. For purposes of analysis under the political question doctrine, judicial imposition of the status of "domestic dependent nations," although it has diminished Indian sovereignty, reserves some measure of political independence, and despite their travails Indian nations continue to exist in a twilight zone between full and extinguished sovereignty. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

592. See Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984) (noting that, under the political question doctrine, the Supreme Court has upheld essentially every exercise of federal regulatory power over Indian affairs).

593. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (holding disputes challenging federal power to regulate Indian tribes are political questions immune from judicial review and subject to the presumption that the United States will always act in good faith).

594. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (holding African Americans are not U.S. citizens under the meaning of "citizen" as contemplated by U.S. Constitution); Singer, *supra* note 133, at 483-84 (noting *Lone Wolf* has "aptly been characterized as the *Dred Scott*" of federal Indian law).

595. See Newton, *Compensation*, *supra* note 167, at 457 (discussing ICC determinations of eligibility and redress).

conflict over membership in the remedial class, critics will recoil at the transfer of as much as several trillion dollars<sup>596</sup> to fewer than two million tribal members, many of whom are of mixed heritage.<sup>597</sup> The transformation of every individual claimed as a member by an Indian tribe into a multimillionaire would be so unpalatable to whites that preclusion of suit, on

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596. Specific demands for damages are speculative, but compensation of the two million living Indian individuals in the amount of \$1 million each for the wrongful death of a single ancestor would cost \$2 trillion. Compensation for expropriated land could conceivably be as costly.

597. "Who is an Indian?" is a problematic question. After centuries of forced assimilation, most of the two million Indians are of mixed heritage. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. L.J. 57, 65 (1999). However, Indian identity has political, cultural, and linguistic, as well as racial, dimensions, and the status of an individual claiming to be an Indian is irreducible to a simplistic determination of his degree of "Indian blood." See Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1009-18 (1981) (distinguishing racial, hybrid, and political classifications); Goldberg-Ambrose, *supra* note 53, at 169 (same); David C. Williams, *The Borders of the Equal Protection Clause: Indians as 'People'*, 38 UCLA L. REV. 759 (1991) (suggesting "Indian" is a racial, as well as a political, term). Moreover, the undisputed, exclusive power of Congress to recognize Indian tribes is a nonjusticiable political question. See U.S. CONST., art. I, § 8, cl. 3 (granting Congress power "To regulate Commerce with . . . the Indian Tribes[.]"); 25 C.F.R. ch. I §83.3-11 (1998) (listing BIA "Procedures for Establishing That An Indian Group Exists As an Indian Tribe"); *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1499-1500 (D.C.C. 1997) (reiterating that federal recognition of an Indian tribe is a political question immune from judicial review). Accordingly, each recognized tribe self-determines membership criteria consonant with its historical development and contemporary needs. *Passamaquoddy v. Morton*, 528 F.2d 370 (1st Cir. 1975). For some, individuals with any degree of linear descent from early tribal members are members even absent contact with the reservation, whereas for others even those with one hundred percent blood-quantum who intermarry or abandon community ties are nonmembers. Michael Haederle, *Trying to Draw the Line*, L.A. TIMES, Dec. 23, 1992, at E1 (describing variance of membership criteria across tribes). Although a one-fourth or greater blood quantum requirement was once a common standard, in recent years cultural identification has gained acceptance as more constitutive of Indian identity and thus more important in ascertaining membership. Michelene Fixico, *The Road to Middle Class Indian America*, in AMERICAN INDIAN IDENTITY: TODAY'S CHANGING PERSPECTIVES 55, 72 (Clifford E. Trafzer ed., 1989). Still, this shift toward culture strikes some as unfair in the sense that reparations to tribes granting membership to individuals with but a small blood quantum compensates persons lacking standing to complain of injuries to which they are linked, by virtue of the fact that most of their ancestors are non-Indian and thus members of the perpetrator group, by the most fragile of causal connections. Moreover, gatekeepers of majoritarian political institutions can terminate tribes whose membership criteria do not suit their remedial interests, thereby shrinking the remedial class. For a thorough discussion of the complex legal, political, and sociological questions that emerge from an attempt to answer the broader 'who is Indian?' question, see William Trapani, *Re/Cognizing Native American Sovereignty in an Age of Manifest Manners*, 3 J. L. SOC'Y 1 (2002).

the ground that it is impossible to fairly assess damages, is a handy hook upon which to hang vigorous objections.

### (3) *Political Objections to Indian Reparations*

#### (a) *Nature of and Remedy for Indian Disenfranchisement*

Most Indians would probably grant that most white Americans are not as racist as are the precedents and policies upon which federal Indian law is crafted. However, an absence of malice does not translate into an abundance of insight: by the early 1970s, the most well-intentioned non-Indians, self-assured that if injustice had yet to be fully remedied it had been consigned to an inglorious past and overwritten by a host of visionary federal programs assured to make necessary amends in the very near future, encouraged Indian tribes to "begin looking forward and to forget the injustices of the past" even as federal seizures of Indian land continued apace.<sup>598</sup> Although many Indian tribes lauded a succession of federal policy statements supporting reconstitution of tribal cultural, political, and economic self-sufficiency,<sup>599</sup> the relative intractability of Indian socioeconomic disadvantage over the past several decades revealed Indian Self-Determination as, at best, a half-empty promise.<sup>600</sup>

"Friends of the Indian" have ventured scant distance toward the legal reforms and institutional endowments necessary to alleviate the poverty and politico-economic insufficiency badgering Indian tribes and individuals.<sup>601</sup> Where successful Indian claimants for reparations would infuse significant sums into tribal institutions and thereby create the preconditions for genuine self-determination, including land restitution and legal reform, the dominant society would retain Indian tribes on strings tied to politically-contingent annual grants, thereby reining in the drive for self-government in favor of the present asymmetrical relationship in which tribal initiative and existence are subordinate to and dependent upon the laws, institutions, and beneficence of the conqueror. In sum, reparations as a tool to facilitate unmediated investment in Indian institutions, businesses, and communities is, for the dominant society, a remedy altogether too promotive of genuine self-determination.

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598. See Newton, *Courts of the Conqueror*, *supra* note 38, at 473.

599. See *Indian Self-Determination*, *supra* note 280.

600. See *id.* (detailing origins and development of Indian Self-Determination).

601. See *infra* notes 752-65 and accompanying text (introducing reforms necessary to enable Indian Self-Determination).



(b) *Sufficiency of Existing Civil Rights Legislation and Broader Liberal Legal Aspirations*

Although remedies available through reparations and existing civil rights legislation are largely identical — both provide for money damages<sup>602</sup> — the diligent enforcement of existing civil rights laws holds even less promise for the remediation of Indian claims. Contrary to a central tenet of liberalism, the legal and political interests of Indians are divergent from most, if not all, other racial and ethnic groups in the United States. For Indians, the question is not merely whether the rights theory of remediation at the core of liberal jurisprudence can conjure forth equal participation in the benefits and privileges of American society through formal and positive civil rights legislation or whether, as CRT insists, something more responsive to the eradication of persistent racial hierarchy is necessary to guarantee non-discrimination and equality. Rather, the Indian quest for self-determination implies a degree of measured separatism that does not correlate with the integrationist tendencies of liberalism and, to a slightly lesser degree, of CRT: with respect to many issue-areas, a great number of Indians seek the legal right to opt out.<sup>603</sup>

Prudence thus counsels for the adoption of a political strategy cognizant of the fact that liberal law itself,<sup>604</sup> and in particular federal Indian law and its doctrines of plenary power and the trust responsibility, is behind the systematic suppression of tribal self-governance<sup>605</sup> and the persistent legal disabilities attached to the expression of Indian culture and religion. Efforts toward the attainment of genuine self-determination are therefore best directed

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602. Injunctive relief — available to civil rights plaintiffs — is beyond the scope of reparations.

603. See SVENSSON, *supra* note 221, at 39 (noting that the principle of Indian self-determination is in tension with the integrationism informing the civil rights movement and liberal law). Although some minority groups claim rights to a separate cultural identity, only Indians can claim the right to political autonomy by virtue of their status as indigenous peoples — a distinct political classification that under international law recognizes rights transcending those that inhere in "mere" minorities even if U.S. policymakers conflate the boundary as a matter of domestic law. See Tsosie, *Sacred Obligations*, *supra* note 49, at 1650-51 (comparing superior rights of indigenous peoples with rights of minorities under the ICCPR).

604. See David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 423-24 (1994) (stating that, when "pervasively dissimilar cultures are yoked together" within a liberal nation-state, minority cultures, particularly where organized along communitarian rather than individualist principles as are Indian tribes in the United States, will systematically lose rights to self-determination).

605. See *supra* notes 143-154, 158, and accompanying text (describing how plenary power doctrine and the trust responsibility suppress Indian self-determination).

not in charting and navigating the proper route to integration but in defining, asserting, promoting, and protecting that self-determination; although these missions are served, if indirectly, through the infusion of monies that either reparations or enforcement of civil rights laws would offer, reparations, particularly the legislative variety, avoids the trap of forcing Indian claimants to resort directly to the very legal system precluding redress while simultaneously altering the dimensions of that system through remedial legislation.

Nevertheless, because it would not only strike a blow at the foundation of the liberal legal order but also introduce the material preconditions for Indian self-determination — a process fairly interpreted as a partial dis-integration of the social fabric — Indian reparations provides fodder for critics of perceived racial separatism while alienating liberal whites.<sup>606</sup>

(c) *Hostility to Group Remedies*

Although the U.S. legal and political system remains generally hostile to recognition and defense of group rights, the special position of Indian tribes in the constitutional order is made manifest inasmuch as relief of a sort has long been accorded by the political branches to harmed Indian groups qua groups. While federal jurisprudence interpreting the constitutionality of affirmative action programs has gradually shifted toward support for the liberal principle that all individual persons are entitled to formal equality before, and treatment under, the law, remedies for Indian tribes do in fact incorporate the concepts of group harm, responsibility, entitlement, and blame. Whereas upon judicial review a remedial program for the benefit of an aggrieved racial group has to withstand strict scrutiny to determine whether it is conducted by an institution guilty of past discrimination while serving a compelling state interest,<sup>607</sup> Indian tribes are considered *political* classifications sharply differentiated from racial groups, and programs of a "remedial" character designed for their benefit are recognized governmental interests under the trust doctrine, exempt from standard Fourteenth Amendment jurisprudence and subject merely to a rational (and deferential) standard of review.<sup>608</sup> Although the question of whether federal programs designed to benefit Indian individuals not members of federally recognized

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606. Pyle, *supra* note 361, at 789-90.

607. *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 227 (1995).

608. *See Morton v. Mancari*, 417 U.S. 535, 552-53, 554 n.24 (1974) (describing policies favoring Indian tribes as "political" rather than "racial" classifications because of a "special relationship" with the United States, and exempting Indian tribes from normal equal protection jurisprudence).

tribes are entitled to the same rational standard of review has recently arisen,<sup>609</sup> firm constitutional support exists for reparations to Indian tribes qua tribes.

Still, in the post-*Adarand* era some of the most vociferous critics of Indian rights invoke equal protection language to assert that Indians should not be able to claim rights reserved under treaties or granted by statute.<sup>610</sup> To the

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609. Some commentators insist that only Indians organized into recognized tribes possess the "special relationship" with the United States that justifies evaluating programs for their benefit under the rational standard of review. See Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 558-92 (1996) (noting that the language in the Indian Commerce Clause and *Mancari* "drew a sharp distinction between American Indians as a racial group and members of Indian tribes as a political group."). Several courts have rejected the position that programs aiding non tribal Indians must endure strict scrutiny, ruling instead that the expenditure of federal monies on remedial projects for Indians logically designed to protect or promote self-determination or culture does not violate the Constitution even where it appears arbitrary or where the funding is given to an organization other than an Indian tribe because the legislative body is entitled to weigh competing arguments and make necessary judgments regarding allocation of resources. See *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 91 (1977) ("Congress must have a large measure of flexibility in allocating Indian awards[.]"); *Morton v. Ruiz*, 415 U.S. 199, 212 (1974) (holding that Alaskan Natives are "Indians" as if members of recognized tribes for purposes of determining the appropriate level of judicial review of programs in their benefit); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89-90 (1918) (same); *Loudner v. United States*, 108 F.3d 896, 901 (8th Cir. 1997) (holding that the trust relationship extends to Indians who were lineal descendants of tribal members but who themselves are not members of any tribes). However, post-*Adarand* cases suggest a judicial reversion in the standard of review of Indian benefits programs, even where such programs are directed to recognized tribes, at least where such programs are not logically related to Indian lands, government, or culture, or where the programs are the creation of state, rather than federal, legislation. See *Williams v. Babbitt*, 115 F.3d 657, 664, 665 (9th Cir. 1997) (suggesting that *Adarand* may place some boundaries on when the *Mancari* rational basis test will apply to preferential programs for Indians, such as if such programs were to give Indians "a complete monopoly on the casino industry or on Space Shuttle contracts"); see also *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (invalidating, as an impermissible substitution of ancestry as a proxy for race in violation of the Fifteenth Amendment, a Hawaii statute by which only Native Hawaiians were allowed to vote for trustees to the State Office of Hawaiian Affairs, despite District Court finding that Congress specifically targeted Native Hawaiians for "rehabilitation" of harms inflicted by the United States, because native Hawaiians are not a federally recognized Indian tribe) (citing *Hirabayashi v. United States*, 320 U.S. 81 (1943)). Whether Congress, as opposed to a state, retains the prerogative post-*Rice* to pass statutes granting preference or benefit to nontribal Indians remains a question for future resolution.

610. See, e.g., *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 759 F. Supp. 1339, 1344 (W.D. Wis. 1991) (noting harassment tactics of non-Indian groups protesting Indian reserved fishing rights); *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000).

extent that critical jurisprudence is correct in positing that adjudications of rights are partly determined by the places occupied in the social hierarchy by the adversaries seeking to defend and challenge them and that minority groups systematically lose such contests, *Adarand* and *Rice*<sup>611</sup> are harbingers of judicial retreat to a stricter standard of scrutiny of remedial legislation benefitting Indians. Proponents of Indian reparations cannot rest upon prior judicial deference to Congress, nor can they be sure that future Congresses, mindful of this judicial yaw, will be as forthcoming with such remedies.

*(d) Resistance to Fundamental Redistribution of Economic and Social Power*

Until the majority comes to accept not only the role of the United States and its laws in the deliberate destruction of Indian populations, property rights, and cultures but also the responsibility to repair the interdependent relationship between Indian self-determination and U.S. legitimacy, Indian reparations, a moral shibboleth through the shadow of which the dominant social group is unwilling to tread, will be viewed as nothing more than a underserved handout to the losers of a long-ago struggle for the continental landmass.<sup>612</sup> A destabilizing reallocation of the American economic and territorial pie on this basis is likely to provoke violent political backlash at flashpoints along a wide spectrum of self-interested white Americans,<sup>613</sup> as well as ethnic elbowing<sup>614</sup> from uncompensated and as-yet-aggrieved minority racial groups, including, inter alia, African-Americans and Hispanics.<sup>615</sup>

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611. *Rice*, 528 U.S. at 495.

612. Although official policy statements are supportive of the right of Indian tribes to self-determine, for many domestic and foreign critics threats to territorial integrity lurk behind every assertion of the right. See JAIMES, *supra* note 95, at 78. The Indian right to self-determination, expressed in a reparations claim, may thus provoke contestation reminiscent of the nineteenth century Indian Wars, albeit on the political, rather than the military, field of battle.

613. Assuming, arguendo, that the total value of the Indian claim for reparations was assessed at nearly \$4 trillion for the wrongful death and land theft elements alone, the burden of taxation, after redistribution across the approximately 100 million taxpayers, would exceed \$40,000 per capita, an amount sufficient for a working couple to make a substantial down payment toward the purchase of a home. Absent a compelling argument on behalf of such a costly demand, framed in terms and replete with symbols that resonate deep within the moral consciousness of the non-Indian majority, Indian reparations will inevitably generate significant political contestation.

614. See *supra* note 475 (defining and discussing the phenomenon of "ethnic elbowing").

615. The likelihood that other racial groups might respond to an Indian claim for reparations by elbowing their way to the head of the reparative line may be easy to overestimate. Scholars of many hues concede that, as prior occupants of the soil and as the victims of some of the most egregious yet uncompensated injustices, Indians deserve a place at or very near the head of the

Moreover, any claim for payment of greater than symbolic compensation to Indian claimants<sup>616</sup> will not only threaten opponents with personal financial loss and national fiscal crisis,<sup>617</sup> it will stoke the argument that any debt has been at least partially, if not completely, discharged through Indian benefits programs legislated and appropriated under the trust responsibility. Indian claimants can simultaneously allay fears of personal and national insolvency while redeeming dependence for emancipation by presenting measured claims for more limited compensation over a period of time and by demonstrating that payments would be reinvested in the U.S. economy. However, unless the dominant social group understands the relationship between the trust doctrine and the web of legally-enforced political, economic, and cultural dependence spun to ensnare Indian self-determination, it may prove impossible to defeat the offsetting of payments under the trust doctrine against the value of the Indian claim.

*(e) Inability to Transform Racial Attitudes, Alter Legal Structures, or Restore Land*

Although a claim for Indian reparations would present a potentially transformative national moment wherein to challenge and upset the assumptions and normative judgments of Indian inferiority and United States' infallibility, a lump-sum payment, although it might materially enrich Indian tribes, would be unlikely to advance the progressive perfection of the American social and legal order. Although Indian tribes seeking to obtain a

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remedial queue. See Westley, *supra* note 17, at 436 ("In arguing . . . for Black reparations, this article does not suggest that Blacks should receive reparations either exclusively or even first. In all justice, indigenous peoples should probably be compensated ahead of any others."); see also Brew, *supra* note 28, at 195-96 ("violation of the human and civil rights of Native Americans . . . has spanned the course of [U.S.] history subjecting them to discrimination much earlier and much longer than [other groups]"); Matsuda, *supra* note 51, at 385 ("[A]ny conclusions the rest of us may come to about law and social change are subject to the special priority of indigenous Americans."). Furthermore, "cross-racial project[s] of social change[.]" in which linkages are formed between communities deficient in social justice — those that, regardless of their biological race, are "raced black" in the political sense — may dampen ethnic elbowing in favor of a commitment to broader social transformation inclusive of all downtrodden groups, including Indians. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* 12-13 (2001).

616. Interestingly, the use of financial means to compensate beneficiaries can nevertheless redound principally to the benefit of those paying reparations, as the remedial method is susceptible to quantification and therefore to fixed and finite limits. Bryant, *supra* note 477, at 149-50.

617. See *supra* notes 479-480 (suggesting reparations presents a threat to the national fiscal health).

measured separatism might be less concerned than other social groups about the prospect that reparations would permit the United States to relax enforcement of civil rights laws on their behalf or to withdraw from the more general struggle for fourth-tier democracy,<sup>618</sup> payment of reparations might obviate recognition of any continuing responsibilities under the trust doctrine, including programs to aid tribes in the transition to self-determination.<sup>619</sup> Moreover, Indian reparations would thrust Indians and non-Indians into contending camps and lock them in political and legal combat in which anything goes in the fight over the wealth and power of the state.<sup>620</sup> In so doing, Indian reparations would miss a key opportunity to employ moral argument<sup>621</sup> to creatively restructure attitudes and institutions and reconcile interdependent peoples, processes that are almost certainly necessary conditions precedent to the award of Indian reparations and, even more significantly, to the reinvestiture of legitimacy in the nation.<sup>622</sup> Furthermore, money cannot be directed to the satisfaction of the harms of which Indians complain: most seek to exercise the rights to self-determine and to express their unique cultures and religions upon sacred ancestral lands.<sup>623</sup> Only land restoration and legal restructuring to permit development of separate political identities can potentiate these fundamental human rights and relieve the economic deprivation and emotional pain borne inter-generationally by Indian tribes and individuals. In sum, because reparations are a far-too-costly and -

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618. See *supra* note 477 (discussing progressive development of race-based rights in a democracy as evolution from the first to the fourth tier). While sympathetic to the objectives of the Civil Rights Movement, Indian tribes are less interested in professing victimhood and framing their claims to fit the African American boilerplate of oppressed racial group seeking integration in the dominant culture than they are in developing a theory of legal mobilization that jibes with the political goal of self-determination. DELORIA, CUSTER DIED, *supra* note 52, at 168.

619. For a discussion of these potential programs, see *infra* notes 727, 761.

620. If past is prologue, even if a battle for reparations were to result in Indian victory, an increase in Indian economic prosperity, without reform of the laws and institutions that suppress Indian autonomy, will invite a corresponding increase in the degree of external interference with and manipulation of tribal institutions. See LOPACH ET AL., *supra* note 179, at 5.

621. Morally central to the Indian claim for redress is the idea that treaties impose upon parties the ongoing moral obligation to act in fairness and in good faith. See Tsosie, *Sacred Obligations*, *supra* note 49, at 1620-21 (noting the Indian philosophy that treaties with the United States are "multicultural agreements that impart duties of good faith and fair dealing.") (quoting WILLIAMS, LINKING ARMS, *supra* note 115, at 112).

622. See Magee, *supra* note 38, at 875-76 (contrasting reparations with a "cultural equity" method of racial redress that requires acknowledgment of and respect for the "cultural-experiential differences" between whites and nonwhites and offers not merely compensation but a "host of creative public and private policy initiatives" to enhance minority participation).

623. Newton, *Courts of the Conqueror*, *supra* note 38, at 765.

improbable remedy toward which to commit their resources,<sup>624</sup> because reparations portends more racial strife than reconciliation and fixates on cash rather than justice or healing,<sup>625</sup> many Indian tribes and indigenous rights groups<sup>626</sup> oppose it as a remedy.

## B. Reconciliation

### 1. General Theory

Reconciliation, or "restorativism,"<sup>627</sup> is a nonpunitive,<sup>628</sup> eclectic<sup>629</sup> paradigm that reorients redress from money<sup>630</sup> toward healing,<sup>631</sup> via

624. Brew, *supra* note 28, at 198-99 (noting that the expense of the legal and political tactics necessary to win reparations exceeds the capacity of most, if not all, Indian tribes).

625. See Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories*, 7 VA. J. SOC. POL'Y & L. 195, 217-21 (2000).

626. WGIP, concerned about coerced sales of tribal resources by co-opted leaders, would deny to indigenous peoples the right to alienate group property. See Matsuda, *supra* note 51, at 396 n.291 (castigating such "devil's compacts"). Indeed, some Indian leaders "have as their primary goal cooperation with non-Indians" rather than protection of the claims of past and future generations. BOLDT & LONG, *supra* note 64, at 77. Moreover, factionalization (multiple tribes can inhabit a single reservation, religion, membership, and development questions divide tribes) prevents any pan-tribal consensus behind reparations as remedy. LOPACHET AL., *supra* note 179, at 5-6.

627. "Restorativism" refers to legal processes that draw upon communitarian, non-adversarial, and healing traditions of indigenous legal systems. Eric Yamamoto, *Rethinking Alliances: Agency, Responsibility, and Interracial Justice*, 3 ASIAN PAC. AM. L.J. 33, 65 (1995) [hereinafter Yamamoto, *Rethinking Alliances*].

628. See John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999) (ascribing to reconciliation the notion that "punishment adds to the amount of hurt in the world, [and] justice has more meaning if it is about healing . . .").

629. Yamamoto, *Rethinking Alliances*, *supra* note 627, at 69 (tracing theoretical roots of reconciliation to theology, psychology, and indigenous knowledge); HENRY STEINER, TRUTH COMMISSIONS 12 (1997) (suggesting reconciliation praxis commingles law, theater, and therapy).

630. Because closure, rather than heightened tension, is the purpose, any compensation allotted to augment reconciliation is subjected to public consensus-building. Minow, *Not Only for Myself*, *supra* note 32, at 679.

631. While reparations makes only lukewarm gestures toward palliating relationships and psyches, reconciliation repositis great faith in its capacity for "healing injured bodies, minds, and spirits[.]" Yamamoto, *Rethinking Alliances*, *supra* note 627, at 65; see also DAVID M. FISHER, HEALING THE WOUNDS 38 (1993) (describing group healing via reconciliation). Reconciliation liberates victims from worthlessness and self-blame and frees perpetrators from guilt and animus. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318 (1987) (noting therapeutic benefit of reconciliation).

demythification<sup>632</sup> and exchange of apologies<sup>633</sup> for forgiveness,<sup>634</sup> a wounded body politic.<sup>635</sup> Remedies<sup>636</sup> are jointly crafted<sup>637</sup> to encourage the dominant group to recognize<sup>638</sup> moral responsibility<sup>639</sup> for past injuries, to reconstruct<sup>640</sup>

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632. Groups and nations "filter and twist, recall and forget 'information' in reframing shameful past acts[.]" Hom & Yamamoto, *supra* note 9, at 1758. Understandings of what happened are collective memories transmitted inter-generationally as cultural property. See generally IWONA IRWIN-ZARECKA, *FRAMES OF REMEMBRANCE* (1994). Particularized collective memories too often become justificatory mechanisms for subordination and domination. KEN CHRISTIE, *THE SOUTH AFRICAN TRUTH COMMISSION* 44 (2000). Where the collective memory of one group has long dominated another, reconciliation begets national catharsis to reveal mutual humanities, intertwine proprietary memories, and reconstruct history. Robert S. Chang, *Facing History, Facing Ourselves*, 5 MICH. J. RACE & L. 111 (1999).

633. "The most difficult words [to utter] are, 'I am sorry.'" DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* 260 (1999). Still, the healing attendant to reconciliation can only commence from a sincere apology. Deborah L. Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1177-78 (1997) (stressing ameliorative capacity of a sincere apology).

634. Yamamoto, *Race Apologies*, *supra* note 22, at 54 (characterizing apology in consideration for forgiveness as "mutual performance"). Although forgiving does not equal forgetting, reconciliation imposes *reciprocal* duties: while a victim may condition forgiveness upon an apology, a victim who fails to forgive a truly repentant wrongdoer "release[s] [him] from further [obligation]." Samuel Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 FORDHAM URB. L.J. 1677, 1692 (2000).

635. See Yamamoto, *Race Apologies*, *supra* note 22, at 10-11 (enumerating "Recognition, Responsibility, Reconstruction, and Reparation" as "four Rs" of reconciliation); see also Levine, *supra* note 634, at 1681 (noting obligation of wrongdoer to repent, apologize, repair, and do penance in order to publicly repudiate the act, expiate guilt, induce forgiveness, and restore community).

636. Whether motivated by the desire for "purification" from sin or by secular commitments to justice, reconciliation must be voluntary: in contrast with reparations, it requires willing parties on both sides of the moral equation. Levine, *supra* note 633, at 1685 n.38.

637. See Braithwaite, *supra* note 628, at 1743 (noting that reconciliation requires agreement on how to repair the harm "in a way that all stakeholders can agree is just.").

638. See Yamamoto, *Race Apologies*, *supra* note 22, at 10-11 (numbering "recognition" — requiring a perpetrator group to acknowledge suffering, confess responsibility, and embrace a duty to heal victims — as step one of reconciliation). In most ethical traditions, recognition must precede forgiveness. Theresa Klosterman, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT'L & COMP. L. 833, 838-39 (1998).

639. Yamamoto, *Race Apologies*, *supra* note 22, at 11 (maintaining in step two — "responsibility" — that acknowledgment and remediation of systematic injustice is presently possible).

640. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 66 (1998) (noting "reconstruction" of connections between victims and communities through empathetic dialogue in step three).



and repair,<sup>641</sup> by affirmative measures,<sup>642</sup> the dignity and position of the aggrieved group,<sup>643</sup> and to usher in a "new moral economy" in which repetition of the past is unthinkable.<sup>644</sup> Although there may be no legal obligation incumbent upon a state to reconcile social groups,<sup>645</sup> by ushering in a "right relationship"<sup>646</sup> and a multicultural ethic of trust and respect,<sup>647</sup> reconciliation

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641. Yamamoto, *Race Apologies*, *supra* note 22, at 11 ("reparation . . . attenuate[s] one group's power over another"). Although its focus is moral, step four structurally alters the relationship between groups to accord victims a "share of the economic pie." Barkan, *supra* note 27, at 53-54 (holding that, even if not all injustice is resolvable and a "primordial, pre-injustice stage" is a fiction, reconciliation requires "fair [re]allocation of the basic resources that ensure full citizenship").

642. Such measures include public apologies, memorials and days of remembrance, legal and constitutional reform, creation of educational and medical trusts, and other acts of "self-imposed suffering[.]" Garvey, *supra* note 76, at 1813-22. Measures to foster intersubjective understanding are encouraged by CIL declarations. See UDHR, *supra* note 3, art. 26(2) ("education shall be directed to . . . promote understanding, tolerance and friendship"); ICESCR, *supra* note 3, art. 13(1) (same); Racism Convention, *supra* note 379, art. 7 (committing parties to adopt measures "in the fields of teaching, education, culture and information" that "promot[e] understanding, tolerance and friendship"). Although self-imposed penance may leave a wrongdoer diminished and self-resentful, it purifies stigma and offers inner peace.

643. Whereas objections to organizing concepts of group rights and harms dog reparations, reconciliation, as it "negotiates between the extremes of individual rights to the exclusion of all other rights on the one hand, and the privileging of tradition and community standards above individual rights on the other[.]" is more attractive to individualists. Barkan, *supra* note 27, at 54.

644. Reconciliation incorporates prevention and deterrence by adopting the theme "Never Forget" closely linked to Jewish remembrance of the Holocaust, that commits victims and wrongdoers to study the past, learn its lessons, and resolve to do better. See Wacks, *supra* note 625, at 207.

645. Although states are increasingly bound by customary and conventional obligations to prosecute, or at least investigate, violations of human rights, any such obligations remain "soft law." See, e.g., *Challenges to Fragile Democracies in the Americas: Legitimacy and Accountability*, 36 TEX. INT'L L.J. 319, 358-61 (2001) (suggesting that despite gradual emergence of a CIL norm, functional forms of redress of human injustice fall to political, rather than judicial, processes and as such cannot properly be construed as constituting binding legal obligations); Steven Ratner, *New Democracies, Old Atrocities: An Inquiry In International Law*, 87 GEO. L.J. 707 (1999) (distinguishing legal and non-legal state obligations to afford redress); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 88-91 (4th ed. 1990) (same).

646. See SALLY E. MERRY & NEAL MILNER, *THE POSSIBILITY OF POPULAR JUSTICE* 360 (1995) ("Right relationships are those that honor mutual human worth, that redress past wrongs . . . , and in which . . . neither fear nor resentment play dominant roles.").

647. Reconciliation elaborates trust and respect as foundational principles for co-existence. See Tsosie, *Negotiating*, *supra* note 187, at 92 (defining an "ethic of respect" as a philosophy of mutual dignity and worth in which differences in a pluralist society are tolerated and solutions to conflicts are negotiated, rather than coerced). For a renewed social contract between peoples to be valid it must be based upon this ethic. CREATING PEACE IN SRI LANKA:

"hasten[s] the day when people actually think in a color-blind way"<sup>648</sup> and a relegitimized<sup>649</sup> nation moves forward with all its social groups<sup>650</sup> marching in step.<sup>651</sup>

## 2. Praxis

### a) Institutions, Procedures, Remedies

As a non-law centric process, reconciliation proceeds not through courts<sup>652</sup> but through an ad hoc<sup>653</sup> institutional framework known as a "truth and reconciliation commission" ("TRC").<sup>654</sup> Although it is deeply imbedded in and

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CIVIL WAR AND RECONCILIATION 16 (Robert I. Rotberg ed., 1999) [hereinafter PEACE IN SRI LANKA].

648. Chisholm, *supra* note 367, at 681.

649. An unwillingness to grant redress to victims of gross human injustice is perhaps the greatest source of national delegitimization. See FOREST MARTIN ET AL., INTERNATIONAL HUMAN RIGHTS LAW & PRACTICE 1076 (1997) (noting that failure to grant redress is itself a cause of political instability and further violations of human rights); see also CHRISTIE, *supra* note 632, at 93 (suggesting that national legitimacy is reflective of the degree of peacefulness of the process whereby disputes between social groups are resolved). Moreover, the failure to grant redress festers in the national conscience as "toxic guilt" that degrades the attractive force of citizenship. Tsosie, *Sacred Obligations*, *supra* note 49, at 1664-66. By initiating intergroup dialogue and denaturing pernicious group attachments in favor of mutual identification with past tragedies as well as a collective stake in the future, reconciliation encourages "a politics of reidentification" in which relegitimized national citizenship and universal concepts of justice become chief repositories of individual loyalties and a nation is "born again." Robert Mesiter, *Forgiving and Forgetting: Lincoln and the Politics of National Recovery*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 137 (Carla Hesse & Robert Post eds., 1999).

650. Reconciliation is touted not merely as a device to soothe the national soul after civil conflicts but as a bridge between modern liberal and conservative ideology that crafts a new moral economy without overwhelming expenditure of public funds. Barkan, *supra* note 27, at 53.

651. Reconciliation does not come easily, and "believing it does will ensure that it will never be." TUTU, *supra* note 633, at 2. However, the "matrix of guilt and mourning" holds within it the promise of healing and national renaissance. Barkan, *supra* note 27, at 54.

652. Courts, as sites of adversity and hierarchy, are almost inherently unfit fora in which to reconcile. Still, at least one has ordered remedies sounding in reconciliation theory. See *Aloboetoe v. Suriname*, Inter-American Court of Human Rights (Ser. C) No. 15 (1994) (ordering, as remedies for indigenous victims of state torture and wrongful death, a public apology by the President of Suriname, compensatory relief, and naming of a park and square after the parent tribe). Nevertheless, reconciliation is ultimately a political, rather than judicial, process.

653. For an argument favoring a permanent international TRC, see Michael Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375 (1997).

654. Since 1974 more than twenty TRCs have been initiated on nearly every continent in

reflective of the "contested site of history" where it is born,<sup>655</sup> a TRC is typically a political organ created by a post-authoritarian government to investigate<sup>656</sup> the gross human injustices of the previous regime, construct and publicize an unflinching historical record,<sup>657</sup> provide a forum for catharsis<sup>658</sup> and penitence, and guide the national transition<sup>659</sup> to democratic unity.<sup>660</sup>

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states as diverse as Argentina, Bolivia, Chad, Chile, El Salvador, Ethiopia, Germany, the Philippines, Malawi, Rwanda, South Africa, Uganda, and Zimbabwe, and still more have been demanded for Bosnia, Mexico, South Korea, Honduras, and Sri Lanka. CHRISTIE, *supra* note 632, at 2. Though a lack of cash and courage has impinged many TRCs, several have aided reconciliation processes. See *id.* at 54-55 tbl. 2.1, 58-59 tbl. 2.2 (providing dates, objectives, and accomplishments for TRCs 1974-1999); Priscilla B. Hayner, *Fifteen Truth Commissions — 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 600-03 tbl. 1 (1994). TRCs have been instituted as alternatives to, as well as complements of, other modes of redress, including amnesty for individual perpetrators at one extreme and criminal prosecution at the other. In recent years Uruguay augmented reconciliation with an amnesty policy, Argentina employed a combination of prosecutions, exonerations, and pardons, and Chile and El Salvador instituted an investigation and disclosure model to publicize past injustices. For a discussion of hybrid models of national reconciliation, see Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

655. CHRISTIE, *supra* note 632, at 7. While there is theoretical interest in a generalized description of TRCs, "no architect of these institutions has proceeded by deduction from general principles." STEINER, *supra* note 629, at 8-9. Because each state that has created a TRC has imparted unto it a distinctive form, composition, and mission, in contrast to the more standardized remedy of reparations it is difficult to abstract analyses of their construction and operation. See TRUTH AND RECONCILIATION IN SOUTH AFRICA AND THE NETHERLANDS (Robert Dorsman et al. eds., 1999) [hereinafter DORSMAN ET AL.] (cautioning against abstract definitions of TRCs as "each is a construction [that] gain[s] and lose[s] meaning in the context of time and place").

656. The investigative mandate of TRCs varies broadly, with some restricted to simple investigating of facts and others tasked with causal analysis and explanation of the origins of intergroup conflicts. STEINER, *supra* note 629, at 7. Most TRCs are endowed with powers to access sensitive and secure information, either independently or in conjunction with the state, although investigative competencies range from powers of search, seize, and subpoena, to reliance upon voluntary, and unverifiable, testimony. CHRISTIE, *supra* note 632, at 7-10.

657. TRCs typically publish an open record or final report, and in the interests of transparency public hearings are often broadcast on national media. See Wacks, *supra* note 625, at 205-7.

658. Reconciliation theory provides that the very act of telling the story of suffering and oppression in a public forum is an act of healing and empowerment. See *id.* at 197 ("Giving the . . . microphone to individuals who have experienced [injustice] . . . facilitate[s] their empowerment.").

659. See STEINER, *supra* note 629, at 9 (stressing that despite variance across cultures and contexts, TRCs are invariably meant to launch radical departures from the moral principles and ideologies of past regimes and thus must be understood as transitional mechanisms).

660. CHRISTIE, *supra* note 632, at 91 (noting that the overarching purpose of a TRC is to "assist the healing of a traumatised, divided, wounded and polarised people")(quoting Bishop

Although their powers, membership criteria, and competencies vary, TRCs are typically staffed by citizens from a cross-section of racial, ethnic, and confessional groups, and nearly all permit direct victim testimony. After hearing evidence and making findings, TRCs draw upon any number of principles<sup>661</sup> to urge the state to adopt remedies, including systematic compensation or restitution, lustration in the case of individuals to whom responsibility is attributed,<sup>662</sup> and legal reform.<sup>663</sup>

*(1) South Africa: Reconciliation After Apartheid*

As apartheid crumbled around them, F.W. de Klerk and Nelson Mandela declared that "[r]econciliation between whites and blacks is a fundamental first step toward healing historic wounds and rebuilding the nation."<sup>664</sup> In 1995 South Africa passed legislation, with strong white support,<sup>665</sup> creating the Truth and Reconciliation Commission of South Africa ("TRCSA") to (1) establish a comprehensive record of the nature, causes, and extent of the gross human rights violations between 1 March 1960 and 10 May 1994; (2) establish the fate and whereabouts of victims of apartheid and restore their dignity; (3) determine the motives of the perpetrators; (4) decide on whether to grant amnesty; (5) recommend measures of reparation and rehabilitation;

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Desmond Tutu, from "Healing a Nation" *Index on Censorship*, No. 5, 38 (1996)).

661. The Truth and Reconciliation Commission of South Africa employed criteria derived from international humanitarian law, international human rights principles, and democratic values inherent in the South African Constitution in determining violations and identifying violators and victims. 1 Report of Truth and Reconciliation Commission of South Africa, 1998, at art. 64.

662. "Lustration" is the legal process wherein prior involvement in a discredited government renders individuals ineligible for government or other positions. TRCs have implicated individuals, including heads-of-state, for serious crimes including torture, rape, and disappearance.

663. Part of the theoretical attractiveness of reconciliation is its flexibility in tailoring of remedies. Whereas reparation is narrowly confined in its remedial sweep to issues of compensation, reconciliation permits implementation of political and legal safeguards, including constitutional reforms such as equal rights and nondiscrimination provisions. See PEACE IN SRI LANKA, *supra* note 647, at 182 (discussing reconciliatory proposals for reform of Sri Lankan and South African constitutions). Societies attempting reconciliation can redefine power relations by promoting the self-determination and autonomy, if not secessionism, of minority groups and indigenous peoples; similarly, national unity can be enhanced by increasing indigenous and minority representation in legislatures to protect devolutions of power. *Id.* at 176.

664. John W. DeGruchy, *South Africa's Past: Crimes and Reparations*, 111 CHRISTIAN CENTURY 1102 (1995).

665. CHRISTIE, *supra* note 632, at 7.

and (6) recommend measures to establish a culture of human rights and prevent further abuses.<sup>666</sup> The diverse, seventeen-member TRCSA,<sup>667</sup> chaired by Archbishop Desmond Tutu,<sup>668</sup> heard direct and indirect testimony<sup>669</sup> first from more than 14,000 victims and then from alleged perpetrators for a period of almost two years in a victim-friendly yet fair and transparent forum.<sup>670</sup> Animated by the African principle of "ubuntu," or interconnectedness,<sup>671</sup> TRCSA, which published a five-volume final report in October 1998, recommended that the government appoint an entity to oversee implementation of the following: (1) individual remedies, including issuance of death certificates, exhumations and reburial of the disappeared, clearing of criminal records, and granting of compensation in acknowledgment of suffering; (2) community remedies, including construction of memorials and repair of damaged medical, educational, and housing infrastructures; and (3) national remedies, including renaming public facilities, designation of a national Day of Remembrance and Reconciliation, and reform of institutions to prevent future abuses.<sup>672</sup> Most of the recommendations, including creation of the monitoring body and constitutional reform in recognition of the self-determination of black South Africans, have been implemented.<sup>673</sup>

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666. See Promotion of National Unity and Reconciliation Act ("PNURA") (No. 34), GG16579 of July 26, 1995. TRCSA was granted no powers to order remedies or enforce laws. *Id.*

667. Commissioners of TRCSA were representative of the South African population in race, gender, and political affiliation, though most were lawyers, doctors, and clergy. CHRISTIE, *supra* note 632, at 90. Commissioners were required to be "fit and proper persons who are impartial and who do not have a high political profile." PNURA, *supra* note 666, at art. 10.

668. Chairman Tutu was appointed by the President of South Africa, Nelson Mandela, in consultation with the National Cabinet. WACKS, *supra* note 625, at 202-03.

669. TRCSA established an e-based "register of reconciliation" to record the sentiments of the reticent and broadly extend catharsis and healing. See <http://www.doj.gov.za/trc/ror/index.htm>.

670. Although victims were permitted to testify in their own languages, TRCSA labored to preserve impartiality, and hearings were open to the public and broadcast on national media. The perception of fairness and transparency was heightened by the moral authority of Chairman Tutu, a "man-of-God who would fearlessly hold both the oppressor and oppressed to account." DORSMAN ET AL., *supra* note 655, at 17.

671. Yamamoto, *Race Apologies*, *supra* note 22, at 51-52 ("Ubuntu is the idea that no one can be healthy when the community is sick: [u]buntu says . . . [i]f I undermine your humanity, I dehumanise myself").

672. TRCSA, Recommendations, 5 FINAL REPORT ch. 8, <http://www.polity.org.za/govdocs/commissions/1998/trc/5chap8.htm>.

673. See S. AFR. CONST. art. 235 ("The right of the South African people as a whole to self-determination . . . does not preclude . . . the right of self-determination of any community sharing a common culture and language heritage"). DORSMAN ET AL., *supra* note 655, at 21.

(2) *New Zealand/Aotearoa: Waitangi Tribunal*

In 1975 New Zealand — successor state to Great Britain — created the Waitangi Tribunal in acknowledgment that the indigenous Maori had been injured for more than a century by British cultural assault and land seizure in violation of the 1840 Treaty of Waitangi.<sup>674</sup> Amended in 1985 to grant any Maori<sup>675</sup> claiming prejudice by any government policy standing before it,<sup>676</sup> the Tribunal is charged with investigating legislative or executive actions that violate Treaty principles, reporting facts, and making recommendations for

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For an evaluation of TRCSA, see Kader Asmal, *International Law and Practice: Dealing With the Past in the South African Experience, Address Before the American Society of International Law's 94th Annual Meeting* (Apr. 5, 2000), 15 AM. U. INT'L L. REV. 1211 (2000).

674. See REPORT OF THE WAITANGI TRIBUNAL ON THE ORAKEI CLAIM (WAI-9), at 12 (1987). The English-language text of the Treaty granted Great Britain sovereignty over New Zealand in consideration for permitting the Maori "full, exclusive and undisturbed possession of their lands and estates." Treaty of Waitangi (Maori-Gr. Brit.) art. 2 (1840). However, the Maori text grants to Great Britain *kawanatanga*, a form of dominion inferior to sovereignty, while reserving *rangatiratanga*, or rights to own, use, and manage lands; the Maori thus continue to assert that the Treaty is a *paipera tapu* — "sacred paper" — that recognizes their sovereignty and entitles them to remedies for its breach. SIMON REEVES, TO HONOUR THE TREATY 13 (1996). The complex legal dispute over the Treaty continues. See New Zealand Maori Council v. Att'y Gen. (1987) 1 N.Z.L.R. 641 (holding that the Maori either ceded sovereignty or affirmed British annexation of New Zealand). Without much concern for legal obligations, Great Britain purported to extinguish Maori customary rights of occupation through legislation transforming lands for sale to non-Maoris; appeals to the judicial system were doctrinally precluded. ALAN WARD, UNSETTLED HISTORY 4 (2000) (describing Crown seizures as "legalized rapacity"). However, by the mid-twentieth century New Zealand came to view the Treaty as having established a quasitrust relationship, a view given judicial notice in 1987 by the High Court. *Huakina Dev. Tr. v. Waikato Valley Auth.* [1987] 2 N.Z.L.R. 188 (declaring Treaty part of the "fabric of New Zealand society"). The trust obligation was recognized by Parliament in 1993 with an Act referring to the Treaty as "establish[ing] the special relationship between the Maori people and the Crown" involving an "exchange of *kawanatanga* for the protection of *rangatiratanga*." Te Ture Whenua Maori Act (1993 N.Z.).

675. In the context of eligibility for government benefits, the question, "Who is a Maori?" is as difficult to answer as the question, "Who is an Indian?" See *supra* note 597 (discussing difficulties in identification of Indian status). In the framework of the Waitangi Tribunal it is answered through domestic legislation that defines "Maori" as simply a "person of the Maori race of New Zealand" and descendants of any such person. REEVES, *supra* note 674, at 50. Practically, Maori status is determined by the Maori themselves. Moreover, few, if any, claims have been brought by individuals — the Maori, as with Indians, advance claims as violations of group rights.

676. See Treaty of Waitangi Amendment Act of 1985 (providing individual standing for any claim that is neither trivial nor "vexatious"). Findings of the Tribunal can be appealed to the Privy Council in London. See WARD, *supra* note 674, at 176.

redress.<sup>677</sup> Once a claim is registered the Tribunal initiates research, separately or jointly with the claimant,<sup>678</sup> prior to formal hearings. If findings support the claim, the Tribunal recommends remedies.<sup>679</sup>

From 1985-1998 the Tribunal, a public body with Maori and Paheka members,<sup>680</sup> accelerated its research and claim evaluation process,<sup>681</sup> and its expert jurisprudence fostered an enhanced public "understanding, . . . not only of Crown actions and Maori losses, but also of Maori society and interactions with the Crown and with settlers."<sup>682</sup> Although critics point to a fiscal cap of \$1 billion on the aggregate compensation available under the organic legislation and call for a series of reforms,<sup>683</sup> a number of settlements<sup>684</sup> providing land restoration, apologies,<sup>685</sup> and promises of political and legal reform<sup>686</sup> have led to a "growing confidence that historical grievances can be

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677. The Waitangi Tribunal is not a court and lacks jurisdiction to determine issues of law or conclusively resolve questions of fact. *See* *Te Rununga o Muriwhenua Inc. v. Attorney-General*, 2 N.Z.L.R. 641, 650 (Ct. Appeal 1990) (providing that a Tribunal finding lacks res judicata effect unless implemented by a court).

678. Funding for the research of claims before the Tribunal is provided by the New Zealand government and by legal aid organizations. *WARD*, *supra* note 674, at 41.

679. One of the first claims presented to the Tribunal alleged a wrongful taking of 700 acres and requested restitution to the tribe of those lands remaining in public ownership. *See* REPORT OF THE WAITANGI TRIBUNAL ON THE ORAKEI CLAIM (WAI-9). The Tribunal found "various breaches of the Treaty by the Crown" including "continuing denigration of [tribal identity]," failure to "secure an adequate economic base for the tribe to ensure its continued presence[.]" and uncompensated takings of tribal lands. *Id.* The Tribunal then urged the government to consider remedies, including restitution of lands, assistance in restoring tribal self-government, \$3,000,000 compensation for lost land use and missed development opportunities, passage of appropriate legislation, and preferential housing policies. *Id.* at 180-95. By the 1990s, many of these remedies had been approved and implemented.

680. "Paheka" is the Maori word for non-Maori New Zealanders.

681. *WARD*, *supra* note 674, at 1 (noting that by late 1998 more than 770 claims had been brought to the Tribunal, with new claims registered at a rate of seventy a year).

682. *Id.*

683. *Id.* at 176-7 (proposing removal of compensation cap of \$1 billion over life of Tribunal, provision of guidelines for case resolution, and drafting of legislation to aggregate claims).

684. Perhaps the most impressive settlement occurred in 1996 when the Ngai Maori accepted a comprehensive package of land, lakes, \$117 million, and an apology. *See New Zealand Settles Claim by Maori Tribes*, HONOLULU ADVERTISER, Oct. 6, 1996, at A18. The previous year, the Ngai rejected a cash settlement as it was not negotiated with all tribal leaders, it excluded claims to lands and resources, and the sum was paltry. *Frantz*, *supra* note 537, at 519.

685. In addition to land restoration and compensation, the Waitangi Tribunal has initiated a process of gradual reinvestiture of tribal sovereignty and resources in the Maori people. *Id.*

686. A Royal Commission is considering proposals whereby to increase Maori political and social power while creating a more secure legal position for the Treaty in the constitutional order. *See REEVES*, *supra* note 674, at 42. One suggestion, predicated upon a constitutional

worked through in ways that are manageable."<sup>687</sup>

### (3) *Hawai'i*

On November 23, 1993, President Clinton signed a joint resolution<sup>688</sup> formally acknowledging and apologizing for the overthrow of the Hawai'ian monarchy and the annexation of Hawai'ian territory by U.S. military forces in support of agricultural interests.<sup>689</sup> A broader commitment to the reconciliation of U.S.-Hawai'ian relations developed when in March 1999 Senator Daniel Akaka (D-Cal.) requested the Secretary of the Interior and the Attorney General to commit their respective agencies to a process of reconciliation between the United States and Native Hawai'ians.<sup>690</sup> In December 1999, the United States, through the Departments of Interior and Justice, held a series of public meetings to lay the foundation for this process

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arrangement that would increase Maori representation in the Paheka-dominated government, would allot equal seats to Maori and Paheka legislators in a revised Parliament. *Id.* at 52. Another proposal, recognizing that the first might be repealed on a simple majority vote, would amend the constitution to devolve power to a newly-created Maori Congress of appointed elders and elected representatives with competence to actively form Maori policy. *See* F.M. BROOKFIELD, *WAITANGI AND INDIGENOUS RIGHTS: REVOLUTION, LAW AND LEGITIMATION* 173-5 (1999) (calling for a Maori Congress as a revising chamber with power to delay, and even reject, measures it finds contrary to principles of the Treaty) (referencing Constitution Act of 1982 (Can.), at §35(1) (protecting indigenous rights against legislative or administrative acts through constitutional reform)).

687. *See* WARD, *supra* note 674, at 2 (noting ongoing work of "researching and hearing claims, . . . identifying issues requiring redress, . . . further clarifying the principles governing levels of reparations, and . . . framing structures to ensure that as many Maori as possible benefit").

688. As the legislation was styled as a joint, rather than a concurrent, resolution or a "sense" of Congress, it has the full force of federal law. *See* *Ann Arbor R.R. Co. v. United States*, 281 U.S. 658, 666 (1930) (treating joint resolution as equivalent to any other legislation enacted by Congress).

689. *See* Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510, 1514. For a detailed discussion of U.S. violations of law in the overthrow and annexation of Hawai'i, *see* Lisa Cami Oshiro, *Recognizing Na Kanaka Maoli's Right to Self-Determination*, 25 N.M. L. REV. 65, 86 (1995); Francis Anthony Boyle, *Restoration of the Independent Nation State of Hawaii Under International Law*, 7 ST. THOMAS L. REV. 723, 723 (1995) (stating the U.S. government has "officially conceded . . . that Native Hawaiian people have the right to restore the independent nation state that you had in 1893 when the [U.S.] . . . came and destroyed it.")

690. *See* John Berry & Mark Van Norman, *From Mauka to Makai: The River of Justice Must Flow Freely* (Report on the Reconciliation Process Between the Federal Government and Native Hawaiians) at i (Oct. 23, 2000) [hereinafter *Hawaiian Reconciliation Report*] (urging the United States to take action to "rectify the injustices" and create a "better future" for the Native Hawai'ian people).



at a "crucial time" in Native Hawai'ian history.<sup>691</sup> By August 2000, the United States acknowledged, in a Draft Report released for public notice and comment,<sup>692</sup> a pattern of dishonorable dealings with Native Hawai'ians and stated, "as a matter of justice and equity," that Native Hawai'ians were entitled to self-determination and to the benefits of a trust relationship with the United States<sup>693</sup> The final report, although it insists that "[c]ase-by-case litigation would not be the most productive avenue for reconciliation," acknowledges the harms inflicted by the United States<sup>694</sup> and recommends proposals, summarized as follows, to effect redress: (1) passage of federal legislation to create a relationship with Native Hawai'ians predicated upon consent and mutual sovereignty,<sup>695</sup> (2) establishment of a Native Hawai'ian Advisory Commission to consult with all federal and state agencies that manage Hawai'ian land or affect cultural issues, and (3) recognition of an ongoing moral responsibility to supervise reconciliation of U.S.-Hawai'ian relations and provide for the general welfare of Native Hawai'ians.<sup>696</sup>

Skeptics question whether reconciliation between the United States and Native Hawai'ians can ever yield a revised history and remedies on the basis of that history.<sup>697</sup> The final version stops short of recommending establishment of a Native Hawaiian Advisory Commission to "serve as the representative voice of the Hawaiian people" and provide social services in culturally-appropriate fashion.<sup>698</sup> However, despite its failure to recommend land restoration, and notwithstanding the fact that it creates no legal rights or obligations, the Hawaiian Reconciliation Report is merely a progress report: examination of "the full nature and extent of the rights and obligations that Congress could consider in legislation to formally extend Federal recognition,

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691. Press Release, U.S. Dep't of Interior, Native Hawaiian Reconciliation Draft Report Released 1 (Aug. 23, 2000), available at <http://www.doi.gov/nativehawaiians>.

692. See Hawaiian Reconciliation Report, *supra* note 690, at 2 (urging "congressional confirmation of a political, government-to-government relationship between Native Hawaiians and the Federal government pursuant to Congress' plenary authority over Indian Affairs.").

693. See Press Release, *supra* note 691, at 1 (quoting John Berry, Assistant Secretary for Policy, Management and Budget, Department of the Interior).

694. See Hawaiian Reconciliation Report, *supra* note 689, at 3.

695. *Id.* at 3-5 (stressing right of Native Hawai'ians to economic, educational, health, and cultural self-determination and recommending relationship with the United States akin to that of Indian tribes).

696. *Id.* at 4.

697. See STEINER, *supra* note 629, at 1223 (stating that in the United States the use of reconciliation to revise history and provide remedies to victims of history is an "especially controversial" project).

698. See Hawaiian Reconciliation Report, *supra* note 690, at 3.

self-determination, and self-governance to Native Hawaiians" lies ahead.<sup>699</sup> Moreover, given the doctrinal and jurisprudential obstacles to the redress of injuries suffered by racial groups at the hands of governmental actors, for Native Hawaiians, reconciliation, though it may be imperfect, is the only open road to remediation.

### 3. *Criticism of Reconciliation, and Responses to Critics*

Critics present a litany of claims to denigrate reconciliation as more fantasy than viable remedial model, including embedded racism, the costliness of effective redress, the likelihood of reopening old wounds, the inadequacy of remedies, and the impossibility of uniting diverse racial, ethnic, and political groups behind one national history and future.

#### a) *Imbedded Racism Precludes Sincere Redress*

For CRT theorists, reconciliation, a remedy akin to reparations if only in that it requires the consent of the political branches of government in order to skirt numerous claim preclusions available to defendants in judicial tribunals, is doomed by the fundamental principle of politics and law: the persistence and pervasiveness of white racism.<sup>700</sup> If the dominant social group will not relax control over the levers of political, economic, and social power, and the scope of minority rights is conditioned by the will of the majority, advocates of reconciliation must acknowledge the wisdom of Frederick Douglass: "Power concedes nothing without a struggle. It never did, and it never will."<sup>701</sup> Observations of TRCSA and the Waitangi Tribunal feed the mills of critics.

Although F. W. de Klerk and Nelson Mandela committed their respective racial and political groups to national reconciliation, many white South Africans refuse to accept any involvement in or responsibility for the official policy of apartheid despite a vast trove of evidence implicating their tacit knowledge of and support for the policy,<sup>702</sup> and some whites have exhibited

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699. *Id.* at 5.

700. See Magee, *supra* note 38, at 909-10.

701. FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE (1845). Unlike reparations, which "communicate[s] counter-narratives to dominant stories about the racial order" in order to seed political terrain before adversarial claims, reconciliation holds out hope for an interdependent national identity. Yamamoto, *Racial Reparations*, *supra* note 12, at 493.

702. CHRISTIE, *supra* note 632, at 26-28, 144 (differentiating Afrikaaner reactions to TRCSA findings into four categories in approximate order of frequency: (1) shock, (2) claim to have been part of resistance to apartheid, (3) outright racism, and (4) desire to be responsible and

little or no contrition but rather a great deal of denial and anger.<sup>703</sup> Moreover, although De Klerk offered a grudging apology for apartheid on behalf of the state, in his summary of government policies and practices he categorically denied knowledge of human rights abuses, alleged that if such abuses occurred they were attributable to the African National Congress, and asserted that black South Africans had "benefitted enormously" from apartheid.<sup>704</sup> For many critics the failure to fully and accurately acknowledge apartheid as a gross injustice truncated the reconciliation process and emptied the apology of any meaningful content. Similarly, some Pahekas, frustrated with the proliferation of Maori claims and the prospect of restructuring the legal and political architecture of New Zealand, are pressing for termination of the Waitangi Tribunal.<sup>705</sup> Racial animus, though more muted than in South Africa, is one of several engines driving attempts to curtail reconciliation with the Maori.

Although they concede the continuing salience of racism, proponents of reconciliation do not despair that attempts to acknowledge historical truths, recognize moral responsibility for past harms, and restore victims and wrongdoers alike to health and unity confront not only the doubters but the defiant. The victory conditions appurtenant to the implementation of reconciliation can be defined as narrowly as merely commencing public moral instruction about the ongoing and pernicious effects of racism, a phenomenon the present generation is apt to ascribe to history.<sup>706</sup> Moreover, reconciliation,

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offer redress). Against the grain of months of publicly-broadcast victim testimony, many white South Africans rejected victim stories as hearsay with an eye toward a financial windfall. DORSMAN ET AL., *supra* note 655, at 20. TRCSA thus effectively granted a fair percentage of white South Africans the irresistible opportunity to officially assert ignorance and state betrayal of their trust — in effect, to assume for themselves the status of co-victims — instead of accepting complicity in and responsibility for the injustices undertaken for their benefit. *Id.* at 38.

703. See CHRISTIE, *supra* note 632, at 156, 166-71 (referencing empirical data that indicate many white South Africans are more angry post-reconciliation, that few listened to public hearings, and that even fewer commented on the web-based register established to glean their insights); *id.* at 26-28 (noting that one of two Afrikaaner members of TRCSA wrote a report defending apartheid while the other resigned over the decision to require Botha to testify).

704. De Klerk tacitly offered the argument that "separate but equal" schools and housing constructed by the government for black South Africans were preferable to no housing at all. See Yamamoto, *Race Apologies*, *supra* note 22, at 57 (discussing 30-page De Klerk Report).

705. See WARD, *supra* note 674, at 178 (noting that "[m]any [white New Zealanders] no doubt wish that the whole process would somehow go away.").

706. See Wacks, *supra* note 625, at 253-4 n.189 (quoting Facing Race, The NewsHour with Jim Lehrer (MacNeil/Lehrer Productions, Sept. 30, 1997) (statement of Angela Oh) ("And I've actually had young . . . college-educated people tell me that, you know, this [racism] is just not an issue of my generation. It seems to be something that's leftover from the '60s.")).

a relative newcomer to the pantheon of remedies for gross human injustices,<sup>707</sup> must begin the conciliatory journey of a thousand miles with a single step: advocates stress that even if the perpetrator group offers nothing more than a grudging apology, "faked remorse is better than nothing," for "doing the right thing, even for the wrong reason, can sometimes lead to doing the right thing for the right reason."<sup>708</sup> Finally, reconciliation proponents recognize that, though theirs is a plea for resolution, rather than intensification, of social conflict, slaying the dragon of racism may require doing battle against forces of oppression and/or pacification.<sup>709</sup> Reconciliation does not terminate racism any more than the fall of the Berlin Wall yielded world peace: victims must remain vigilant.

*b) Inflames Racial Tension*

Reconciliation implies a return to normalcy, and without a compelling argument that the status quo is undesirable it is all too easy for critics, whose numbers are drawn most frequently from the former perpetrator group, to be dismissive.<sup>710</sup> Even where the necessity for redress manifests, critics scoff at the notion that reconciliation heals injured psyches and group identities and suggest rather that it "[e]xacerbates old issues that have been dug up anew."<sup>711</sup> For opponents of reconciliation, kicking through the leaves of history to air grievances is a disquieting, selfish exercise that calcifies group allegiance and suppresses pluralist affiliations.<sup>712</sup> According to this view, reconciliation, particularly when actuated as a TRC with the power to recommend broad legal and political overhaul, conjures up the ghosts of Nuremberg and Tokyo and

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707. See Levine, *supra* note 634, at 1692-93 ("Despite the prominent position it has held for millennia in religious and moral thinking, [reconciliation] is relatively new to . . . legal theory.")

708. Garvey, *supra* note 76, at 1850.

709. See Nader & Ou, *supra* note 158, at 40 ("[re]conciliation may lead to conflict as well as peace; and resolution may lead to injustice as well as justice[.]").

710. See Levine, *supra* note 634, at 1687 n.51 (warning that "obtuseness of the heart" — the self-satisfaction of those comfortable with the status quo — is deadly to reconciliation).

711. See Hayner, *supra* note 654, at 609.

712. Minow, *Not Only for Myself*, *supra* note 32, at 697. For anxious Pahekas, the Waitangi Tribunal created a "grievance industry fostered by hasty and poorly drawn legislation" which leads to sharper divisions, turning "history into a permanent bleeding sore that threatens the political consensus on which [New Zealand] is based." WARD, *supra* note 674, at 1. Whether and how such historical retrospection might venture across some invisible boundary into the counterproductive is the question: "Is there a golden mean, some 'proper' degree of collective memory appropriate for bearing in mind the cruelties and lessons of a troubled past, while not so consuming as to stifle the possibilities of reconciliation[?] How might one imprint such a memory on a people's or state's conscience? What purposes might be served by a detailed recording of gross abuses[?]". STEINER, *supra* note 629, at 7.

threatens to disrupt or even destroy nations.<sup>713</sup> Rather than discover the truth, experience catharsis, and heal, participants — victims and perpetrators — are wounded yet again.<sup>714</sup> Moreover, critics posit that, particularly where multiple groups lay claim to victim status, reconciliation can stimulate squabbling over the title of "most victimized;" rather than fixate upon an unsavory past, peace is served by disengagement from history and an abstract acknowledgment of mutual — perhaps inevitable — injustices.<sup>715</sup> In short, peace, an objective not found in the national rear-view mirror, will elude us all until we forgive, forget, and move forward.<sup>716</sup>

Similarly, victims are frequently unwilling to forgive their former oppressors, particularly where economic and social inequalities post-date the formal end of inter-group hostility and inequality.<sup>717</sup> Victims' refusals to forgive the most egregious of human injustices deserve a large measure of respect,<sup>718</sup> even if victims' interests in healing are more generally served by forgiveness, for those who have not suffered the indignities visited upon the victims would presume far too much in attempts to delineate the precise boundaries between the forgivable and the unforgivable. Moreover, forgiveness, just as apology, cannot be the subject of compulsion.

In response, reconciliation advocates stress that justice is a necessary, if insufficient, condition for peace, and, in turn, that attitudinal transformation of all parties is a prerequisite if justice is to be secured.<sup>719</sup> Without unraveling

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713. Proposals for constitutional reform in particular are threatening to the dominant social group where modifications to current legal and political structures erode privilege, dilute electoral and representational powers, trim the margin for direct domination, and enfranchise formerly unrepresented constituents. See WARD, *supra* note 674, at 1-2 (noting that Pahekas nearly unanimously oppose alteration of parliamentary democracy and common-law adjudication as currently practiced as threats to the unity and identity of New Zealand).

714. See Yamamoto, *Race Apologies*, *supra* note 22, at 68 (referencing political science research); see also Martha Minow, *The Work of Re-Membering: After Genocide and Mass Atrocity*, 23 FORDHAM INT'L L.J. 429, 430 (1999) [hereinafter Minow, *Re-Membering*] ("How we remember must not mistakenly produce narratives of collective guilt lying ready to be ignited by manipulative demagogues.").

715. HENRY STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1228 (2000).

716. See *id.* (presenting the "forgive and forget" critique that privileges peace over justice where, when every member of the dominant social group received benefits under the discredited regime, this universal culpability renders individualized justice a practical impossibility).

717. Ward, *supra* note 674, at 147.

718. See Trudy Govier, *Forgiveness and the Unforgivable*, 36 AM. PHIL. Q. 59, 71 (1999) (concluding that while "no one is absolutely unforgivable, whatever he or she may have done in this world," perpetrators of the most "ghastly" offenses who refuse to acknowledge or repair their wrongs may be "conditionally unforgivable").

719. See Chisholm, *supra* note 367, at 703-04 (estimating chance of declarations of social

the underlying origins of intergroup enmity and providing opportunities for the confession of and atonement for unjust acts, any attempts to attain present-day social peace will founder on the absence of any genuine acknowledgment of, and forgiveness for, historical wrongs: peace requires justice, which requires the guilty to admit to, accept responsibility for, and repair unjust acts, while requiring the victims to grant forgiveness in exchange. Although the pursuit of justice may be a painful venture for all concerned,<sup>720</sup> mere declarations of social peace do not suffice: every link in the chain of peace must be forged in truth and tempered in pain, and to reject responsibility for justice at any point is a pernicious election of efficiency and comfort, or perpetual victim-status, over reciprocal moral obligations, with implications for the ultimate integrity of the society in which such a choice is made.<sup>721</sup> Victims are no more entitled to revenge than perpetrators are entitled to commit further acts of injustice, and, responsibilities to atone and forgive are reciprocal. Reconciliation directs wrongdoers and victims to atone and forgive and makes possible secular absolution of the nation.<sup>722</sup> By teaching everyone to remember the past in such a way as to collectively resolve not to repeat it while refusing to grant any group the right to arm itself with the past as a weapon with which to exact revenge on another group, reconciliation bears only the promise for genuine national healing and reunification on less exclusivist grounds.

*c) Too Costly, or Insincere Half-Measures that Buy History at a Discount?*

Reconciliation draws further fire from those who generally brand racial

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peace "healing the . . . divide, without addressing the underlying sources of . . . animosities, as unlikely as healing a festering wound by applying bandages, without first cleaning away the . . . pus").

720. See Wacks, *supra* note 625, at 208 (insisting that public expressions of wrongdoing, though intensely painful, are essential to mythic deconstruction, catharsis, expiation, and healing).

721. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1706 (1976) (arguing that failure to consider the benefits of the moral development of society in analyzing the costs of administering justice sets the stage for the "cheaper and cheaper production of injustice and social disintegration").

722. Reconciliation can demonstrate to members of the perpetrator group that the suffering of the victim group has earned them a rightful place in the nation while binding both groups even closer together. See DORSMAN ET AL., *supra* note 655, at 31 ("out of all this, the wrangling, lying, squirming, blaming, posturing, politicking, the vanity, the moral arrogance, the shortcomings, rose the soul of my country . . . and every time I hear that I know I belong nowhere else . . .").

redress an "unproductive complaining, free-for-all which wastes the taxpayers' money."<sup>723</sup> Redistribution of material resources may strain the confines of the politically possible, particularly in materially-deprived societies. In stark contrast, many advocates of inter-group justice fear that reconciliation, particularly where unaccompanied by weighty compensation, functions as "hush money" that liberates wrongdoers too easily from moral burdens<sup>724</sup> and purchases victims' silence with useless symbols and empty apologies while offering little of consequence — i.e., monetary compensation — to the most needy.<sup>725</sup> More radical victim-critics, seeking restoration of lands and sovereignty, may reject political compromises attendant to negotiation and demand not only significant financial compensation but full control over natural resources, power-sharing agreements, separate representation and taxation, rights to secede, or even restoration of indigenous sovereignty over the entirety of national territory.<sup>726</sup> This group-based separatism feeds on the perception of reconciliation-as-pacification and compounds the struggle toward a unifying national identity and citizenship.

Despite the foregoing, advocates remain sincere in their conviction that reconciliation is not only a cheaper but a more effective path to harmony and justice, and if they win the hearts of minds of neither the most stingy or callous of perpetrators nor the most vindictive or separatist of victims they can

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723. Wacks, *supra* note 625, at 251-52. While certainly not as costly as reparations, reconciliation might lack the approbation of politicians whose fiscal conservatism blinds them to its social benefits. Acknowledgment and recognition of state responsibility for past injustice are cheap, but repair can founder on the shoals of lucre. See *Rosewood Case Takes Wrong Path*, PENSACOLA NEWS J., Apr. 18, 1994, at A6 ("'I object only to the money,' stated one state representative, 'but a recognition that something terrible happened, I could support that.'").

724. See Wheeler, *supra* note 44, at 55-56 (indicating that reconciliation absent adequate compensation deeds to perpetrators the benefit of the victims' "validation of their right to hold on to the unjust gains" accruing during the previous regime).

725. See Timothy Garton Ash, *South Africa: True Confessions*, N.Y. REV. BOOKS, Jul. 17, 1997, at 34 ("[It] was usually the more well-off individuals for whom the symbolic act of telling their stories and symbolic reparations would suffice . . . [F]or those who were poor . . . the main motive coming was simply the hope of material compensation. The poor can't eat tombstones."); see also Yamamoto, *Race Apologies*, *supra* note 22, at 52 (contending that "storytelling about personal trauma and words of apology" must be accompanied by companion policies of structural and attitudinal reform, as well as material compensation); MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 6-10 (1997) (suggesting that reconciliatory approaches to redress of gross human injustices fail to provide closure and fail to deter repetition).

726. See Michael Field, *Bolger Gives Blunt "No" to Maori Seeking New Zealand Sovereignty*, AGENCE FRANCE-PRESSE, May 15, 1995 (noting the most contentious settlement demands of some Maori for claims against New Zealand); see also BROOKFIELD, *supra* note 686, at 175-76 (noting Maori proposals to split New Zealand into Paheka and Maori nations).

still champion reconciliation as a mode of redress pregnant with opportunities for both historical and moral correction, a claim unavailable to exponents of any other remedy.

*d) No Common Truth or Vision*

Reconciliation can offer portage to only so many expectations, particular in societies where conflict has only recently ended and the mission is not simply to restore the status quo ante but to institute equal political citizenship and justice on the site where once there was conquest and subordination.<sup>727</sup> Distinct peoples cling tenaciously to differing versions of the truth, as well as contending ideas of what values, images, beliefs, and attributes are or ought to be constitutive of the nation, and where peoples cannot yet agree about what transpired, or where no common national identity can be sculpted from competing collective memories,<sup>728</sup> the time is not yet ripe<sup>729</sup> for reconciliation. South Africa has yet to arrive at a common understanding of history, of responsibility for that history, or of how to transcend that history, and may never.<sup>730</sup> If the preconditions of community are incapable of satisfaction through reconciliation, proponents of redress must search elsewhere for the Holy Grail of justice and harmony between peoples.

Notwithstanding the impossibility of locating universalizable answers to the existential questions, "What is truth?" and "Who am I?",<sup>o</sup> and despite the fact that reconciliation may fail more often than not,<sup>731</sup> supporters hold firm to the conviction that reconciliation is the start of the journey toward intergroup healing and the forging of a common national identity and vision. Whereas

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727. Timing may be a variable of cardinal importance in that there is an ideal window of opportunity — not immediately following regime change when there has been insufficient cooling of passions and justice can be individualized, but not too long after a subsequent regime assumes authority and memories of injustice grow dim and overbroad to the point where no one bears a sense of responsibility — to bring a claim for reconciliation. See Minow, *Not Only for Myself*, *supra* note 32, at 681; see also Jonathan Tepperman, *Truth and Consequences*, FOREIGN AFF., Mar./Apr. 2002, at 142 (suggesting that for societies recently riven by conflict it may be impossible to achieve more than a mere "nonlethal coexistence").

728. In a profound sense, truth is not an absolute concept but one dependent upon group identity and memory. CHRISTIE, *supra* note 631, at 172.

729. The assumption that truth can be recognized as such by all contending social groups is possibly the weakest unstated premise in the theory of reconciliation. *Id.* At least with reparations or individual prosecutions of wrongdoers, truth, or a facsimile for truth, is pronounced as a matter of law and policy. *Id.* at 49.

730. See Yamamoto, *Race Apologies*, *supra* note 22, at 67 (noting that TRCSA has failed to produce a "societal narrative" to guide future reconciliation).

731. Garvey, *supra* note 76, at 1846.



reparations, a status quo remedy narrow in its consideration of possibilities for healing, marks the death of group interdependence and the demise of mutual moral and political responsibility, reconciliation heralds a new social and moral order.

#### IV. *The Claim for Indian Reconciliation*

##### A. *Acknowledge Harm and Recognize Wrongs: National Demythification and the American Indian Reconciliation Commission*

"Legal amnesia," ignorance, and malignance stand between Indian claims for redress and a legal and political system that has denied justice to the original inhabitants of the United States for centuries.<sup>732</sup> Even if most Americans are not as racist as their forefathers<sup>733</sup> they remain a remarkably presentist people, particularly with regard to the factual and moral understandings that inform their collective memory of the events marking the "discovery," formation, and expansion of their nation at the cost of Indian lives, lands, and cultural patrimonies.<sup>734</sup> This ahistoricism has dire consequences for Indian redress, particularly where claims arise on

732. See Aviam Soifer, *Objects in the Mirror Are Closer Than They Appear*, 28 GA. L. REV. 533, 553 (1994) (labeling "failures of memory" to dismiss Indian claims for redress "legal amnesia", an act of indeliberate injustice). Unconscious psychological processes shield individuals from the pain of awareness of past atrocities and prevent them from having to grapple with present obligations to provide redress. Minow, *Re-Membering*, *supra* note 714, at 429.

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

734. For too long, the American national myth has swept genocide, land theft, and ethnocide under the national rug. See Michael Schudson, *Dynamics of Distortion in Collective Memory*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* 346 (Daniel Schacter ed., 1995). Addressing the conflict over ancient Indian remains, the author notes:

If you recall the [Indian Wars] . . . as part of the history of nation-building, it is one story; if you recall it as part of a history of racism it is another. If you see the skeletal remains of [Indians] from long ago as part of an impersonal history of the human species, the remains are valuable specimens for scientific research; if you understand them as the cherished property of their descendants, they deserve reverent treatment and should be reburied according to their customs[.]

*Id.*

"unfamiliar intellectual terrain" out of violations of complex historical agreements "rather than being ignited by the fire of the moment[.]"<sup>735</sup> Compounding the majoritarian unwillingness to wrestle with its historical ignorance are philosophical distortions built into the legal and political framework that render Indian justice claims all the more difficult to substantiate in the language of their colonizers. In short, the first step in U.S.-Indian reconciliation must be dismantling of national myth of Indian inferiority and white infallibility through retelling and re-envisioning U.S.-Indian relations from the cultural viewpoint of the victims of that history.<sup>736</sup> Indian claims stories — rich sources of truth that emerge from oral history to contextualize and humanize the Indian experience while revealing the inadequacy and falsity of the record as it now stands — can be a powerful source of liberation and legitimization for all Americans.<sup>737</sup>

Thus, the first element of U.S.-Indian reconciliation should be Congressional passage of legislation, ideally by bipartisan action, to establish and fund a formal and independent TRC<sup>738</sup> charged with (1) investigating Indian claims afresh; (2) allowing Indian voices to enrich and debunk the sanitized national record with oral histories uncomfortable to majoritarian

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735. Charles Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WISC. L. REV. 375, 378.

736. See Soifer, *Redress, Progress*, *supra* note 394, at 526 ("The prevailing presumption is that somehow, sometime — perhaps when we weren't paying attention — sufficient justice and equality came to prevail. Therefore . . . we all now enjoy an equal, fair start in the cosmic race of life. We hold tightly to this credo as if it were self-evident, no matter what the actual evidence may be.")

737. Indian claims stories are emerging in contemporary literature and scholarship. See, e.g., PETER NABOKOV, *NATIVE AMERICAN TESTIMONY* (4th ed. 2000) (presenting Indian claims stories of genocide, land theft, and ethnocide); SHERMAN ALEXIE, *THE TOUGHEST INDIAN IN THE WORLD* (2000) (presenting contemporary Indian struggles to preserve cultural identity). However, a broader audience is necessary to effectuate reconciliation and re-legitimization: were the United States to assist the public airing of the Indian side of the story it would legitimize the country as a nation committed to justice even where such a commitment is embarrassing or implicates the moral foundations of its sovereignty.

738. See Wacks, *supra* note 625, at 221-24 (suggesting that although federal, state, and local governments would assist with funding and logistics, any TRC created to advance the cause of racial reconciliation in the United States must retain formal independence in order to preserve neutrality and functionality); see also Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT'L & COMP. L. 1017 (2001) (discussing proposal to create such a TRC). Fears that AIRC might prove too costly should be seen for what they really are: excuses not to consider reconciliation. The Warren Commission, a body created to investigate the death of a single man — President Kennedy — cost more than \$30 million. AIRC, a body intended to explain the deaths of millions, cannot be refused solely on financial grounds.

ears; and (3) persuading the United States to formally acknowledge the wrongs inflicted upon Indian tribes and individuals over the period 1776-2002 in a new national creation-story.<sup>739</sup>

Membership of the American Indian Reconciliation Commission ("AIRC") would consist of equal numbers of Indians and non-Indians and include tribal chairpersons and national elected officials; jurists, lawyers, and scholars versant in federal Indian law, tribal legal systems, and indigenous rights regimes; and clergy, with a secretariat versant in Indian issues. Drawing upon the experiences of precedent TRCs, AIRC would identify sites across the country, such as Indian reservations, major urban centers with significant Indian populations, and universities, where fora would be established to which tribes and individual Indians could submit requests to testify about experiences past and present.<sup>740</sup> Requests might be reduced to writing on a standard form, filed with the closest forum, and considered by a committee established for that purpose.

AIRC would broadcast hearings and testimony on public broadcast media and an internet website, and transcripts would be circulated in newspapers to facilitate transparency and the wide dissemination of Indian stories. Although testimony might be shocking and difficult matter to which to listen,<sup>741</sup> as nothing could conceivably implicate living persons in any criminal activity, AIRC need not keep secret witness identities, nor would it need to grant amnesty. Victims would receive a certificate recognizing their contribution

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739. Although the plenary power of Congress over Indian affairs is beyond doubt, recent case law suggests that the standard of review of federal legislation under equal protection analysis may have created legal loopholes through which opponents of reconciliation might slip to prevent redress of Indian claims. *See supra* Benjamin, note 609. Although Indian tribes are political rather than racial categories, to avoid or mitigate the potential for litigation and preserve a rational basis standard of review, Congress could clearly state factual findings supporting Indian reconciliation in a series of "Whereas" clauses such as the following: "Whereas the economic, social, and cultural effects of the deliberate web of dependency, underdevelopment, and racial subordination established by the United States have been devastating to Indian Self-Determination and to the physical and mental health, prosperity, cultural patrimony, and general well-being of Indian people and tribes [.]". *See* S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309 (1994) (presenting template for congressional findings in support of redress for Native Hawaiians).

740. For those unable or unwilling to testify publicly, testimony might be taken through deposition, affidavit, or by other means.

741. If testimony does not disturb, it does not serve truth-telling or deterrence. *See* Minow, *Re-Membering*, *supra* note 714, at 429 ("if we are not shocked . . . we have forgotten to remember, 'Never again.'").

to truth-telling and reconciliation.<sup>742</sup> Upon conclusion of its hearings, AIRC would send a final report to Congress and the President with nonbinding remedial recommendations, to include apologies, compensation, land restoration, and other measures to promote and protect self-determination.

### *B. Apologize*

After re-envisioning the history of U.S.-Indian relations persuades the United States to acknowledge harm to Indian tribes and individuals, AIRC should next direct the federal government toward relieving the burden of its national guilt-complex<sup>743</sup> while advancing the process toward forgiveness by recommending in its final report that the U.S. government issue a formal apology, on behalf of the United States and all its citizens past and present, as symbolic recognition of the role of public and private actors in past acts of genocide, land theft, and ethnocide.<sup>744</sup> National church and corporate boards might apologize for acts in which these institutions were complicit.<sup>745</sup> An appropriate apology should incorporate recognition of a corresponding moral, if not legal, obligation to negotiate repair.

### *C. Repair*

The most difficult phase of U.S.-Indian reconciliation is likely to be the process of repair and restoration. Even if the United States and its people, through elected representatives, are moved to apologize and promise to afford Indians "justice," it is far more difficult to reach agreement with Indian tribes

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742. See Wacks, *supra* note 625, at 233.

743. WHITE, *supra* note 287, at 273.

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

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

See *supra* note 28 (quoting letter from President Bush to Japanese-American internees).

745. Yamamoto, *Rethinking Alliances*, *supra* note 627, at 70.

as to what constitutes a "just" result, and still more difficult to cobble together specific legislation that satisfies all concerned.

### 1. *Land Restoration and Legal Reform*

#### a) *Land Recovery or In-Kind Transfers*

A combination of land restitution and, above all, legal reform occupies the apex of the remedial pyramid desired by Indian tribes.<sup>746</sup> Indian tribes and individuals deserve and demand restoration of lands to the limits of reason and equity, whether the specific properties taken from them by force-of-arms or, if this proves so disruptive to the settled expectations of present landowners that it threatens social peace,<sup>747</sup> in-kind grants from vast federal land holdings.<sup>748</sup> Some scholars suggested in the immediate post-Cold War era that

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746. This article is solely the assessment of the author and does not purport to stand as the official proposal of any Indian tribe or individual. Indian opinion ranges as broadly as that of any other political, racial, or ethnic group, and while many tribes and individuals surely subscribe to the proposals and recommendations offered herein, others may prefer solutions that are more or less supportive of group-based human rights such as collective self-determination, more or less insistent upon the defense of reserved rights under treaties, and more or less committed to legal reform as opposed to more radical means of change. Moreover, the use or exclusion of the historical experience of certain Indian tribes and individuals in illustration of particular points is intended with great respect. Part of the process of reconciliation will certainly be reconciliation between, and within, Indian tribes, and each and every Indian voice should be granted the opportunity to speak. Further, each Indian tribe should have the opportunity to graft specific remedies onto whatever remedial package is developed.

747. Because the prospect of wholesale evacuation of white landowners from Indian lands threatens the social peace, courts have been loathe to order the remedy of ejectment as applicable to redress white encroachment on Indian lands. *See* Cayuga Indian Nation of New York v. Cuomo, Nos. 80-CV-930, 80-CV-960, 1999 WL 509442 (N.D.N.Y. 1999); Cayuga Indian Nation of N.Y. v. Pataki, 165 F. Supp. 2d 266 (2001) (refusing to order ejectment of non-Indian possessors of land claimed by Cayuga Indians on grounds that the "public interest" would not be served by disrupting settled reliance expectations of non-Indian improvers of land and "prov[ing] all too vividly the old axiom: "Two wrongs don't make a right[.]" and that enforcement would be a practical impossibility). *But see* Banner v. United States, 238 F.3d 1348 (Fed. Cir. 2001) (ejecting white possessors who refused to accept Congressionally-ratified leases from Seneca Nation from Seneca land within limits of City of Salamanca and declining to compensate lessees for the lost value of improvements on ground that ownership of improvements on land belong to the owner, rather than the improver).

748. More than 650 million acres of federal lands are held for purposes of grazing, forestry, wilderness, and other uses and managed by federal agencies, in particular the Bureau of Land Management. Current federal law provides that the homeless receive first priority for use of "surplus" federal land and property. Stuart B. McKinney Act, 42 U.S.C. § 11411(f)(3)(A) (2000). The General Services Agency (GSA) administers conveyance of surplus federal land. 40 U.S.C. §§ 471-492 (2000). Surplus land is sold when the GSA determines there is no

transnational rights-based arguments claiming the sanctity of private property and objections to unjust enrichment would generate a more favorable political and legal climate for restitution of Indian lands.<sup>749</sup> This aspiration has yet to be realized, in part because the United States is not yet the safe environment for the coexistence of basic value- and cultural-differences that the liberal legal order insists is already upon us. Moreover, although compensation for the wrongful deaths of ancestors, the denial of the use of tribal lands and resources, and legal assaults on Indian religions, languages, and cultures may be in order, it is impossible to objectively quantify the value of those injuries and morally odious to try,<sup>750</sup> and compensation cannot reach, let alone discharge, U.S. obligations to dispatch the set of institutionalized doctrines and canons<sup>751</sup> that smother contemporary Indian land ownership and strip fundamental civil, political, economic, and social rights from Indian tribes and people.

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federal use, and surplus land is sold to the private sector for fair market value, either through sealed-bid competition, public auction, or mail auction. *Id.* Although Indian tribes are permitted to acquire surplus federal lands, the trust doctrine imposes, through extensive federal regulations and Secretarial oversight and veto power, obstacles to land acquisition. *See* 25 C.F.R. § 151 (2002). The National Congress of American Indians Land Recovery Task Force has proposed revisions to federal regulations regarding tribal acquisitions of federal surplus lands to facilitate expansion of the tribal land base. *See* Acquisition of Title to Land in Trust, 64 Fed. Reg. 17, 574 — 17, 588 (proposed Apr. 12, 1999)(to be codified at 25 C.F.R. § 151 (proposing modifications to, inter alia, limit discretionary power of federal agencies and officials, particularly with respect to the purposes for which such lands are acquired). More extensive legislative reforms might provide that federal surplus lands be granted in fee simple to Indian tribes in proportion to the acreage of their existing land claims against the United States *See generally* ROBERT WARRIOR, LIKE A HURRICANE: THE INDIAN MOVEMENT FROM ALCATRAZ TO WOUNDED KNEE (1996) (describing early such discussions in late 1960s and 1970s). Millions of acres of Western States such as Nevada, currently under Federal control, might be allotted to tribes for occupancy, sale, rental, or resource extraction. Although such a proposal would not directly restore sacred lands, it would enable tribes to sell recently acquired federal surplus acreage and resources for the purpose of purchasing sacred lands.

749. *See* Newton, *Compensation*, *supra* note 167, at 454.

750. For a rough attempt at quantification of the human costs of genocide, land theft, and ethnocide, *see supra* note 596 (evaluating Indian claims at more than \$4 trillion). However, the harm suffered is inherently inestimable to peoples for whom ancestors, land, and culture are spiritually interwoven and constitutive of identity in a manner irreducible to comprehension by Western legal minds. Any proposed sum might stoke the perception of greed or suggest that the real motivation for redress is vindictive and thereby goad the majority into political backlash.

751. Taken together, the international legal doctrines of discovery and conquest, as judicially incorporated in domestic law, as well as the trust doctrine, plenary power, and judicial subversion of reserved rights, constitute an interconnected matrix of legal disability that refers Indian rights to property, culture, religion, development, and self-government to interpretation, appropriation, and suppression by an oft-hostile non-Indian majority.

*b) Omnibus Indian Rights Act*

A series of legal reforms is essential, including an Omnibus Indian Rights Act ("OIRA")<sup>752</sup> to (1) strengthen protection of Indian religious, cultural, and property rights;<sup>753</sup> (2) create specific remedial programs for the benefit of Indian tribes and individuals;<sup>754</sup> (3) tighten judicial canons of construction to resolve ambiguities and construe treaty terms in favor of tribal reserved rights;<sup>755</sup> (4) incorporate, by implementing legislation, those principles of

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752. See ANAYA, *supra* note 37, at 134-35 (advocating a legislative approach to securing Indian rights where transformation of existing land tenure regimes or substantial reallocation of resources or authority is at issue).

753. Process is at least as important as doctrine. Even if *City of Boerne, Race Horse, Employment Division v. Smith, Dion, Tee-Hit Ton, Lone Wolf*, and all other case law burdening Indian cultural, religious, and property rights were stricken in a single legislative fiat, failure to alter the process by which laws are made in a democracy that enshrines the principle of majoritarianism would sow the seeds of future Indian disability in the soil of the new legal system. Although the precise mechanisms whereby to accomplish Indian participation in the drafting of legislation trenching in Indian affairs is open to debate, and although mere participation does not preclude truncation of rights through judicial review, Indian presence in the U.S. legal process is essential. OIRA might enhance protection of Indian religious, cultural, and property rights by (1) crafting explicit statutory exceptions to ESA for religious-based takings of endangered species, (2) mandating inclusion of Indian representatives in U.S. delegations to international organizations and quasi judicial bodies with competence over subject matter that implicates indigenous rights, including, e.g., the International Whaling Commission, the UNHRC, the General Assembly, and the Permanent Forum; (3) preempting state laws imposing penalties for religious-based use of controlled substances by including specific language in AIRFA to exempt Indian religions from the operation of state laws; and (4) explicitly restoring lands and usufructuary rights reserved in original treaties with the United States. Significant ethno-historical research would be required to lay a factual predicate for each restoration; scholars and historians would thus assist in drafting OIRA.

754. The purpose of including specific remedial programs within OIRA is to free remedial funds from the strings of dependence: recent federal block grants to tribes, though they have increased opportunities for economic development, have all too frequently been accompanied by a maze of regulations that defeats tribal initiative and substitutes legal accountability for cultural appropriateness. A chapter of OIRA would streamline the grant process, reduce management costs, and liberate future remedial programs from unnecessary federal oversight. Greater consultation with tribes in the block-granting process would rationalize expenditures of funds and lead to greater, and more culturally relevant, economic development. The forum for such negotiations might itself be the object of constitutional reformation.

755. At least one commentator suggests that, as U.S. federal courts are precluded, by institutional commitments to the legal doctrine of *stare decisis* and the political principles of majoritarianism and separation of powers, from revising canons of construction in defense of Indian reserved rights, any such reform can only transpire under the framework of a new institution unfettered by such legal and political baggage. A separate Court of Indian Affairs, with a bench populated in part by Indian judges and with schooling in the history of U.S.-Indian

international law supportive of the rights of indigenous peoples.<sup>756</sup> Furthermore, Constitutional Amendment[s] may be necessary to (1) renounce plenary power or permit devolutions of power that enhance tribal autonomy and sharply limit the subject matter and issue-areas in which Congress may treat Indian tribes as "domestic dependen[cies;]"<sup>757</sup> (2) shape the trust doctrine

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relations, and in particular the process of treatymaking, might be a fruitful avenue for further investigation and discussion. See VINE DELORIA, JR., & CLIFFORD M. LYTLE, *The Future of Indian Nations*, in THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 244-64 (1984). This Court might be created by Congress under Article III with appellate jurisdiction to hear cases sounding in federal Indian law and competence to award restitution of Indian lands and rights. Further, administrative agencies, particularly those that distribute benefits to tribes, should create rules that Article I courts, when adjudicating cases affecting Indian rights, appoint a special master fluent in Indian legal issues to hear the merits.

756. Positive legal reform may be inadequate, standing alone, given the present commitments of the dualist U.S. legal system to past moral judgments enshrined in legal precedents. See *supra* notes 433, 529, 533, 546, 547 (discussing failure of U.S. courts to incorporate a significant and growing body of CIL declarative of the group rights of indigenous peoples). In addition to the incorporation of much of the Draft Declaration in domestic law, a necessary outcome of any reformation of federal Indian law may be the recapture of the medieval ecclesiastical humanism that "perceived a normative order independent of and higher than the positive law or decisions of temporal authority" and "provided the jurisprudential grounds . . . to withhold the imprimatur of law from acts of earthly sovereigns found to violate th[is] moral code." ANAYA, *supra* note 37, at 10. A conference of jurists, scholars, and practitioners — assisted by the American Legal Institute — might be convened to restate federal Indian law: a Restatement of Federal Indian Law, ameliorated by the humanist tradition, might render unto Indian tribes a more normatively attractive foundation upon which to base their legal and political relationship with the United States. In sum, enhanced political and legal autonomy must be accorded Indians if the ravages of genocide, land theft, and ethnocide are to be transcended, and striking a balance between majoritarianism and moral obligations to afford justice must enlist the concerted efforts of interested persons of all hues and creeds. For advocacy of human rights treaties as *persuasive* legal sources, see Dorothy Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15 (1996).

757. Precedent exists with the inter-American system for a Constitutional Amendment in recognition of indigenous rights to self-determination: several American states have expressly adopted constitutional or statutory provisions to implement elements of international declarations regarding indigenous peoples. See, e.g., CAN. CONST. (Constitution Act, 1982) sched. B. (Canadian Charter of Rights and Freedoms) Part I, § 26 (guaranteeing that interpretation of the Constitution does not abrogate or derogate from aboriginal rights); CONST. OF ARG. art. 75 (1994) (recognizing indigenous peoples, their distinctive cultural identities, and their ancestral land rights, and directing the legislature to act accordingly); CONST. OF NICAR. art. 5 (as amended 1995) (affirming that the indigenous people of Nicaragua have the right to live and develop according to the forms of social organization that correspond to their customs, language, beliefs, and aboriginal rights to land). States across the globe are considering similar measures. If plenary power were abridged by constitutional amendment to grant tribal autonomy in all issue-areas save for defense and foreign relations, arguments for its retention



in the direction of judicially-enforceable guarantees of Indian welfare, or eliminate it entirely as a relic of colonialism and paternalism, rife with potential for abuse and dereliction;<sup>758</sup> (3) recognize Indian property as within the full meaning of the protections of the Fifth Amendment Takings and Just Compensation Clauses of the U.S. Constitution; and (4) restore or confirm the status of Indian tribes as entities superior to the states in the federalist hierarchy.<sup>759</sup> Preceding reforms might be fostered by legislative deconstruction

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would be easier to marshal. Whether devolutions of power might lead to separate Indian legislative bodies or merely to the constitutionally-enforceable guarantees that negotiations be conducted on the basis of a respect for mutual sovereignties and that tribal governments would be permitted much greater freedom from external interference or mediation, would be negotiated. It is not inconceivable that the process of constitutional amendment might pave the road to an eventual resumption of treaty-making with Indian nations that would incorporate the substantive protections of proposed constitutional reforms within new sacred texts. Such an approach — the rejection of plenary power as a barrier to enforcement of constitutional guarantees with respect to the rights of the nonwhite "Other" in favor of the incorporation of international legal principles within the domestic legal order — has been referred to by scholars as a "metaconstitutional" approach to the governance of nations within. *See, e.g.,* Natsu Taylor Saito, *Asserting Plenary Power over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 467 (2002).

758. Legislation or constitutional amendment to grant federal courts, or a Court of Indian Affairs, subject matter jurisdiction to hear cases concerning breaches of duty under the trust doctrine would resituate that doctrine on a more stable moral and legal foundation. *See supra* notes 303, 304 (noting narrow grounds under which suit by Indian claimants for breach of duty can be maintained against the United States). Corresponding measures to strip doctrinal defenses from the United States would be necessary; amendments to the FTCA should be considered. *See supra* notes 552-97 and accompanying text (discussing doctrinal defenses to Indian claims for redress). Although opinion is divided as to whether the trust doctrine ought to be preserved with enhanced judicial enforcement provisions or jettisoned entirely as a colonialist remnant, a pan-Indian consensus supports major revision. Another transformative proposal might shift central administrative authority over tribes from Congress to the trusteeship of the UN under an Article 73 mandate for the international community to aid non-self-governing Indian tribes in reacquiring their lands and developing their rights to and capacities for self-determination. ANAYA, *supra* note 37, at 83-84. Although this measure more directly challenges U.S. authority than the preceding proposal, precedents support internationalization of domestic trust responsibilities under similar circumstances. *See* Karl J. Irving, *The United Nations and Democratic Intervention: Is "Swords into Ballot Boxes" Enough?*, DENV. J. INT'L L. & POL'Y 41, 69 (1996) (noting establishment under international law of ad hoc trust administrations under League of Nations and UN systems in, inter alia, Crete, China, South America, the Middle East, the South Pacific, Europe, and Africa).

759. Although nothing in the U.S. Constitution mandates the inferiority of Indian tribes to state and federal governments, practice has rendered them so, and a constitutional amendment to specify their co-equality with, at a minimum, states, would free Indian tribes of the obligation to submit their rights to cultural expression and economic self-determination for State review.

or decomposition of the BIA<sup>760</sup> and tribal governments,<sup>761</sup> as well as by other measures that restructure U.S.-Indian relations.

Endowment of pan-Indian legal organizations, such as the Native American Rights Fund, the Institute for the Development of Indian Law, and the University of New Mexico Indian Law Program, would draw additional Indians into the legal profession and enhance the autonomous Indian capacity to frame and defend Indian rights and interests in U.S. courts.<sup>762</sup> Similarly, investiture of tribal colleges and charter schools for Indian children with

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*See Dean, supra* note 572 (describing subjection of Indian gaming to veto through state compacting processes); *see also supra* notes 208-22 and accompanying text (describing restriction of Indian religion by operation of law). In recent years, the executive branch has verbally supported an enhanced tribal position in the federalist system, but practice has not followed promise. *See Clinton Remarks, supra* note 546, at 942 ("We must . . . become full partners with the tribal nations."). Indian tribes remain the least powerful in the tripartite system of federal, state, and tribal governments, and moral and legal obligations arising under the trust doctrine are subject to majoritarian political preference at multiple levels of governance. More expansive reform proposals that would relate Indian tribes to the surrounding state by altering the current federalist structure, such as a separate Indian legislature with power to veto legislation, or the set-aside of seats in Congress for Indian representatives, though radical departures from the domain of the politically possible, merit discussion in subsequent work.

760. If the BIA still serves an important lobbying function by securing allocations of funding under the trust responsibility, its positive contributions are more than offset by negatives: most Indian scholars conclude that the BIA, a top-down institution, has undermined traditional tribal structures, coopted tribal autonomy and resources, and reinforced a relationship of dependency. *See, e.g., AMERICAN INDIAN POLICY, supra* note 349, at 99-100. So long as Indian political and economic initiatives must travel through the BIA and external interests drive analyses of priorities, culturally appropriate development cannot proceed. An Indian Assembly, consisting of representatives from all Indian nations and placed outside the U.S. political and legal framework, might be created as a quasi legislative body by OIRA with powers to negotiate directly with Congress and executive agencies as to the legal and substantive contours of the trust.

761. Reformation of Indian institutions to enhance their benefit to Indian people requires considerations of the goodness of fit of goals and political and economic strategies. In some instances, the near-total reconstitution of tribal governments may be a necessary condition precedent to the creation of fully independent, culturally integrated, and functional Indian societies. Friedman, *supra* note 84, at 526 (correlating an increase in the incorporation of the principle of indigenous self-determination in formal institutions with increases in indigenous health and social welfare). Rather than accept as permanent fixtures the tribal governments and constitutions created by the IRA and modified by subsequent federal legislation and regulation, Indian people, as part of their rights to self-determination, must be permitted to define their governance structures and processes as they see fit. Federal financial assistance in this reconstruction is welcome where it aids, rather than derails, Indian Self-Determination.

762. *See Nader & Ou, supra* note 158, at 22.

sufficient funds to allow their expansion, curricular development,<sup>763</sup> and maturation is also essential if the next generation of Indian leaders is to develop the skills necessary to lead their tribes to economic development, political independence, and legal sophistication without non-Indian intermediation.<sup>764</sup> Because passage of appropriate legislation will be hotly contested and require political horse-trading, inclusion of language committing the United States to a reasonably specific process of legislative reform in the authorization of AIRCA will suffice at the outset of reconciliation.<sup>765</sup>

For much of the non-Indian majority, this agenda resonates not as the legal obligation of a constitutional republic descended heavily upon prior sovereigns but rather as an existential threat. Non-Indians are Americans too, and they have nowhere to go if transformations in land tenure regimes evict them from their homes. Broaching the subject of land restoration with a non-Indian can trigger defensive backlash: as a white businessman huffs, "I didn't persecute anybody at Plymouth Rock . . . This is the 1990s. We didn't do anything to them, and we don't owe them anything."<sup>766</sup> Similarly, the suggestion that tribal self-determination be bolstered with legal significance evokes reactions to "Indian separatism" verging on enmity, even when offered by the U.S. President<sup>767</sup>: a U.S. senator angrily proclaims that "[c]itizens of the

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763. A UNESCO study indicates that fewer than 150 of the more than 500 Indian languages have survived in any form. See Virginia Fention, *Study Warns 3,000 of World's Languages Could Go Silent*, BOSTON GLOBE, Feb. 21, 2002, at A18; see also MICHAEL KRAUSS, *THE WORLD'S LANGUAGES IN CRISIS* (1992) (estimating that 135 of the 155 Indian languages still spoken in the United States are essentially moribund). Teaching tribal language and culture to the youngest Indian schoolchildren is an important antidote to the poison pill of ethnocide that serves the legislative purpose of the Native American Languages Act of 1990. See 25 U.S.C. § 2901 (2000) (committing United States to preservation of Indian languages). Programs established in metropolitan education centers to instruct off-reservation and non-member Indians in tribal languages, cultures, and histories would be of similar remedial benefit.

764. See Daniel Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 931-32 (1994) (suggesting that ethnic colleges and universities can play an important role as institutions of community-enhancement and development); see also Suagee, *supra* note 9, at 746 (noting that tribal colleges, the leading institutions of higher learning on reservations, are essential to Indian capitalization and self-determination).

765. The following clause might suffice: "The Congress of the United States (1) pledges to pass necessary legislation to permit Indian tribes and Indian people to reconstitute their political and economic institutions as they see fit without external interference as befits the right of foreign sovereigns and in keeping with their extensive human rights as indigenous peoples."

766. Timothy Egan, *Backlash Growing as Indians Make a Stand for Sovereignty*, N.Y. TIMES, Mar. 9, 1998, at A1.

767. See Clinton Remarks, *supra* note 546, at 942 ("This then is our first principle: respecting your values, your religions, your identity, and your sovereignty.") (statement of

[U.S.] should not have their rights limited by separate governments within the [U.S.]<sup>768</sup>

#### D. Peacemaking

##### 1. Cultural Hermeneutics

If a theory of justice is to span the chasm between peoples, ideas, and objectives, its enunciation and implementation will require negotiation.<sup>769</sup> Although their resilience is unquestionable after a half-millennium of extreme challenges, Indian tribes are now too numerically and militarily inferior to impose solutions by force; on the other hand, reason, principle, moral obligations, and the aspirational values of a constitutional, republican form of government erected upon prior sovereigns with whom it is interdependent, if not the force of law, conspire to restrain the United States.<sup>770</sup> While the conflict between the United States and Indian tribes has been waged primarily on battlefields and in courtrooms, the origins are rooted largely in cultural differences difficult to exaggerate: the "problem of learning how meaning in one system of expression is expressed in another" is one of the "most difficult tasks we confront in a multicultural world."<sup>771</sup> Recognition of mutual sovereignty — a companion obligation to a multicultural ethic of respect —

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President William Clinton).

768. Egan, *supra* note 766, at A16 (quoting Sen. Slade Gorton (R.-Wash.)).

769. Currently, a federal statute prevents recognition of Indian tribes as nations with whom the United States may contract by treaty. See 25 U.S.C. §71 (1994). Repeal of this statute — a demand of many Indian tribes — would revive the principle of mutual sovereignty and infuse negotiations with the ethics of mutual respect and consent so vital to the process of atonement, forgiveness, and reconciliation. See Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 970-72, 979-80 (1996) (arguing that the historical treaty process should serve as a template for a contemporary framework of U.S.-tribal negotiations between mutual sovereigns).

770. See ANAYA, *supra* note 37, at 130 (stressing that where a state acquired its sovereignty by displacing original sovereigns it incurs the obligation — moral if not necessarily legal — to "foster the capacity of Natives to govern their own communities as well as contribute to the development of all our peoples, indigenous or immigrant."). Constitutional republics are particularly committed, at least as a matter of political theory, to tolerating dissent as a bulwark against repressive hierarchy. See generally Daniel A. Farber, *Richmond and Republicanism*, 41 FLA. L. REV. 623 (1989) (noting commitments of neo-republican governments to tolerance of dissent and negotiated compromise). Persuasion, in contrast to domination, is currency of the realm in the liberal constitutional republic, and the most convertible denomination is U.S. See de Tocqueville, *supra* note 73, at 107 (stating that because in democracies the laws are reflective of the will of the people, those who wish to modify the laws must "either change the opinion of the nation, or trample upon its decision").

771. WILLIAMS, *LINKING ARMS*, *supra* note 115, at 1139-49.

will require a "cultural hermeneutics," which in turn mandates the clearing of barriers to communication and the sharing of stories, fears, hopes, and dreams. By restoring the full and equal legal personality of Indian tribes,<sup>772</sup> creating the conditions for trust and identification of shared interests obscured now by history and emotion, tempering tendencies toward extremism,<sup>773</sup> and tutoring both parties in the common humanity of each other, U.S.-Indian negotiations can usher in a "North American vision of law and peace"<sup>774</sup> that relegitimizes the United States and offers an impeccable example of intergroup justice to an attentive international community.<sup>775</sup> Fittingly, the ancient Indian method of dispute resolution known as Tribal Peacemaking ("TPM")<sup>776</sup> can guide this restorative journey toward reconciliation.

## 2. Tribal Peacemaking

TPM, the ideal-typic form of horizontal justice, heals wounds by publicly

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772. See Frickey, *supra* note 56, at 1783-84 (arguing that negotiation on neutral sites, in contrast to adjudication in the courts of the conqueror, grants subordinated groups equal ownership of, and responsibility for, the resolution of their disputes with the dominant power); see also Tsosie, *Negotiating*, *supra* note 187, at 35-37 (contending that because the exercise of majoritarian political preference dictates that tribal rights cannot be fairly adjudicated in courts of the United States, negotiation, though also risky, is the only path through the minefield of power and prejudice). Still, while the post-Cold War era is a fruitful moment to discuss enlargement of the international legal personality of nonstate actors as international law becomes ever-more concerned with the "ought" and not simply with the "is," the United States has not fully committed to the vision of mutual sovereignty advocated by Tsosie, Williams, Anaya, and other Indian scholars.

773. ANAYA, *supra* note 37, at 130.

774. WILLIAMS, *LINKING ARMS*, *supra* note 115, at 181.

775. See Hom & Yamamoto, *supra* note 9, at 1778 (noting that the international indigenous rights regime is currently being negotiated by a panoply of states, indigenous NGOs, unions, and corporations in multiple sites across the globe).

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

and ceremonially deploying spiritual<sup>777</sup> norms and collected tribal wisdom, listening compassionately to the widest possible circle of people, and reminding participants of their relational and cooperational obligations to one another.<sup>778</sup> Rather than address only disputants, TPM balances the intellectual, emotional, and physical dimensions of the entire tribe on its journey toward restoration.<sup>779</sup> Despite its nonpunitive foundations,<sup>780</sup> TPM can provide effective redress for offenses as serious as robbery, rape, and murder.<sup>781</sup>

a) *Procedures*

TPM reflects the interests of parties against the backdrop of tribal norms, and behavior-altering mechanisms — anger, shame,<sup>782</sup> embarrassment, and

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777. TPM recognizes no separation of religious and secular, and supernatural power is directed to overcome disharmony and reestablish order. Philmer Bluehouse & James W. Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, 10 *MEDIATION Q.* 327, 332 (1993).

778. See Dianne LeResche, *Editor's Notes, Native American Perspectives on Peacemaking*, 10 *MEDIATION Q.* 321, 321 (1993).

779. *Id.* at 321-22. TPM is rarely used in disputes between members of different tribes. See Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in The Largest Native American Nation*, 18 *AM. INDIAN L. REV.* 1, 16 (1993) (noting that where outsiders are involved in disputes with members of Indian tribes, particularly where physical injuries are involved, the absence of common ties of kinship, religion, community, and ethos that drive the process of Indian dispute resolution and encourage parties to remove the conflict from the adversarial plane tend to preclude the success of such an enterprise); see also Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 *REGENT U. L. REV.* 53, 55 (1998) (noting that while elements of TPM, termed "restorative justice," have been introduced into non-Indian contexts such as family group conferences, "community injury," and victim/offender mediation, these efforts have not met with anticipated success, largely because urbanized, atomized settings do not offer the "spiritual glue" of communal obligations to condition individual conduct). In essence, so central to the successful functioning is the commitment to shared tribal values and responsibilities that extension of TPM beyond the boundaries of the reservation or beyond the subject matter of disputes between tribal members is inherently problematic. Nonetheless, where individuals are linked not by membership in a political community but by common commitments to justice and to restoration, TPM retains its potential to heal. For a discussion of the application of TPM across political boundaries, see generally Bradford, *Reclaiming*, *supra* note 265.

780. TPM is decidedly nonpunitive in its philosophical underpinnings. In contrast to state adjudication, no central authority can directly apply coercion to enforce the collective will. *Id.*

781. See Lieder, *supra* note 779, at 17-18.

782. See Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 *WASH. L. REV.* 1003, 1015 (1997) (describing how, within the tightly interconnected tribe, the technique of shaming — calling down personal criticism upon one who deviates from group norms — can induce those who wish to remain accepted within the tribe

encouragement — modify negotiating positions and guide parties toward harmony. Neither lawyers nor judges are present. All who know the parties or are familiar with the history of the dispute are required to sit together in a circle.<sup>783</sup> The oral procedure is supervised by a "peacemaker" who has lived a long and exemplary life in spiritual and temporal terms.<sup>784</sup> Nevertheless, the "peacemaker" has merely persuasive rather than compulsory powers: his obligations do not extend further than inducing people to talk to one another by speaking and thinking well and exemplifying tribal values and ways.<sup>785</sup> The peacemaker is not neutral: he or she has the respect of the parties, who are frequently related to him or her by blood or marriage.<sup>786</sup> Thus, the parties are strongly inclined to follow proffered "guidance"<sup>787</sup> that encourages people to live up to their communal responsibilities, requests apologies, suggests means and amounts of restitution,<sup>788</sup> and ensures that all parties depart "with their tails up [rather than one] with a tail up, one with a tail down."<sup>789</sup>

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to modify contrarian positions in order to bring themselves into a state of harmony with others).

783. See Bernard, *supra* note 776, at 830.

784. See LeResche, *supra* note 778, at 321 (demonstrating that one of the most important criteria in the selection of "leaders" of traditional Indian tribal societies was skill in mediating intragroup hostility). Research suggests that selection as leaders of those with skill in dispute resolution may be a common characteristic of the tribal level of sociopolitical organization. See, e.g., Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323, 352 (1993) (identifying the main criteria for chieftdom among the Roma as "intelligence and a sense of fairness" in resolving group disputes).

785. See Costello, *supra* note 228, at 887.

786. See Bluehouse & Zion, *supra* note 777, at 329 (explaining that the "core of common law" of most Indian legal systems is the "lineage system," a method of tracing relationships and adjusting disputes between people with the assistance and intervention of clan and family members whose influence constituted a form of "ingrained emotional cement"). Thus, in contemporary TPM the peacemaker is often a blood relative of one or both parties.

787. See *id.* at 332. For the peacemaker there is explicit stress upon an affirmative, interventionist role in maneuvering parties back to harmony by reference to traditional values. In the language of mainstream alternative dispute resolution, the TPM peacemaker can be cast as a directive and activist mediator whose expertise in the particular substantive domain in which the dispute occurs permits him to thrust himself into the conflict and make judicious use of persuasion, influence, and judgments to achieve concrete settlement of an otherwise elusive problem. Nevertheless, TPM is neither mediation nor arbitration as understood by the Western mind as such terms do not capture its inherently spiritual, communal, and restorative essence. *Id.* at 335.

788. See Jennifer Roback, *Exchange, Sovereignty, and Indian-Anglo Relations, in PROPERTY RIGHTS AND INDIAN ECONOMIES,* *supra* note 315, at 35 (noting that TPM almost never offers the guilt of the accused as the "question presented"; rather, the gap separating parties is generally the amount of restitution, either material or services, to be paid, and this amount is the subject of bargaining, negotiation, and intervention by the peacemaker).

789. LeResche, *supra* note 778, at 322.

b) *Peacemaker*

The peacemaker typically enters the peace circle<sup>790</sup> to lead a prayer summoning the aid of the supernatural and framing the attitudes and relationships of the parties. The peacemaker then listens to all subjective points of view to determine the reasons for disharmony. In this open, loosely structured discussion, feelings and emotions are recognized as equally important to reason, and all persons, though they are offered emotional support, are required to directly confront the full consequences of their actions, including the injustice done and the resultant harm.<sup>791</sup> Emphasizing future relations rather than the legal consequences of past events, the peacemaker then (1) presents a lecture on how or why the parties have violated tribal values and breached tribal solidarity,<sup>792</sup> (2) leads a discussion of practical means whereby the parties can end the dispute, and (3) suggests how all can conform future conduct to values reflective of tribal relational aspects and rights to justice and harmony.

c) *Remedies*

Remedies in TPM are generally implemented without resistance or resort to the traditional instruments of the penal system, even in cases concerning

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

791. According to Zion and Yazzie:

[TPM] addresses denial, minimalization and externalization in ways that [mainstream] systems cannot do. In a given [mainstream] system, proving the facts of a case is difficult and burdensome. In criminal systems with the privilege against self-incrimination, defendants cannot be compelled to discuss motives, attitudes, . . . or causes of misconduct. In [TPM], which does not utilize punishment, people are free to "talk out" the problem fully and get at the psychological barriers which impede a practical solution.

Zion & Yazzie, *supra* note 37, at 80-81.

792. See Zuni Cruz, *supra* note 195, at 581-82. Breaches of tribal solidarity are occasioned by individuals who place greater emphasis upon their needs and desires than they do upon the interests of the tribe. *Id.*



criminal conduct. As agreements are the product of a consensus that includes the wrongdoer(s), the personal honor and communal obligation of the wrongdoer(s) is pre-enlisted in support of compliance. Further, TPM enlists extended family and friends as "probation officers" with "responsibility to the victims and communities to prevent the wrongdoer from causing further harm."<sup>793</sup> Moreover, given the powerful psychological sanctions available to the tribe in the form of ridicule, ostracism, and banishment, a wrongdoer's need to remain in good stead is easily manipulated.<sup>794</sup>

d) *U.S.-Indian TPM*

United States-Indian TPM ("USITPM") would be conducted shortly after AIRC concluded its final report and before drafting of proposed legislative reforms. USITPM might enlist the most respected elder Indian and non-Indian statesmen as peacemakers to supervise, lead, and guide negotiations as to remedies for the redress of Indian claims.<sup>795</sup> Such persons would collect and merge spiritual and secular values common to both Indian and non-Indian cultures and urge Indian and U.S. negotiators to envision a future when all U.S. citizens, Indian and non-Indian, are full and equal members of one great nation with corresponding rights and duties toward that nation. Peacemakers

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793. Costello, *supra* note 228, at 899-900.

794. Research at the intersection between political economics and anthropology suggests that the tribe performs an essential insurance function by facilitating fundamental survival tasks that can only be performed in teams: tribal members, in exchange for this insurance, grant their loyalty unreservedly. As a product of these mutually advantageous, continuous, and critical intratribal interactions and the ease of observing and transmitting information and norms within the small community, the problem of monitoring to prevent free-riding inherent in team production disappears. Not only does the tribe reduce or eliminate bad-faith incentives to opportunism or cheating, but expulsion, ostracism, and other forms of collective refusal to deal, highly effective sanctions given the importance of individual reputation and face-saving in a small interdependent circle, are far more efficient than formal legal enforcement mechanisms. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 245-47 (1979). Research into other tribal legal systems supports the finding that psychological pressure is at least as effective in securing compliance as the formal institutions of state coercion. See Weyrauch & Bell, *supra* note 784, at 358-59 (noting that among the Roma, the permanent sentence of *marime* - "impurity" requiring ostracism - is the equivalent of a death penalty since the permanent outcast, subjected to the shunning of the entire Roma community, is frequently driven to suicide); see also Landes & Posner, *supra*, at 182 n.144 (describing how Amish wrongdoers are required to make public confessions lest they be shunned, a fate which results in the deviant member becoming a social pariah with whom no one will eat, speak, or do business).

795. Peacemakers would not be granted authority to commit their respective nations unless agreed to prior to USITPM.

would urge the United States to confront again the history of genocide, land theft, and ethnocide, renew the apology to Indian tribes and people, and suggest remedies that would restore dignity and demonstrate a genuine desire to live up to the highest American aspirations enshrined in the Declaration of Independence. Peacemakers would also encourage Indian nations to express their suffering but to be forgiving and willing to start relations with the United States anew, freed of the burdens of a painful history. USITPM might meet at a series of venues, including sacred tribal lands and U.S. retreats such as Camp David in Maryland. Although the recommendations of USITPM would not be binding, remedies agreed upon would be committed to paper and transmitted to Congress as the basis for legislative action.

### *E. Commemoration*

Commemoration of the history of genocide, land theft, and ethnocide is necessary to "ensure that future generations will not forget . . . [or] perpetuate the American legacy" of injustice toward Indian tribes and people.<sup>796</sup> Erection of monuments at sites of Indian genocide<sup>797</sup> and on the National Mall,<sup>798</sup>

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796. Brew, *supra* note 28, at 198.

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

798. Critics might label the above proposal an example of a "memorial fever" sweeping the nation and causing interest groups to "fiercely compete for space on the most hallowed memorial space in the nation[.]" Elaine Sciolino, *Fighting For Space in Memorial Heaven*, N.Y. TIMES, Jun. 28, 2001, at A24 (noting critics who claim that a "growing tendency to memorialize individual groups" and to "car[ve] the nation in ever-thinner slices of hyphenated Americans divides rather than unites the country."); see also Edward T. Linenthal, *The Contested Landscape of American Memorialization: Levinson's "Written in Stone"*, 25 L. & SOC. INQUIRY 249, 260-62(2000) (book review). While the object of reconciliation is indeed to unite rather than to divide peoples, the mythical version of history from which the genocide, land theft, and ethnocide of the first inhabitants of the United States is purposefully redacted,

naming of public buildings and parks after Indians of historical significance, renaming of offensively-named professional sports teams,<sup>799</sup> and creation of a wing in the National Museum of the American Indian with specific focus on the gross human injustices suffered by Indian people will serve these transformative and deterrent purposes.<sup>800</sup> Posthumous pardons should be granted to Indians executed for resisting genocide and land expropriation.<sup>801</sup> Establishment and funding of cultural, historical,<sup>802</sup> language, and religious

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no longer functions as political adhesive. Historical revision, in the most visible and tangible manner possible, is necessary to restore the gravitational force between disparate groups in the American polity, and, particularly where history has not been co-authored by subordinated groups, memorials are an appropriate way to initiate re-envisioning and reunifying.

799. Since 1968 the National Congress of American Indians has campaigned to eradicate racist stereotypes of Indians, including offensively named athletic teams such as the Cleveland Indians, Washington Redskins, and Atlanta Braves. Chryss Cada, *In Colo., Fightin' Whities Play Hardball, Basketball Team Picks Unusual Nickname in Protest of Indian Mascots*, BOSTON GLOBE, Mar. 16, 2002, at A2. Although more than 1200 scholastic teams have altered their names in the past thirty-eight years, more than 600 teams have not, and many Indians find the use of Indian caricatures as mascots or monikers deeply offensive. *Id.* For a discussion of the controversy over Indian-themed athletic teams and the Indian claim that such names are pejorative, denigrating, and racist, see Newton, *Memory and Misrepresentation*, *supra* note 209, at 1007; see also Note, *A Public Accommodations Challenge to the Use of Indian Team Names and Mascots in Professional Sports*, 112 HARV. L. REV. 904, 904-06 (1999) (arguing that naming sports stadium "Redskins Stadium" violates the federal public accommodations law, 42 U.S.C. § 2000(a); *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q. 2d 1705, 199 WL 435108 (P.T.O. 1999) (stripping federal trademark registration from Redskins football organization on ground the name was "immoral, deceptive, or scandalous" (citing 15 U.S.C. § 1052(a)(2000))).

800. The National Holocaust Museum, an institution commemorating the Jewish Holocaust, might serve as a model for a planned National Museum of the American Indian. See 20 U.S.C. §§ 80q 1-15 (2000) ("National Museum of the Indian Act") (Supp. 1990). Exhibits might include original copies of U.S.-Indian treaties along with subsequent histories and specific dates and circumstances of U.S. breaches. Histories of tribes, from first contact to dispossession and genocide to the present, could be preserved in rich detail. Names of Indian individuals murdered might be inscribed on a national register, and certificates could be issued to descendants of each victim commemorating the circumstances of each death. Indian curators with tribal cultural and historical knowledge would play an important role in the establishment and development of all aspects of the Museum, which is scheduled to open in fall 2004.

801. See Steven Braun, *Clemency for Hanged Man Delivers Justice Long Awaited*, L.A. TIMES, June 2, 2001, at A10 (2001 WL 2492036) (noting Maryland gubernatorial grant of posthumous pardon to black man executed for rape of white woman in 1917 after a trial held in a climate of mob violence); Chomsky, *supra* note 106 (discussing execution of Dakota warriors for defending their territories from invasion by the United States in violation of a treaty).

802. Existing institutions might be assisted in discharging this function, possibly as a central archive with satellite branches across the United States and in tribal colleges or in consortium with other institutions. See, e.g., the D'Arcy McNickle Center for American Indian History of

centers<sup>803</sup> will regenerate sources of tribal cohesion while offering non-Indians the opportunity to adjust their perceptions of Indian culture and religion toward understanding and tolerance.<sup>804</sup>

#### F. Compensation

Direct wealth transfers to Indian individuals are indicated as a symbolic act in recognition of U.S. responsibility as well as to compensate loss, grief, and trauma, particularly for the poorest of Indians and for off-reservation Indians who do not presently enjoy the legal, medical, and educational entitlements their tribal counterparts receive.<sup>805</sup> However, the gross human injustices experienced by Indian people over history can never be adequately compensated with money. While material compensation may well be an appropriate component of redress, because Indian claims are effectively group claims, and because the expression of Indian sovereignty occurs through institutions rather than individuals, remedial measures involving cash are best directed toward tribes. Establishment of an independent fund sufficient to create and endow the institutions proposed, purchase some lands, and serve as a social support net for the poorest Indian individuals, would be an important contribution to redress. The amount of such compensatory relief, though significant, is certain to be far less than the \$4 trillion sum potentially claimed as reparations. Something on the order of \$20 billion might suffice.<sup>806</sup>

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the Newberry Library, the foremost institution for Indian studies, <http://www.newberry.org>.

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

804. See Pritchard, *supra* note 44, at 263.

805. See *id.* at 264 (contending that monetary damages for racial discrimination, arbitrary deprivation of liberty, pain and suffering, physical and emotional abuse, disruptions of family life, loss of cultural rights and fulfillment, loss of native title rights, economic loss, and loss of opportunities is inappropriate as redress for indigenous claims); see also Howard Schneider, *Canada Apologizes for Abusing Native Peoples*, WASH. POST, Jan. 8, 1998, at A1 (announcing establishment of "healing fund" to compensate native Canadian children "who suffered physical and mental abuse at the government-run schools"); Wacks, *supra* note 625, at 209 (suggesting cash is the most desirable remedy for the poorest victims of injustices).

806. Compensation at a per capita rate of \$10,000 for the nearly two million Indians would total \$20 billion. Some or all might be paid through grants in fee simple of federal surplus lands and resource rights to Indian tribes. Revenue-sharing from sales of leases of natural resource rights on former Indian lands, abeyance of taxation on Indian incomes (presently, most Indian income, whether earned on or off-reservation, is taxable, see Superintendent of Five Civilized

### G. *Forgive, Heal, and Forge a Common Cause*

If the United States acknowledges, recognizes responsibility for, and repairs the gross injustices suffered by Indian tribes and individuals over the course of its creation and expansion, Indians must find it in their hearts and minds to forgive. Despite its rapacious, sanguinary history, if the United States restores a meaningful measure of land to Indian tribes and amends its legal and political order to ensure respect for and protection of fundamental Indian rights to self-determination, a new regime of peace and justice worthy of emulation and export will be rewarded with the most precious gift that could ever be bestowed: forgiveness. Although their pain is indelibly etched in their collective memories, by forgiving the United States and all its people in a solemn ceremony,<sup>807</sup> broadcast globally to symbolize the dawn of the new relationship, Indian minds, spirits, and relationships will finally be allowed to heal, and all Americans will be released from the chains of history and freed to forge a better tomorrow.

### V. *Conclusion*

In August 2001, the UN convened the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance in Durban, South Africa.<sup>808</sup> The conference, called to address causes of and remedies for racial discrimination, imploded<sup>809</sup> under the pressure of states interested less in combating racism than in waxing rhetorical.<sup>810</sup> Still, although "you do not

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Tribes v. Commissioner, 295 U.S. 418 (1935)), as well as other negotiated solutions would be considered.

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

808. See *World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, <http://www.un.org/WCAR> (last visited Sept. 18, 2001).

809. Douglas Blackmun, *U.S. and Israel Pull Delegates To Race Talks*, WALL ST. J., Sept. 4, 2001, at A12.

810. For months, the United States vacillated over whether to participate in the Racism Conference: reparations was but one issue that threatened to derail the Conference — efforts to equate Zionism with racial discrimination were even more divisive of regional, confessional, and ideological blocs. See Dafna Linzer, *Forum on Racism Draws Mixed Feelings*, BOSTON GLOBE, Aug. 16, 2001, at A1. On August 27, 2001, after domestic furor over a Draft Declaration minimizing the significance of the Nazi Holocaust and equating it with Israeli policies in the West Bank and Gaza, the United States indicated it would not attend. N.Y. TIMES, Aug. 28, 2001 (referencing Draft Declaration, Racism Conference, UN. Doc. A/CONF.189/4 (20 August 2001), at para. 32 ("[T]he (holocausts/Holocaust) and the ethnic

combat racism by conferences that produce . . . hateful language,"<sup>811</sup> neither do great nations refuse opportunities to redress past injustices.

Even as the United States labors to diffuse liberal humanism and democratic freedom through civil rights legislation and humanitarian intervention, the smoke from the Indian Wars occludes the national moral landscape. Two centuries of genocide, land theft, and ethnocide have stripped away the fundamental human rights of its indigenous people, and the nation decorated in the laurels of champion of the international human rights movement seems to have forgotten that justice begins at home. Rendering justice unto Indian tribes and people will resolve this national conundrum, honor the American creed of liberty and justice for all, and legitimate the international leadership of a nation becoming more faithful itself to the standards it does not shy away from imposing abroad. At the dawn of the Age of Apology, the moral coherence of the nation in the watchful world it so frequently seeks to mold is at stake, and if Indians continue to slip through the interstices of law, policy, and convenience, the lessons communicated far and wide will return as specters to haunt U.S. policymakers who look outward without first looking within.

For the United States, justice will not come without a painful re-examination, acknowledgment, and communication of its hidden history. Binary thinking prevents linking genocide, land theft, and ethnocide to the status of the original Americans as the most materially deprived, politically

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cleansing of . . . Arab[s] in historic Palestine . . . must never be forgotten.")). Although many states and Jewish groups supported the United States' withdrawal, human rights NGOs and African American groups suggested the action was prompted by text characterizing slavery as a crime against humanity and offering succor to reparacionists. Rachel L. Swarns, *At Race Talks, Delegates Cite Early Mistrust*, N.Y. TIMES, Sept. 5, 2001, at A1. Although reparations claims would likely be nonjusticiable in U.S. courts, U.S. officials cited concern that formal apology might trigger litigation as a second basis for withdrawal. Rachel Swarns, *Overshadowed, Slavery Debate Boils in Durban*, N.Y. TIMES, Sept. 6, 2001, at A1. Although the impending collapse of the Conference forced several African leaders to openly criticize reparations as counterproductive, efforts to draw blocs into accord confronted the seeming-impossibility of harmonizing pan-Arab demands for mention of the "plight of the Palestinian people," African demands for an apology for trans-Atlantic slavery, and EU-U.S.-Israeli refusal to countenance anti-Zionism. Associated Press, *Arab States Reject Compromise Proposal at Racism Forum*, MIAMI HERALD, Sept. 7, 2001, at 5A. Although the "Zionism is racism" language was stricken and participants agreed to brand slavery a crime against humanity, the Declaration abjured resolution of the ideological morass, simultaneously terming the Palestinians a "people under foreign occupation" while refusing to commit participants to apologize or pay reparations for slavery. *Id.* Questions of racial injustice and racial redress linger post-Durban as sources of international systemic conflict. Rachel Swarns, *Racism Talks Still Seek to End Impasses on Israel and Slavery*, N.Y. TIMES, Sept. 8, 2001, at A1.

811. Blackmun, *supra* note 809, at A12 (quoting U.S. Secretary of State Colin Powell).

and economically dependent, and legally exposed social group. Displacement of a mythical version of national genesis in favor of the truth will pierce the domestic veil of ignorance, upset the non-Indian majority, and erode theoretical bases of U.S. sovereignty and control over Indian people, culture, and land. On the other hand, continued refusal to confront the past and provide redress for Indian claims will corrode the national soul.

Redress of Indian claims need not be the wedge that drives peoples further apart. Although some recommend reparative justice, a paradigm that fixes upon compensation, money alone will not solve Indian problems, nor will zero-sum philosophies, conflictual principles, and preclusive legal doctrines serve the moral interests of Indian or non-Indian parties. The relationship between Indian and non-Indian is one of interdependence. While various peoples may take different paths on their collective and individual journeys, all share the same destination: a nation conceived in respect for the right to autonomous self-determination. Justice is proprietary to no one race, ethnicity, or political group; it is universal. Where past relations between constituent American peoples have given rise to grievous wounds, the reestablishment of justice requires not only formal commitment to the rule of law but a broader commitment to restoration. This cannot occur in an atmosphere of distrust, resentment, and lingering hatreds.

By treating the relationship between Indian and non-Indian as the cardinal objective of redress, reconciliation will allow fashioning of expansive remedies, such as land restoration, legal reform, and reinfusion of tribes with powers of self-determination, in such a manner as to nurture, rather than destroy, rapprochement. Though expression of justice in palatable policy prescriptions is possible, however, reconciliation implicates the existential direction of the nation. Persons of good faith must align a constellation of political, moral, and legal forces to induce acknowledgment, recognition of responsibility, apology, repair, commemoration, compensation, forgiveness, and healing. Painful stories and lessons will have to be told and learned. Insecurities will have to be addressed, consciences assuaged, fears allayed, courage mustered. Reconciliation is difficult to commence and easy to abandon. Social groups unwilling to repair past harms may be unwilling to reconcile; it may be hopelessly naive to think otherwise. However, if Indian and non-Indian peoples can fashion a common historical understanding upon which to ground a more peaceful joint future, the frontier of justice will be thrown far further than could have been imagined even a generation ago, and a new American Manifest Destiny as exemplar and defender of global human rights may well be carried to all corners of the earth.

The prognosis for U.S.-Indian reconciliation is good. The United States is an exceptional nation, far more just than the one the Framers created, and

committed to, if slow to render, justice. Its moral sextant is sound, if in occasional need of calibration. Moreover, Indians are forgiving and patient. Although reconciliation will consume time, courage, resources, and faith, our histories and futures on this land are inescapably enmeshed. Our destiny is to live together in the justice and peace we deserve as inherent aspects of our dignity. The *tocsin* has been sounded; the offering of peace with justice has been extended; the time for U.S.-Indian reconciliation is now.



