AMERICAN INDIAN CULTURE AND RESEARCH JOURNAL 22:2 (1998) 1–69

The Tragedy and the Travesty: The Subversion of Indigenous Sovereignty in North America

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> Much ink has been spilled during the late twentieth century explaining that the rights of indigenous peoples are a matter of internal, "domestic" consideration on the part of the various States in which we reside, as if our status was merely that of "ethnic minorities" integral and subordinate to these larger politico-economic entities. Such an interpretation is inaccurate, invalid, and in fact illegal under international law. We are *nations*, and, at least in North America, we have the treaties to prove it. We are thus entitled—morally, ethically and legally entitled—to exercise the same sovereign and self-determining rights as the States themselves. This cannot be lawfully taken from us. Our entitlement to conduct our affairs as sovereigns will remain in effect until such time as we ourselves voluntarily modify or relinquish it.
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> — Glenn T. Morris
> 1997

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Questions concerning the rights and legal and political standing of indigenous peoples have assumed a peculiar prominence in the world's juridical debates over the past quarter-century.[1] Nowhere is this more pronounced than in North America, a continent presided over by a pair of Anglo-European settler powers, the United States and Canada,[2] both of which purport to have resolved such issues—or to being very close to resolving them—in a manner which is not only legally consistent, but so intrinsically just as to serve as a humanitarian model deserving of emulation on a planetary basis.[3] Indeed, the United States in particular has long been prone to asserting that it has already implemented the programs necessary to guarantee self-determination, including genuine self-governance, to the Native peoples residing within its borders.[4] Most recently, its representatives to the United Nations announced that it would therefore act to prevent the promulgation of an international convention on the rights of indigenous peoples if the proposed instrument contradicted U.S. domestic law in any significant way.[5]

While it is true that the treatment presently accorded Native North Americans is far less harsh than that visited upon our counterparts in many other regions—by the government of Guatemala upon Mayans, for instance, or of Indonesia upon East Timorese—it is equally true that this has not always been the case, and that the material conditions to which indigenous peoples in the United States and Canada are subjected remain abysmal.[6] Moreover, there are firm indications that whatever relative physical advantages may be enjoyed by North America's Native peoples vis-à-vis those in Third World nation-states accrue simply and directly from the extent to which we are seen as being more thoroughly pacified than they. The governments of both North American settler states have recently demonstrated a marked willingness to engage in low intensity warfare against us whenever this impression has proven, however tentatively, to be erroneous.[7]

Such circumstances hardly bespeak the realization, by any reasonable definition, of indigenous self-determination. Rather, they are more immediately suggestive of internal colonial structures along the lines of those effected in England and Spain during the final phases of their consolidation.[8] It is thus necessary to separate fact from fable in this respect, before the latter is foisted off and codified as an element of international law supposedly assuring the former.[9] The present essay

attempts to accomplish this, briefly but clearly, by advancing a historical overview of the process predicating the contemporary situation in which North America's Native peoples find ourselves and, thus, determining with some degree of precision what this situation actually is. From there, it will be possible to offer an assessment of what must be changed, and the basis on which such change might be approached, if indigenous self-determination is ever to be (re)attained on this continent.[10]

Along the way, we will be at pains to explain the nature and origin of the customary and conventional international legal entitlements possessed by North American Indians, and the manner in which these have been systematically abridged by the United States and Canada. Emphasis will be placed on U.S. practice throughout, if only because Canada has become something of a junior partner in the enterprise at issue, implicitly—yet sometimes with remarkable explicitness—resorting to an outright mimicry of the doctrinal innovations by which its more substantial southern neighbor has sought to rationalize and justify its Indian policies.[11]

THE QUESTION OF INHERENT SOVEREIGNTY

It is important to bear in mind that a distinction must be drawn between nations and states. There is a rough consensus among analysts of virtually all ideological persuasions that a nation consists of any body of people, independent of its size, who are bound together by a common language and set of cultural beliefs, possessed of a defined or definable land base sufficient to provide an economy, and evidencing the capacity to govern themselves.[12] A state, on the other hand, is a particular form of centralized and authoritarian sociopolitical organization.[13] Many or perhaps most nations are not and have never been organized in accordance with the statist model. Conversely, only a handful of the world's states are or have ever really been nations in their own right (most came into being and are maintained through the coerced amalgamation of several nations).[14] Hence, although the term *state* has come to be employed as a virtual synonym for *nation* in popular usage—the membership of the United Nations, for example, is composed entirely of states—the two are not interchangeable.[15]

Regardless of the manner in which they are organized, all nations are legally construed as being imbued with a sover-

eignty which is inherent and consequently inalienable.[16] While the sovereign rights of any nation can be violated—its territory can be occupied through encroachment or military conquest, its government usurped or deposed altogether, its laws deformed or supplanted, and so forth—it is never extinguished by such actions.[17] Just as a woman retains an absolute right not to be raped even as she is subjected to it, a nation continues to possess its full range of sovereign rights even as their violation occurs. The only means by which the sovereignty of any nation can be legitimately diminished is in cases where the nation itself *voluntarily* relinquishes it.[18]

There can be no question but that the indigenous peoples of North America existed as fully self-sufficient, self-governing, and independent nations prior to commencement of the European invasions.[19] Nor can there be any real doubt as to whether the European powers were aware of this from the outset. Beginning almost the moment Columbus set foot in this hemisphere, Spanish jurists like Franciscus de Vitoria were set to hammering out theories describing the status of those peoples encountered in the course of Iberian expeditions to the "New World," the upshot being a conclusion that "the aborigines undoubtedly had dominion in both public and private matters, just like Christians."[20] The diplomats and legal scholars of England, France, Portugal, and the Netherlands shortly followed suit in acknowledging that Native peoples constituted inherent sovereigns.[21]

In 1793, Thomas Jefferson, author of the American Declaration of Independence and a leading official of the newly founded republic, summed up his own country's position by observing that "the Indians [have] full, undivided and independent sovereignty as long as they choose to keep it, and ... this might be forever."[22] Henry Knox, the first U.S. secretary of war, echoed this understanding by reflecting that indigenous peoples "ought to be considered as foreign nations, not as the subjects of any particular State."[23] And again, in 1832 John Marshall, fourth chief justice of the U.S. Supreme Court, reflected on how the "Indian nations have always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil since time immemorial."[24]

Among other things, such acknowledgments mean that the laws by which indigenous nations governed themselves and/or regulated their relationships to others—"aboriginal law,"

as it is often called—was and is possessed of a jurisdictional standing equivalent to that of the nation-states of Europe (or anywhere else).[25] This is to say that, within their respective domains, the legal system of each Native people carried preeminent force, and was binding on all parties, including the citizens of other countries. Whether or not something was "legitimate" was entirely contingent upon whether it conformed to the requirements of relevant international and aboriginal law, *not* the domestic statutory codes of one or another interloping state.[26]

Perhaps above all indigenous nations, no less than any others, have always held the inherent right to be free of coerced alterations in these circumstances.[27] For any country to set out unilaterally to impose its own internal system of legality upon another is to adopt a course of action which is not just utterly presumptuous but invalid under international custom and convention (and, undoubtedly, under the laws of the country intended for statutory subordination).[28] To do so by resort to armed force, a pattern which is especially prominent in the history of U.S.-Indian relations, is to enter into the realm of waging aggressive war, probably the most substantial crime delineated by international law.[29]

While given countries may obviously wield the raw power to engage in such conduct—witness the example of Nazi Germany—they never possess a legal right to do so. Thus, whatever benefits or advantages they may obtain through such behavior are perpetually illegitimate and subject to repeal.[30] Conversely, those nations whose inherent rights are impaired or denied in such fashion retain an open-ended prerogative—indeed, a legal responsibility—to recover them by all available means.[31] It is, moreover, the obligation of all other nations, and the citizens of the offending power itself, to assist them in doing so at the earliest possible date.[32] Although the matter has been subject to almost continuous obfuscation, usually by offenders, there are no exceptions to this principle within the laws of nations.[33]

ON THE MATTER OF TREATIES

While the innate sovereignty evidenced by Native peoples should be sufficient in itself to anchor our exercise of the full range of self-determining rights, there are other even less ambiguous indicators of our rightful status. It is, for instance, a

fundamental tenet of international affairs that treaties are instruments reserved exclusively for the defining of relationships between nations. Governments enter into treaties only with one another, not with subparts of their own or any other polity.[34] Hence, it has long been understood as a matter of conventional as well as customary law that for a government to enter into a treaty with another entity is concomitantly to convey formal recognition that the other party is a peer, constituting a fully sovereign nation in its own right.[35]

In the United States, this principle is incorporated into domestic law under Article I, Section 10 of the Constitution, and in Article VI, Clause 2, which makes any treaty, once ratified, "the Supreme Law of the Land."[36] Assorted elements of British Crown and Canadian law go in very much the same direction.[37] All told, the U.S. Senate ratified some four hundred treaties with North America's indigenous peoples between 1778 and 1871 (about eight hundred more had by that point been negotiated by the federal executive, but failed to achieve ratification for one reason or another).[38] In Canada, as part of a process extending well into the twentieth century, a further 138 had been confirmed by roughly the same point.[39] As U.S. Attorney General William Wirt put it in 1821:

> The purpose, then once conceded, that the Indians are independent to the purpose of treating, their independence is to that purpose as absolute as any other nation.... Nor can it be conceded that their independence as a nation is a limited independence. Like all other nations, they have the absolute power of war and peace. Like any other nation, their territories are inviolable by any other sovereignty.... They are entirely self-governed, self-directed. They treat, or refuse to treat, at their pleasure; and there is no human power that can rightly control their discretion in this respect.[40]

So clear were such pronouncements that more than 150 years later, even such habitual unapologetic Euro-American triumphalists as the late historian Wilcomb Washburn have been forced to concede that the "treaty system, which governed American Indian relations [with the United States and Canada], explicitly recognizes the fact that [both] governments ... acknowledged the independent and national character of the Indian peoples with whom [they] dealt."[41] Insofar as

"recognition once given is irrevocable unless the recognized [nation] ceases to exist or ceases to have the elements of nationhood," it is accurate to observe that the effect of the treaties is as forceful and binding now as when they were signed.[42] Legally speaking, it is the treaties rather than settler-state statutory codes which continue to define the nature of the relationship between most American Indian peoples, Canada, and the United States.[43]

This is and will remain unequivocally the case, absent an ability on the part of the United States and/or Canada to demonstrate that the indigenous nations with which they entered into treaties have either undergone some legitimate diminishment in their status or gone out of existence altogether. To quote Attorney General Wirt again:

> So long as a tribe exists and remains in possession of its lands, its title and possession are sovereign and exclusive. We treat with them as separate sovereignties, and while an Indian nation continues to exist within its acknowledged limits, we have no more right to enter upon their territory than we have to enter upon the territory of [any] foreign prince.[44]

There are of course arguments, typically advanced by officials and other advocates of settler-state hegemony, that literal extinction applies in certain cases, and that the requisite sorts of diminishment in standing has in any event occurred across the board through processes ranging from discovery and conquest to the voluntarily sociopolitical and economic merger of once distinct indigenous polities with the "broader" settler societies which now engulf us.[45] Since any of these contentions, if true, would serve to erode Native claims to inherent sovereignty as well as treaty rights, it is worth examining each of them in turn.

DISCOVERY DOCTRINE

It has been considered something of a truism in the United States since its inception that America's vestiture of title in and jurisdiction over its pretended land base accrues "by right of discovery."[46] This is a rather curious proposition since, unlike Canada, which has always maintained a certain fealty to the

British Crown, the United States can make no pretense that its own citizenry ever "discovered" any portion of North America. Nor, the claims of several of the country's "founding fathers" and many of their descendants notwithstanding, did Great Britain transfer its own discovery rights to the insurgent Continental Congress at the conclusion of America's decolonization struggle.[47] Rather, under the 1783 Treaty of Paris, England simply quitclaimed its interest in what is now the U.S. portion of the continent lying eastward of the Mississippi River.[48]

Moreover, even had the American republic somehow inherited its former colonizer's standing as a bona fide discovering power, this would not in itself have conveyed title to the territory in question. Contrary to much popular—and preposterous—contemporary mythology, the medieval "doctrine of discovery," originating in a series of interpretations of earlier papal bulls advanced by Innocent IV during the mid-thirteenth century and perfected by Vitoria and others three hundred years later, did nothing to bestow ownership of newfound territory upon Europeans other than in cases where it was found to be *territorium res nullius* (genuinely uninhabited).[49] In all other instances, the doctrine confirmed the collective title of indigenous peoples to their land—in essence, their sovereignty over it—and, thus, the right to retain it.[50]

> [N]otwithstanding whatever may have been or may be said to the contrary, the said Indians and all other peoples who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they may be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.[51]

What the discovering power actually obtained was a monopolistic right vis-à-vis other European powers to acquire the property in question, should its Native owners ever willingly consent to its alienation.[52] As John Marshall correctly observed in 1832, discovery "could not affect the rights of those already in possession, either as aboriginal occupants, or by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on

a denial of the right of the possessor to sell."[53]

In substance, the doctrine was little more than an expedient to regulate relations among the European powers, intended to prevent them from squandering the Old World's limited assets by engaging in bidding wars—or, worse, outright military conflicts among themselves—over New World territories. As Marshal noted:

> [Since the Crowns of Europe] were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated, as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against other governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere.[54]

That such understandings were hardly unique to John Marshall is witnessed in a 1792 missive from then Secretary of State Thomas Jefferson to the British foreign ministry, in which he acknowledged that the Treaty of Paris had left the United States, not with clear title to lands west of the Appalachian Mountains, but rather with an ability to replace England in asserting what he called a "right of preemption."[55]

> [T]hat is to say, the sole and exclusive right of purchasing from [indigenous peoples] whenever they should be willing to sell.... We consider it as established by the usage of different nations into a kind of *Jus gentium* for America, that a white nation settling down and declaring such and such are their limits, makes an invasion of those limits by any other white nation an act of war, but gives no right of soil against the native possessors."[56]

So plain was the pattern of law and historical precedent in Marshall's mind that he openly scoffed at notions, prevalent

among his countrymen, that the doctrine of discovery did, or could have done, more:

> The extravagant and absurd idea, that feeble settlements made along the seacoast ... acquired legitimate power to govern [Native] people, or occupy the lands from sea to sea, did not enter into the mind of any man. [Crown charters] were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightly convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not undertake to grant what the crown could not affect to claim; nor was it so understood.[57]

The same problems afflicting arguments that title to unceded Indian land which advocates claim was passed to the United States via the Treaty of Paris also beset other acquisitions from European and Euro-American powers. This is most notably true with respect to the 1803 Louisiana Purchase and the 1848 cession of the northern half of Mexico under the Treaty of Guadalupe Hidalgo, but also pertains to the 1845 admission of Texas to the Union, the 1846 purchase of Oregon Territory from Russia, and so on.[58] As concerns the largest single annexation ever made by the United States, encompassing the entire Transmississippi West:

> What [the United States] acquired from Napoleon in the Louisiana Purchase was not real estate, for practically all of the ceded territory that was not privately owned by Spanish and French settlers was still owned by the Indians, and the property rights of all the inhabitants were safeguarded by the terms of the treaty of cession. What we did acquire from Napoleon was not the land, which was not his to sell, but simply the right [to purchase the land].[59]

Similarly, the Treaty of Guadelupe Hidalgo, by which the U.S. war against Mexico was concluded, made express provision that already-existing property rights, including those of the region's indigenous peoples, be respected within the vast area ceded by the Mexican government.[60] In no instance is there evidence to support assertions that the United States obtained

anything resembling valid title to its presently claimed continental territoriality through interaction with non-indigenous governments, whether European or Euro-American. Less can such contentions be sustained with regard to Hawaii.[61] The matter is confirmed by the 1928 *Island of Palmas* case, in which the International Court of Justice (ICJ, or World Court) found that title supposedly deriving from discovery cannot prevail over a title based in a prior and continuing display of sovereignty.[62]

TERRITORIUM RES NULLIUS

Although John Marshall himself, while readily conceding many of its implications, would ultimately pervert the doctrine of discovery in a relatively sophisticated fashion while attempting to rationalize and legitimate his country's territorial ambitions (this will be taken up below), many of his successors operated in a much cruder fashion. Hence, in the 1842 *Martin v. Waddell* case, decided only seven years after Marshall's death, the Supreme Court set down the following opinion (despite the clear exposition of the doctrine's actual contents the late chief justice had so recently bequeathed):

> The English possessions in America were not claimed by right of conquest, but by right of discovery. For, according to the principles of international law, as understood by the then civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been practiced towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe, at their pleasure, as if it had been found without inhabitants.[63]

In so thoroughly misconstruing extant law, rewriting history in the process, what the good justices were about was devising a legal loophole. Through it, they intended to pour a veneer of false legitimacy over U.S. plans, by now openly and officially

announced as the country's "manifest destiny," of rapidly extending its reach from the Mississippi to the Pacific and beyond, ignoring indigenous rights, not only to land but to liberty and often life itself, at every step along the way.[64] The mechanism they seized upon for this purpose was the principle of *territorium res nullius*, the element of discovery doctrine providing that uninhabited territory might be claimed outright by whomever first found it.[65]

It's not that the Supreme Court of the United States or anyone else ever really argued that North America was completely unoccupied at the time of the initial European arrivals. Instead, they fell back on the concept of the "Norman Yoke," an ancient doctrine particularly well developed in English legal philosophy, stipulating that to be truly owned it was necessary that land be "improved."[66] Whomever failed within some "reasonable" period to build upon, cultivate, or otherwise transform their property from its natural "state of wilderness" forfeited title to it. The land was then simply declared to be vacant and open to claim by anyone professing a willingness to "put it to use."[67]

The Puritans of Plymouth Plantation and Massachusetts Bay Colony had experimented with the idea during the 1620s—arguing that while Native property rights might well be vested in town sites and fields, the remainder of the territories, since it was uncultivated, should be considered *terra nullius* and thus unowned—but their precedent never evolved into a more generalized English practice.[68] Indeed, the Puritans themselves abandoned such presumption in 1629.[69]

> Whatever theoretical disagreements existed concerning the nature of the respective ownership rights of Indians and Europeans to land in America, practical realities shaped legal relations between the Indians and colonists. The necessity of getting along with powerful Indian [peoples], who outnumbered the European settlers for several decades, dictated that as a matter of prudence, the settlers buy lands that the Indians were willing to sell, rather than displace them by other methods. The result was that the English and Dutch colonial governments obtained most of their lands by purchase. For all practical purposes, the Indians were treated as sovereigns possessing full ownership of [all] the lands of America.[70]

By the early nineteenth century, the demographic/military

balance had shifted dramatically in favor of settler populations.[71] One result was that the potential of invoking the Norman Yoke in combination with the broader principle of *res nullius* began to be rethought. In terms of international law, the principle eventually found expression in the observation of jurist Emmerich de Vattel that no nation holds a right to "exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate."[72] For all practical intents and purposes, John Marshall himself employed such reasoning in an 1810 opinion holding that portions of Indian Country not literally occupied or cultivated by indigenous peoples might, at least in certain instances, be construed as unowned and therefore open to claims by settlers.[73]

During the next seventy-five years, the principle was brought to bear in the continuously evolving formation of U.S. Indian policy—as well as judicial interpretation of indigenous property entitlements—with the size of an ever greater number of the areas set aside (reserved) for Native use and occupancy demonstrating no relationship at all to the extent of aboriginal holdings or to more recent treaty guarantees of territoriality. Rather, federal policymakers, judges, and bureaucrats alike increasingly took to multiplying the number of Indians believed to belong to any given people by the number of acres it was thought each individual might use "productively." The aggregate figure arrived at would then be assigned as that people's reserved land base.[74] By the latter part of the nineteenth century, the process in Canada was much the same.[75]

In the United States, the trend culminated in passage of the 1887 General Allotment Act, a measure by which the government authorized itself to impose such terms upon every indigenous nation encompassed within the country's claimed boundaries.[76] At the stroke of the congressional pen, traditional Native modes of collective landholding were unilaterally abolished in favor of the self-anointedly more "advanced" or "civilized" Euro-American system of individual ownership.[77] The methods by which the act was implemented began with the compilation of official rolls of the members of each "tribe" in accordance with criteria sanctioned by the federal Bureau of Indian Affairs (BIA).[78] When this task was completed, each individual listed on a roll was allotted a parcel of land, according to the following formula:

1 . To each head of a family, one-quarter section [160 acres].
2. To each single person over eighteen years of age, one-eighth section.
3. To each orphan child under eighteen years of age, one-eighth section.
4. To each other single person under eighteen years of age living, or who may be born prior to the date of the order ... directing allotment of the lands, one-sixteenth section.[79]

Once each Native person had received his or her allotment, the balance of each reserved territory was declared surplus and made available to non-Indian settlers, parceled out to railroads and other corporations, and/or converted into federal parks, forests, and military compounds.[80] In this manner, the indigenous land base, which had still amounted to an aggregate of 150 million acres at the time the act went into effect, was reduced by approximately two-thirds before it was finally repealed in 1934.[81] Additionally, under provision of the 1906 Burke Act, which vested authority in the secretary of the interior to administer all remaining Native property in trust, a further "27,000,000 acres or two-thirds of the land allotted to individual Indians was also lost to sale" by the latter year.[82] What little territory was left to indigenous nations at that point was thus radically insufficient to afford economic sustenance, much less to accommodate future population growth.[83]

Needless to say, Native people agreed to none of this. On the contrary, we have continuously resisted it through a variety of means, including efforts to secure some just resolution through U.S. courts. Our refusal to participate in allotment and similar processes has often resulted in our being left effectively landless, defined as non-Indians, and worse.[84] The response of the Supreme Court to our due-process initiatives has been to declare, in the 1903 case *Lonewolf v. Hitchcock*, that the United States enjoys a permanent "trustee relationship" to its Native "wards," affording it a "plenary power" over our affairs which frees it to "change the form of" our property—from land, say, to cash or other "benefits"—at its own discretion. As a concomitant, the court argued that the United States holds a unilateral right, based in no discernible legal doctrine at all, to abrogate such terms and provisions of its treaties with indigenous nations as it may come to find inconvenient while still binding us to the remainder.[85]

By 1955, things had reached such a pass that Native peoples

were required for the first time to demonstrate that they had acquired title to their lands from a European or Euro-American power rather than the other way around.[86] Even in cases where such recognition of title was clear and apparent—the Rainbow Bridge and G-O Road cases of the 1980s, to name two prime examples—U.S. courts have consistently ruled that the "broader interests" of North America's settler society outweighs the right of indigenous owners to make use of their property in a manner consistent with their own values, customs, and traditions.[87] In other instances, such as *U.S. v. Dann*, treaty land has been declared vacant even though Native people were obviously living on it.[88]

Canadian courts, although not necessarily citing specific U.S. precedents, has followed much the same trajectory. This has been perhaps most notable in the 1984 *Bear Island* case, in which it was concluded that, Crown law to the contrary notwithstanding, federal law allowed provincial extinguishment of aboriginal title claims to "unoccupied" territories.[89] Relatedly, opinions have been rendered in several other instances— the 1973 *Calder* case, for example, and the *Cardinal* case a year later—holding that federal Canadian law functions independently of any historical guarantees extended to Native people by Great Britain, a position essentially duplicating the effect of *Lonewolf*.[90] Indeed, Canada has recently gone so far as to claim the kind of permanent trust authority over indigenous nations within its ostensible boundaries earlier asserted by the United States[91] The rights of Native people in Canada have of course suffered accordingly.[92]

Whatever merit may once have attended such legalistic maneuvering by the United States and Canada—and it was always dubious in the extreme—it has long since evaporated. The Charter of the United Nations has effectively outlawed the assertion of perpetual and nonconsensual trust relationships between nations since 1945, a circumstance reaffirmed and amplified by the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.[93] The *Lonewolf* court's grotesque interpretation of U.S. prerogatives to exercise a "line item veto" over its treaties with indigenous nations has been thoroughly repudiated by the 1967 Vienna Convention on the Law Treaties.[94] And, since the World Court's 1977 advisory opinion in the *Western Sahara* case, claims to primacy based in the notion of *Territorium res Nullius* have been legally nullified.[95]

RIGHTS OF CONQUEST

It has become rather fashionable in many quarters of North America's settler societies to refer to indigenous peoples as having been "conquered."[96] The basic idea has perhaps been expressed best and most forcefully by the U.S. Supreme Court in its 1955 *Tee-Hit-Ton* opinion.

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[97]

"After the conquest," the court went on, Indians "were permitted to occupy portions of the territory over which they had previously exercised 'sovereignty,' as we use the term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."[98] This curiously bellicose pontification, advanced a scant few years after U.S. jurists had presided over the conviction at Nuremberg of several German officials—including judges—in no small part for having vomited up an almost identical rhetoric,[99] is all the more peculiar in that it appears to bear virtually no connection to the case supposedly at hand.

> The Alaska natives [who had pressed a land claim in *Tee-Hit-Ton*] had never fought a skirmish with Russia [which claimed their territories before the United States] or the United States.... To say that the Alaska natives were subjugated by conquest stretches the imagination too far. The only sovereign act that can be said to have conquered the Alaska natives was the *Tee-Hit-Ton* opinion itself.[100]

If it may be taken as a rudiment that any conquest entails the waging of war by the conqueror against the conquered, then the sweeping universalism evident in the high court's pronouncement goes from the realm of the oddly erroneous to that

of the truly bizarre. While the United States officially acknowledges the existence of well over four hundred indigenous nations within its borders, it admits to having fought fewer than fifty "Indian Wars" in the entirety of its history.[101] Assuming that it was victorious in all of these—in actuality, it lost at least one[102]—and could on this basis argue that it had conquered each of its opponents, the United States would still have to account for the nature of its contemporary relationship to several hundred *un*conquered indigenous nations by some other means.

Lumping the Native peoples of Canada into the bargain, as the language of *Tee-Hit-Ton* plainly suggests was its intent, renders the court's reading of history even more blatantly absurd. North of the border, with the exception of two campaigns mounted to quell Louis Riel's rebellious Métis during the mid-nineteenth century, nothing that might rightly be termed an Indian war was fought after 1763.[103] On the contrary, it was explicit and successfully enforced Crown policy from that point onward to avoid military conflicts with North America's indigenous nations by every available means.[104] Of all imaginable descriptions of what might constitute a basis for Britain's assertion of rights in Canada, then, "conquest" is without doubt among the most wildly inaccurate.[105]

Benighted as was the *Tee-Hit-Ton* court's knowledge of historical fact, its ignorance of relevant law appears to have been even worse. The difficulties begin with the court's interpretation of the ancient notion of the "rights of conquest," which it erroneously construed as asserting that any nation possessed of the power to seize the assets of another holds a "natural" right to do so ("might makes right," in other words).[106] In reality, if the doctrine had ever embodied such a principle—and no evidence has ever been produced to show that it did—it had not done so for some nine hundred years.[107] By the sixteenth century, Vitoria, Matías de Pas, and others had codified conquest rights as an adjunct or subset of the discovery doctrine, constraining them within very tight limits.[108]

Such rights might be invoked by a discovering power, they wrote, only on occasions where circumstances necessitated the waging of a just war. With respect to the New World, the bases for the latter were delineated as falling into three categories: first, instances in which, without provocation, a Native people physically attacked representatives of the discovering Crown; second, instances in which the Natives arbitrarily refused to

engage in trade with Crown representatives; and, third, instances in which Native people refused to admit Christian missionaries among them. Should any or all of these circumstances be present, the jurists agreed, discoverers held the right to use whatever force was necessary to compel compliance with international law.[109] Having done so, they were then entitled to compensate themselves from the property of the vanquished for the costs of having waged the war.[110] In all other instances, however, legitimate acquisition of property could occur only by consent of its indigenous owners.[111]

The problem is that in the entire history of Indian-white relations in North America, there is not a single instance in which any of the three criteria can be documented.[112] Hence, contra the *Tee-Hit-Ton* court's all-encompassing declaration that Euro-American title to the continent derives from conquest, such a result does not obtain, legally at least, even with regard to the relatively few instances in which wars were actually fought.[113] It follows that the only valid land title presently held by either the United States or Canada is that accruing from bilateral and mutually consensual treaties through which certain Native lands were ceded to those countries or predecessor powers like England and France.[114]

Earlier U.S. jurists and legislators understood the law, even if the *Tee-Hit-Ton* court did not. One consequence was the 1787 Northwest Ordinance, in which the Congress foreswore all wars of conquest against Native peoples and pledged the country to conducting its relations on the basis of treaties negotiated in "utmost good faith."[115] As has been mentioned, John Marshall classified contentions that North America's indigenous nations had been conquered as "extravagant and absurd."[116] Elsewhere, he observed that "law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, [is] incapable of application" to American Indians.[117] Even the *Martin* court, hostile to Native interests by any estimation, was at pains to state that "English [and, by extension, U.S.] rights in America were *not* claimed by right of conquest (emphasis added)."[118] Probably the most definitive assessment was that offered by Indian Commissioner Thomas Jefferson Morgan in 1890, after the Indian Wars had run their course.

> From the execution of the first treaty made between the United States and the Indian tribes residing within its

> limits ... the United States has pursued a uniform course of extinguishing Indian title only with the consent of those tribes which were recognized as having claim to the soil by reason of occupancy, such consent being expressed by treaties.[119]

In light of all this, it is fair to say that there is not a scintilla of validity attending the *Tee-Hit-Ton* opinion, either legally or in any other way. The same holds true for the dominant society's academic and popular discourse of conquest, perhaps best represented by the 2,000-odd "Cowboys and Indians" movies produced by Hollywood over the past seventy-five years.[120] To pretend otherwise, as the *Tee-Hit-Ton* court did, does nothing to legitimate Euro-American claims of primacy over Native territories. Rather, it is to enter a tacit admission that, in the United States at least, much land has been acquired in the most illegitimate fashion of all—the waging of aggressive war—and that a considerable part of the continent constitutes what one analyst has termed "occupied America."[121]

EXTINCTION

Although both the United States and Canada officially maintain that genocide has never been perpetrated against the indigenous peoples within their borders,[122] both have been equally prone to claim validation of their title to Native lands on the basis that "group extinction" has run its course in a number of cases. Where there are no survivors or descendants of preinvasion populations, the argument goes, there can be no question of continuing aboriginal title. Thus, in such instances, the land—vacated by the literal die-off of its owners—must surely have become open to legitimate claims by the settler states under even the most rigid constructions of *territorium res nullius*.[123]

While the reasoning underpinning this position is essentially sound, and in conformity with accepted legal principles, the factual basis upon which it is asserted is not. With the exception of the Beothuks of Newfoundland, whose total extermination was complete at some point in the 1820s, it has never been demonstrated that any of the peoples Native to North America, circa 1500, have ever been completely eradicated.[124] Take the Pequots as a case in point. In 1637, they were

so decimated by a war of extermination waged against them by English colonists that they were believed to have gone out of existence altogether. Even their name was abolished under colonial law.[125] For three centuries, Pequots were officially designated as being extinct. Yet today the federal government has been forced, grudgingly, to admit that several hundred people in Connecticut are directly descended from this "extirpated" nation.[126]

Similar examples abound. The Wampanoags of Massachusetts were declared extinct in the aftermath of the 1675 King Philip's War, but managed to force recognition of their continuing existence during the 1970s.[127] More or less the same principle applies to a number of other peoples of the Northeast:[128] the Piscataways, Yamasees, Catawbas, and others of the Southeast, all of whom were reportedly extinct by 1800;[129] the Yuki, Yahi, and others of Northern California, largely annihilated through the "cruelties of the original settlers" prior to 1900;[130] and so on around the country. James Fenimore Cooper's "Last of the Mohicans" wasn't, nor was Alfred Kroeber's Ishi really the "last of his tribe."[131] In sum, the fabled "Vanishing Red Man," alternately bemoaned and celebrated with a great deal of glee in turn-of-the-century literature, didn't.[132]

By and large, extinction is and has always been more a classification bestowed for the administrative convenience of the settler states than a description of physical or even cultural reality. The classic example occurred when, during the decade following the adoption of House Resolution 108 in 1953, the United States Congress systematically terminated its recognition of more than one hundred indigenous peoples.[133] Some, like the Menominees of Wisconsin, were eventually able to obtain formal reinstatement.[134] The majority, however, like the Klamaths of Oregon and an array of smaller peoples in Southern California, have been unsuccessful in such efforts. They remain officially dissolved, whatever remained of their reserved territories absorbed by the surrounding settler state.[135]

In other instances, the United States has simply refused ever to admit the existence of indigenous peoples. Notably, this pertains to the Abnakis of Vermont, who, having never signed a treaty of cession, actually hold title to very nearly the entire state.[136] Other examples include the Lumbees of North Carolina, perhaps the most populous indigenous people in all of North America, and a number of fragmentary groups like the Miamis of Ohio scattered across the Midwestern states.[137]

While not following precisely the same pattern, Canada has also utilized policies of declining to acknowledge Native status and/or refusing to recognize the existence of entire groups as a means of manipulating or denying altogether indigenous rights to land and sovereign standing.[138]

While neither such official subterfuges nor the popular misconceptions attending them have the least effect in terms of diminishing the actual rights of the peoples in question, they do place the settler states in positions of patent illegality. Among other things, it is readily arguable that official declarations that still-viable human groups have gone out of existence, coupled to policies designed and intended to bring this about, constitute the crime of genocide, not only within the definition of the term as originally advanced by Raphaël Lemkin during the Second World War, but as it is now codified in international law.[139]

MERGER WITH SETTLER SOCIETY

A final line of argument extended by the United States and Canada to justify their denials of indigenous rights to self-determination is that most Native peoples have long since commingled with the settler societies of both countries to the point, in many if not most cases, of rendering our sovereignty self-nullifying.[140] Although it is true that international law recognizes the voluntary merger of one nation into another as the sole sure and acceptable means by which national identity and concomitant national rights can be extinguished, it is dubious whether the description actually applies to any but a handful of North America's indigenous nations (if at all).[141]

> In many instances there is simply no evidence of a voluntary merger by treaty agreements or in any manner. One will search the treaties of the Six Nations Confederacy and no doubt many other Indian nations in vain for such evidence.... Very few treaties, perhaps none, include provisions even remotely suggesting voluntary merger or voluntary surrender of sovereignty [although a] few treaties contain provisions subjecting the Indian parties to United States law.... Many Indian nations such as the Hopi have never made a treaty or agreement with the United States and [therefore] cannot be said to have assented to a merger.[142]

The state contended in *Worcester v. Georgia* that since, under Article III of the Treaty of Hopewell, the Cherokee Nation had voluntarily placed itself under the military protection of the United States, it had effectively relinquished its national sovereignty, merging with "the stronger power."[143] Chief Justice Marshall rejected this argument unequivocally and in terms which encompass all indigenous nations finding themselves in a comparable situation:

> [T]he settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right of self-government—by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.[144]

That Marshall's 1832 opinion yields a continuing validity is amply borne out in the status accorded such tiny protectorates as Liechtenstein and Monaco in Europe itself, examples which—along with Luxembourg, Grenada, the Marshall Islands, and a number of other small nations around the world whose right to sovereignty is not open to serious challenge—also preempt questions of scale.[145] As Onondaga leader Oren Lyons has aptly put it, "Nations are not according to size. Nations are according to culture. If there are twenty people left who are representing their nation ... they are a nation. Who are we to say less?"[146]

Other mainstays of the merger argument are the facts that Native peoples both north and south of the border have become increasingly assimilated into settler culture, accepted citizenship in both the United States and Canada, adopted forms of governance explicitly subordinated to those of the settler states, and are now thoroughly encompassed by the statutory codes of the latter.[147] Even the most cursory examination of the record reveals, however, that none of this has occurred in anything resembling a "voluntary" manner on the part of the indigenous nations involved. Indeed, Native resistance to all four aspects of the process has been, and in many cases continues to be, substantial.

For starters, the kind and degree of cultural assimilation among Native people evident today in both countries results not from any choice made by Indians to "fit in," whether collectively or individually, but from extraordinarily draconian conditions imposed upon us by the settler-state governments. From at least as early as the last quarter of the nineteenth century, the United States and Canada alike implemented policies of compulsory assimilation involving direct intervention in the domestic affairs of all indigenous nations within their respective spheres.[148] Among the techniques employed was the systematic subversion of traditional Native governments through the creation, underwriting, and other support for oppositional factions, and routine disruption of customary social and spiritual practices.[149] Most especially in the United States, but also to a considerable extent in Canada, the early phases of such initiatives were coupled to the previously discussed program of land allotment and manipulation of "tribal" membership.[150] Meanwhile, the traditional economies of an ever increasing number of Native peoples throughout North America were undermined and in many cases obliterated altogether.[151]

While all of this was obviously devastating to the ability of indigenous nations to maintain their cohesion and cultural integrity, the real linchpin of assimilation policy on both sides of the border was the imposition of universal compulsory "education" upon Native children.[152] Between 1880 and 1930, up to 80 percent of all American Indian youngsters were sent, almost always coercively, often forcibly, to remote boarding schools, far from family, friends, community, nation, and culture. Thus isolated, shorn of their hair, compelled to dress in Euro-American attire, forbidden to speak their Native languages or follow their spiritual beliefs, subjected to severe corporal punishment and/or confinement for the slightest breach of "discipline," the students were typically held for years, systematically indoctrinated all the while to accept Christianity, speak "proper" English, and generally adopt Western values and perspectives.[153]

The express objective of the boarding school system was, according to U.S. Superintendent of Indian Schools Richard H. Pratt, to "kill the Indian" in each pupil, converting them into psychological and intellectual replications of non-Indians.[154] The broader goal, articulated repeatedly by the administrators of U.S. assimilation policy as a whole, was to bring about the functional disappearance of indigenous societies as such by

some point in the mid-1930s.[155] The intent in Canada was no different, albeit geared to a somewhat slower pace.[156] While such a process of sociocultural "merger" can by no conceivable definition be described as voluntary, it is glaringly genocidal under even the strictest legal definition of the term.[157]

Citizenship fares little better as a justification for statist presumption. Indians, as a rule, sought to become citizens of neither the United States nor Canada. On the contrary, the record demonstrates conclusively that in the latter country we began to be treated as subjects at a time when we were strongly and all but unanimously asserting the exact opposite. Consider, for example, the following observation, drawn from the opinion of a twentieth-century Canadian court:

> It is well-known that claims have been made from the time of Joseph Brant [Thayendanegea, a Mohawk who led a faction of his people to fight on the British side during the U.S. War of Independence, and afterwards into Canada] that the Indians were not really subjects of the King but an independent people—allies of His Majesty—and in a measure at least exempt from the civil laws governing the true subject. "Treaties" had been made in which they were called "faithful allies" and the like.... As to the so-called treaties, John Beverly Robinson, Attorney-General for Upper Canada, in an official letter to Robert Wilmot Horton, Under Secretary of State for War and Colonies, March 14, 1824, said: "To talk of treaties with the Mohawk Indians, residing in the heart of one of the most populous districts of Upper Canada ... is much the same, in my humble opinion, as to talk of making a treaty of alliance with the Jews of Duke Street...."[158]

More formally, in the sense of enfranchisement and the like, citizenship was not extended to indigenous people until An Act to Encourage the Gradual Civilization of the Indian Tribes was effected by the Province of Canada in 1857.[159] Since the law made acceptance voluntary—Indians had to apply, and were declared legally "white" upon acceptance—there were relatively few takers.[160] Hence, pursuant to the 1867 British North American Act (Constitution Act), Native citizenship in Canada was simply made declarative, irrespective of objections raised by its alleged beneficiaries.[161] As Prime Minister Sir John A.

MacDonald put it in 1887, "the great aim of [such] legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the dominion, as speedily as they are fit for the change."[162]

In the United States, citizenship was first imposed upon Native people in a large-scale fashion during the 1880s, as a quid pro quo in the release of individually allotted land parcels from trust status.[163] In 1924, an act was passed unilaterally conferring citizenship upon all Indians who had been overlooked in earlier processes, or who had proven resistant to accepting it.[164] As in Canada, "The grant of citizenship was not sought by the Indian population, and many Indian nations have consistently and vigorously denied United States citizenship. The Six Nations Confederacy, to use a now familiar example, has repeatedly gone on public record to reject United States citizenship and deny the federal government's power to make them citizens."[165]

> It has never been held by any court, national or international, that the unilateral conferral of citizenship upon a population deprives them of their separate nationhood. The ultimate question is, after all, whether Congress [or the Canadian parliament] has the right or the legal power under international law to legislate over Indian nations without their consent.[166]

As to the fact that indigenous governments are presently considered as parts of the settler-state governmental hierarchies themselves, Native people no more chose this status than they did U.S. or Canadian citizenship or any other aspect of assimilation.[167] Traditional forms of governance throughout the United States were systematically supplanted, nation by nation, under the 1934 Indian Reorganization Act (IRA) with a constitutional structure designed by the BIA.[168] In the great majority of cases, the resulting "tribal councils" were patterned more after corporate boards than actual governing bodies, while all of them derived their authority from and were underwritten by the United States rather than their own ostensible constituents.[169]

Although superficially democratic in its implementation—referenda were conducted on each reservation prior to its being reorganized—the record is replete with instances in which federal officials misrepresented what was happening in order to

convince Native voters to cast affirmative ballots.[170] In certain instances—among the Lakota, for example, where a sufficient number of dead persons to swing the outcome were later shown to have "voted"—outright electoral fraud prevailed.[171] Hopi provides another useful illustration.

> [Indian Commissioner John] Collier reported to the Secretary of Interior in 1936 that [in 1935] the Hopis had accepted the IRA by a vote of 519 to 299, the total votes cast representing 45 percent of the eligible voters, [yet he] came up with a figure of 50 percent for the percentage of voters coming to the polls a year later, in 1936, to vote on the constitution in, in his annual report for 1937. [But] according to the statistics contained in the ratified and Interior-approved constitution itself, only 755 people voted in the constitutional referendum. This is 63 fewer people than voted in the 1935 referendum on the Indian Reorganization Act. How can 818 voters constitute 45 percent of the eligible voters in 1935 and, a year later, 755 voters constitute 50 percent?... Clearly, Collier made up his own statistics, and perpetrated a good deal of deception in order to make it seem the Hopis [embraced the IRA], when they did not.[172]

Moreover, a "number of Hopis assert today that voters were told they were voting for retention of their land, not for reorganization; that registration papers were falsified; and that votes were fabricated."[173] In reality, voter turnout was less than 30 percent.[174] Even this does not tell the whole story, since, as was made clear to BIA representatives at the time, the bulk of eligible voters did not abstain. Instead, they opted to exercise their traditional right of signifying "no" by actively boycotting the proceeding.[175] Tabulated in this fashion, the best contemporary estimate is that fewer than 15 percent of all eligible Hopis actually voted for reorganization, while more than 85 percent voted against it.[176] Nonetheless, it remains the official position of the United States that the IRA council is the "legitimate" government of the Hopi people.

In Canada, meanwhile, provision was first made in the 1876 Indian Act to establish a system of "band governments" under federal rather than Native authority.[177] In 1880, the law was amended to deprive traditional "chiefs" (i.e., leaders) of their authority as rapidly as elected officials became available.[178] In

1884, the Indian Advancement Act was passed for, among other things, the specific purpose of preparing federally created and funded band councils to assume functions roughly analogous to municipal governments.[179] In 1920, an amendment to the then-prevailing Indian Act of 1906 empowered the councils, by simple majority vote, to make Canadian citizens of their constituency as a whole.[180] And so it has gone, right up through the 1982 rewriting of the Canadian Constitution, a document which explicitly delineates the location and prerogatives of Native governments *within* the settler-state corpus.[181]

Under the circumstances already described in this section, suggestions that other unilaterally imposed "accommodations of" Native people within U.S. and Canadian statutory codes might somehow imply the legitimate merger of indigenous nations with the settler states are too ludicrous to warrant serious response.[182] On balance, both the arrangement and the duplicitous nature of the arguments used to rationalize and defend such ideas are entirely comparable to those employed by France with respect to Algeria during the early 1950s.[183] As such, they are frankly colonialist and therefore in violation of black letter international law.[184]

No mere adjustments to the status quo—the enactment of another statue here, a constitutional amendment there—can rectify a situation which is so fundamentally at odds with legality. The only possible course by which either Canada or the United States can redeem its posture as an outlaw state is to recall and act upon the 1832 observation of John Marshall that "Indian nations [have] always been considered as distinct, independent political communities, retaining their original natural rights.... The very term 'nation,' so generally applied to them, means 'a people distinct from others.'... The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having a definite and well-understood meaning. We have applied them to other nations of the earth. They are applied to all in the same sense."[185]

THE MARSHALL INNOVATION

It will undoubtedly be argued that there is yet another way out of the box of illegality in which the settler states would otherwise appear to be trapped, and that Marshall himself supplied

it a year before he made the above-quoted statement. This is found in a formulation extended by the chief justice in an 1831 opinion, *Cherokee v. Georgia*, as he struggled with the impossible task of reconciling the legal realities of indigenous sovereignty to the insistence of his own country upon asserting its dominion over them.[186] After conceding that argumentation "intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of governing itself, has ... been completely successful,"[187] he went on to observe:

> [Y]et it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps be denominated domestic dependent nations.[188]

There were several bases upon which Marshall rested this idea, probably most importantly the element of discovery doctrine vesting sole rights of territorial acquisition in discovering Crowns he had previously explored in his *McIntosh* opinion.[189] While, as has been mentioned, the intent of this proviso was to regulate affairs among the European powers, not Indians, Marshall reconfigured it as a kind of restraint of trade measure imposed upon the indigenous nations themselves. From there, he was able to extrapolate that, insofar as discovering powers enjoyed a legitimate right to constrain Native peoples in the alienation of their property, to that extent at least the sovereignty of the discoverer stood at a level higher than that of the discovered. Ultimately, from a juridical perspective, this was the logical loophole employed to recast the relations between the United States and indigenous nations not as an association of peers, but in terms of supremacy and subordination.[190]

Although Marshall's interpretation stood the accepted meaning of international law squarely on its head—and there is ample indication he was fully aware of this[191]—it served the purpose of rationalizing U.S. expansionism quite admirably.[192] From the foundation laid in *Cherokee*, it was possible for American jurists and policymakers alike to argue that indigenous nations were always sovereign enough to validate U.S. territorial ambitions through treaties of cession, never sovereign enough to decline them (indeed, after 1831, Native refusals to comply with U.S. demands were often enough con-

strued as "acts of aggression" requiring military response).[193] Here, too, lay the groundwork for the eventual assertion of perpetual trust discussed above in relation to *Lonewolf*, allotment, reorganization, and all the rest.[194]

So useful has the doctrine emanating from Marshall's quartet of "Indian Cases"—*Peck*, *McIntosh*, *Cherokee*, and *Worcester*—proven in enabling the U.S. judiciary to justify, or at least to obfuscate, its Indian policy that Canadian courts have openly and increasingly embraced it. This began at least as early as 1867, when a Québec court quoted an entire passage from *Worcester* in the landmark case, *Connolly v. Woolrich*.[195] In its 1973 *Calder* opinion, the Supreme Court of Canada lavished praise on the *McIntosh* opinion as "the *locus classicus* of the principles governing aboriginal title."[196] By 1989, in determining the outcome of the *Bear Island* case, a Canadian appellate court simply abandoned its country's legal code altogether, adopting as precedents what it deemed to be the "relevant" aspects of U.S. common law. Most especially, these included the "domestic dependent nation" formulation advanced by Marshall in *Cherokee*.[197] Canadian policymakers have, of course, trotted dutifully down the same path.[198]

Whatever its utility for settler states, however, the Marshall doctrine does not add up to internationally valid law. On the contrary, the *Cherokee* opinion in particular cannot be honestly said to stand muster even in terms of its adherence to U.S. constitutional requirements. This is because, irrespective of the nomenclature he applied, when the chief justice held that indigenous nations occupy both a position within the federal dominion and a level of sovereignty below that of the central government, he was effectively placing us on the same legal footing as the individual states of the union.[199] This he could not do, by virtue of the earlier-mentioned constitutional prohibition against treatymaking by and with such subordinate sovereignties, while simultaneously arguing that we should be treated as fully independent nations for purposes of conveying land title through treaties.[200]

The matter cannot be had both ways. Either we were and are sovereign for purposes of treating, or we were and are not. In the first instance, we could not have been and thus are not now legally subordinated to any other entity. In the second, we could not have been considered eligible to enter into treaties with the federal government in the first place, a matter which would serve to void all pretense that the United States holds

legitimate title to any but a tiny fraction of its claimed territoriality outside the original thirteen Atlantic Coast states.[201]

By insisting upon playing both ends against the middle as he did, Marshall affected no reconciliation of conflicting legal principles whatsoever. Rather, he enshrined an utterly irreconcilable contradiction as the very core of federal Indian law and policy. In the process, he conjured up the fiction of "quasi-sovereign nations"—aptly described by one indigenous leader as "the judicial equivalent of the biological impossibility that a female can be partly pregnant"—a concept which has been firmly repudiated in international law.[202] As a consequence, so long as the United States continues to rely upon the Marshall doctrine in defining its relationship to Native peoples, it will remain in a legally untenable posture. No less does this hold true for Canada.

SUBVERSION OF INTERNATIONAL LAW

The second half of the 1960s saw the growth of a strong and steadily more effective movement toward national liberation among the Native peoples of North America. In the United States, traditional elders joined forces with younger militants to engage in an extended series of confrontations, some of them armed, with federal authorities.[203] These were highlighted by a protracted fishing rights campaign in Washington state (1964-69), the thirteen-month occupation of government facilities on Alcatraz Island (1969-70), the seizure of BIA headquarters in Washington, D.C. (1972), and the 71-day siege of the Wounded Knee hamlet, on the Pine Ridge Reservation (1973).[204] Initially concentrated in the United States, such initiatives had become noticeably more evident in Canada as well by the mid-1970s.[205]

By that point, an organization calling itself the American Indian Movement (AIM) had emerged as the galvanizing force within the liberation struggle and had become the target of severe physical repression by the federal government.[206] It was in this context, with world attention drawn to U.S.-Indian relations by the extraordinary pattern of events, that Lakota elders convened a meeting on the Standing Rock Reservation for purposes of establishing an organization to bring the question of indigenous treaty rights before the United Nations. Charged with responsibility for carrying out this task was AIM leader Russell Means, who in turn named Cherokee activist Jimmie

Durham to direct the day-to-day operations of what was dubbed the International Indian Treaty Council (IITC).[207]

Within months, Durham had established the presence of "AIM's international diplomatic arm" at both the United Nations headquarters in New York and the Palace of Nations in Geneva, Switzerland, and had begun lobbying for hearings on settler-state denial of self-determination to indigenous nations and other abuses. This agenda dovetailed neatly with investigations already underway in several UN agencies and led to an unprecedented conference on discrimination against Native peoples in Geneva during the summer of 1977, attended by representatives of some ninety-eight indigenous nations of the Western Hemisphere.[208] In some ways prefiguring a special session of the Russell Tribunal convened in Rotterdam to consider the same matters two years later,[209] the 1977 "Indian Summer in Geneva" sparked serious discussion within the United Nations concerning the need for a more regularized body to consider indigenous issues.[210]

Meanwhile, undoubtedly in part to preempt just such developments, the U.S. Congress came forth in 1975 with a statute bearing the supremely unlikely title of "American Indian Self-Determination and Educational Assistance Act."[211] While the act did nothing at all to meet the requirements of international legal definition—quite the opposite, it offered little more than a hiring preference to Native people in programs attending policies implemented "in their behalf" by the federal government[212]—U.S. representatives at the UN were quick to use it in asserting that questions of indigenous self-determination in the United States were "superfluous" since it was the only country in the world to specifically guarantee such rights within its own statutory code.[213]

This in itself was insufficient to halt the international process, given that a U.S. domestic law, no matter how it was presented, could hardly be argued as bearing upon the circumstances of Native peoples elsewhere. Thus, after much maneuvering, the United Nations Working Group on Indigenous Populations, a subpart of the Economic and Social Council (ECOSOC), was established in 1981.[214] Its mission was to conduct biannual sessions at the Palace of Nations during which Native delegations would present information, and to submit regular reports to ECOSOC's Commission on Human Rights, with the preliminary goal of completing a then ongoing global study of the conditions imposed upon Native peoples.[215] After

1984, although Durham and others had hoped to see a direct application of existing law to Native circumstance, the Working Group was also mandated to produce a whole new draft declaration of indigenous rights for endorsement by the UN General Assembly.[216]

There followed a lengthy period of procrastination and outright obstruction on the part of various nation-state delegations. Those of Canada and the United States, to take notable examples, tied things up for several *years* while arguing that the draft document, like the name of the Working Group itself, should be couched in terms of *populations* rather than *peoples*.[217] This was because the former term, used interchangeably with *minorities*, is employed with reference to demographic subsets of given polities, a classification automatically placing them within the parameters of their respective countries' "internal" affairs.[218] *Peoples*, on the other hand, are construed as distinct polities on their own merit, and, as such, are universally guaranteed the unfettered right of self-determination under international law.[219]

It was not until 1989 that the two North American settler states abandoned their terminological objections, and then only with the caveat that they were doing so with the specific understanding that use of the word *peoples* would not be construed as conveying legal connotations.[220] By then, their joint bottleneck had stalled the formulating procedure to the point that draft declaration, originally intended for consideration by the General Assembly during the UN's 1992 "Year of Indigenous Peoples," could not be completed on that schedule.[221] Another year was required before the document was reviewed and tentatively approved by Native delegations, a further eighteen months before it had been signed off by the Working Group and its immediate parent, ECOSOC's Sub-Commission on Prevention of Discrimination and Protection of Minorities.[222]

Matters finally came to a head in October 1996, when, prior to its submission to ECOSOC's main body, and thence the General Assembly, a subgroup of the Commission on Human Rights convened in Geneva to review the draft. When the panel, composed exclusively of nation-state representatives, set out to "revise" the document in a manner intended quite literally to gut it, a unified body of indigenous delegates demanded that it be sent forward unchanged. U.S. representatives, who had for the most part remained a bit more circumspect in their approach over the pre-

ceding twenty years, then at last openly announced that the function of the proposed declaration was, in their view, to confirm rather than challenge the convoluted doctrines through which their country purportedly legitimates settler hegemony.[223] The United States, they made clear, would reject anything else, a position quickly seconded by Canada's representatives. This affront precipitated a mass walkout by Native delegates, thereby bringing the entire process to a temporary halt.[224]

PROSPECTS AND POTENTIALS

The recent events in Geneva represent something of a crossroads in the struggle for Native sovereignty and self-determination, not only in North America, but globally. The sheer audacity with which the United States and Canada have moved to convert a supposed universal declaration of indigenous rights into little more than an extrapolation of their own mutual foreclosure upon the most meaningful of these clearly describes one direction in which things are moving. If the North American settler states are successful in pushing through their agenda, indigenous rights the world over will be formally defined in much the same truncated and subordinative fashion as is presently the case here. Native peoples everywhere will then be permanently consigned to suffer the same lack of recourse before the ICJ and other international adjudicating bodies that they have long experienced in U.S. and Canadian courts.[225]

In the alternative, if the all but unanimous indigenous refusal to agree to substantive alteration of the draft document they themselves endorsed proves inadequate to compel its eventual acceptance by the General Assembly, other options must be found. The most promising of these would appear to reside in a generalized Native repudiation of any statist version of the proposed declaration of indigenous rights combined with a return to the strategy advocated by Durham and others during the late 1970s.[226] This, quite simply, devolves upon the devising of ways to force acknowledgment of indigenous rights under existing law rather than the creation of a new instrument.[227]

There are numerous routes to this end, beginning with the seeking of ICJ advisory opinions on the broader applicability of its interpretations in the *Island of Palmas* and *Western Sahara*

cases.[228] Perhaps more important are a range of possibilities by which the ICJ and/or appropriate UN organs might be compelled to advance concrete interpretations of the meaning inherent to assorted declarations, covenants, and conventions—the 1966 International Covenant on Economic, Social and Cultural Rights, for example, and the 1966 International Covenant on Civil and Political Rights—vis-à-vis indigenous peoples.[229] Probably salient in this regard is the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 1514 (XV)), the fifth point of which stipulates that:

> Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without conditions or reservations, in accordance with their freely-expressed will or desire, without any distinction as to race, creed or colour, to enable them to enjoy complete independence and freedom.[230]

The nature of the "immediate steps" to be taken are neither mysterious nor left to the interpretive discretion of colonizing states. Rather, they are spelled out clearly in Articles 73-91 of the United Nations Charter.[231] In essence, all such territories/peoples must be inscribed by the colonizer on a list maintained by the UN Trusteeship Council, which then must approve a plan, including a timetable, by which complete decolonization will occur at the earliest feasible date.[232] The colonizer is then required to submit regular reports to the council on progress made in fulfillment of the plan.[233] The process culminates in a referendum or comparable procedure, monitored by the UN and sometimes conducted under its direct supervision, by which the colonized people determine for themselves exactly what they wish their political status to be, and what, if any, relationship they wish to maintain with their former colonizers.[234]

One significant hurdle which must be cleared in the course of bringing such elements of black letter law to bear on the question of Native rights are the provisions contained in Article 1 (4) of the United Nations Charter and Point 7 of General Assembly Resolution 1514 (XV) guaranteeing the territorial integrity of all states.[235] By and large, the meaning of these clauses has been interpreted in accordance with the so-called

"Blue Water Principle" of the 1960s, a doctrine holding that in order to be eligible for decolonization, a territory must be physically separated from its colonizer by at least thirty miles of open ocean.[236] By this standard, most indigenous peoples are obviously not and will never be entitled to exercise genuine self-determining rights.

There are, however, substantial problems attending the Blue Water formulation, not just for indigenous peoples but for everyone. It would not, for instance, admit to the fact that Germany colonized contiguous Poland during World War II, or that the Poles possessed a legitimate right to decolonization. Plainly, then, a basic reformulation is in order, starting perhaps from the basic premise that integrity is not so much a matter of geography as it is a question of whether a given territory can be shown to have been legitimately acquired in the first place. Thus, the definitional obstacle at hand readily lends itself to being rendered far less insurmountable than it might now appear.[237]

Ultimately, such issues can be resolved only on the basis of a logically consistent determination of whether indigenous peoples actually constitute "peoples" in a legal sense. While the deliberately obfuscatory arguments entered on the matter by the United States, Canada, and several other settler states during the 1980s have by this point thoroughly muddied the situation with respect to a host of untreatied peoples throughout the world, the same cannot be said with respect to the treatied peoples of North America. As has been discussed in this essay, we have long since been formally recognized by our colonizers not only as peoples, but as nations, and are thereby entitled in existing law to exercise the rights of such *regardless* of our geographic disposition.[238]

The path leading to an alternative destiny for indigenous peoples is thus just as clear as that the settler states would prescribe for us. By relentless and undeviating assertion of the basic rights of treatied peoples—at all levels, through every available venue and excluding no conceivable means of doing so—we can begin to (re)secure them, restoring to ourselves and our posterity our/their rightful status as sovereign and coequal members of the community of nations, free of such pretense as IRA-style "self-governance" and subterfuges like the "Self-Determination" Act. In achieving success in this endeavor, we will eventually position ourselves to assist our relatives tangibly in other parts of the world, untreatied and thus unrecognized as being imbued with the same self-determining rights as

we, to overcome the juridical/diplomatic quandary in which this circumstance places them.

NOTES

1. See generally, Douglas Sanders, "The Re-Emergence of Indigenous Questions in International Law," *Canadian Human Rights Yearbook* 3 (1983); S. James Anaya, "The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective," in Robert N. Clinton, Nell Jessup Newton, and Monroe E. Price, eds., *American Indian Law: Cases and Materials* (Charlottesville, VA: Michie Co., 1991).

2. It is of course true that Mexico is geographically part of the North American continent. Since its colonial legal tradition is Iberian rather than Anglo-American, however, it is excluded from the present analysis (which is thus restricted to the area north of the Río Grande). Those interested in the circumstances pertaining to Ibero-America would do well to reference Greg Urban and Joel Sherzer, eds., *Nation-States and Indians in Latin America* (Austin: University of Texas Press, 1991). Of additional interest is Roxanne Dunbar Ortiz, *Indians of the Americas: Human Rights and Self-Determination* (London: Zed Press, 1984).

3. Perhaps the most coherent articulation of the thinking embodied in this claim will be found in Charles F. Wilkinson's *Indians, Time and Law* (New Haven, CT: Yale University Press, 1987). For more analyses specific to Canada, see Russel Barsh and James Youngblood Henderson, "Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and Constitutional Renewal," *Journal of Canadian Studies* 17:2 (1982); Paul Williams, "Canada's Laws About Aboriginal Peoples: A Brief Overview," *Law & Anthropology* 1 (1986); Shorn H. Venne, "Treaty and Constitution in Canada," in Ward Churchill, ed., *Critical Issues in Native North America*, Doc. 62 (Copenhagen: IWGIA, 1989).

4. See, e.g., the statements quoted by Jimmie Durham in his *Columbus Day* (Minneapolis: West End Press, 1983). For detailed analysis of the actualities involved, see Carol J. Minugh, Glenn T. Morris, and Rudolph C. Ryser, eds., *Indian Self-Governance: Perspectives on the Political Status of Indian Nations in the United States of America* (Kenmore, WA: World Center for Indigenous Studies, 1989).

5. For further details, see Ward Churchill, "Subterfuge and Self-Determination: Suppression of Indigenous Sovereignty in the 20th Century United States," in *Z Magazine* (May 1997).

6. See, e.g., Robert M. Carmack, ed., *Harvest of Violence: The Maya Indians and the Guatemala Crisis* (Norman: University of Oklahoma Press, 1988); John G. Taylor, *Indonesia's Forgotten War: The Hidden History of East Timor* (London: Zed Books, 1991). On the historical treatment of Native peoples both north of the Río Grande and south, see David E. Stannard, *American Holocaust: Columbus and the Conquest of the New World* (New York: Oxford University Press, 1992).

For particular emphasis on the U.S. portion of North America, including current data on health, life expectancy, and so forth, see Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas* (San Francisco: City Lights Books, 1997).

7. Most notably, this applies to the counterinsurgency campaign waged during the 1970s against the American Indian Movement by U.S. civil authorities, backed up by the military, and, to a lesser extent, actions undertaken against the Mohawk Warriors Society by Canadian military and police units twenty years later; see Bruce Johansen and Roberto Maestas, *Wasi'chu: The Continuing Indian Wars* (New York: Monthly Review, 1978); Ward Churchill and Jim Vander Wall, *Agents of Repression: The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement* (Boston: South End Press, 1988); Geoffrey York and Loreen Pindera, *People of the Pines: The Warriors and the Legacy of Oka* (Boston: Little, Brown, 1991).

8. On England, see Michael Hecter, *Internal Colonialism: The Celtic Fringe in British National Development, 1536-1966* (Berkeley: University of California Press, 1975); Peter Berresford Ellis, *The Celtic Revolution: A Study in Anti-Imperialism* (Talybont, UK: Y Lolfa Cyf., 1985). On Spain, see Robert P. Clark, *Negotiating with ETA: Obstacles to Peace in the Basque Country, 1975-1988* (Reno: University of Nevada Press, 1990); Cyrus Ernesto Zirakzadeh, *A Rebellious People: Basques, Protests, and Politics* (Reno: University of Nevada Press, 1991).

9. There is much theoretical precedent for such an outcome with respect to enunciating principles of self-determination, not least within such ostensibly liberatory perspectives as Marxism-Leninism; see Walker Connor, *The National Question in Marxist-Leninist Theory and Strategy* (Princeton, NJ: Princeton University Press, 1984). For a concrete example of the United States, and Canada secondarily, manipulating the codification of international law in such fashion as to protect their own prerogatives to engage in certain of the practices ostensibly proscribed, see Lawrence J. LeBlanc, *The United States and the Genocide Convention* (Durham, NC: Duke University Press, 1991).

10. It might be useful for some readers at this point to offer a reference addressing the meaning of the term *self-determination* in not only its theoretical but also its legal and practical applications; see generally, Michla Pomerance, *Self-Determination in Law and Practice* (The Hague: Marinus Nijhoff, 1982).

11. The first indication that this is so may be found in the 1867 Quebec case *Connolly v. Woolrich* (11 LCJ 197) in which a Canadian court considering the validity of a marriage effected under Native tradition for purposes of determining inheritance rights repeated verbatim a lengthy passage from Chief Justice of the U.S. Supreme Court John Marshall's opinion in *Worcester v. Georgia*, 6 Peters 515 (1832). For a comprehensive overview of this phenomenon, see Bruce Clark, *Indian Land Title in Canada* (Toronto: Carswell, 1987).

12. See, e.g., J.V. Stalin, *Marxism and the National and Colonial Questions* (New York: International, 1935); V.I. Lenin, *The Right of Nations to Self-Determination: Selected Writings* (New York: International, 1951); Louis L. Snyder, *The Meaning of Nationalism* (New Brunswick, NJ: Rutgers University

Press, 1954); Ernst Gellner, *Nations and Nationalism* (Ithaca, NY: Cornell University Press, 1983).

13. For a variety of viewpoints, all arriving at more or less the same conclusion, see Ernst Cassirer, *The Myth of the State* (New Haven: Yale University Press, 1946); Perry Anderson, *Lineages of the Absolute State* (London: New Left Books, 1974); L. Tivey, ed., *The Nation-State* (New York: St. Martin's Press, 1981); J. Frank Harrison, *The Modern State: An Anarchist Analysis* (Montréal: Black Rose Books, 1984)

14. For further clarification, see Hugh Seton-Watson, *Nations and States: An Inquiry into the Origins of Nations and the Politics of Nationalism* (Boulder, CO: Westview Press, 1977); Anthony D. Smith, *State and Nation in the Third World* (Brighton, UK: Harvester Press, 1983).

15. As American Indian Movement leader Russell Means quipped during a talk delivered in Denver on October 9, 1996, "to be accurate, the United Nations should really have been called the United States. But the name was already taken" (UN, tape on file).

16. Sovereignty is a theological concept originally associated with the transcendent power of the deity. It was secularized during the sixteenth century when the French theorist Jean Bodin used it to describe the authority of the Crown, beyond which no world was seen to exist (monarchs, ruling by "divine right," were in his view accountable only to natural and supernatural law). Eventually, during the era of the American and French revolutions, the idea was reworked so that sovereignty might be understood as something vested in the people themselves, or, most recently, in the states supposedly embodying their "will"; L. Oppenheim, *International Law*, 8th ed. (London: Longman's, Green, 1955), 120-2; Carl Schmidt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge: MIT Press, 1985).

17. This is not to say that the actions themselves bear an intrinsic illegitimacy, simply that they do not represent a negation of sovereignty. Even in the most extreme instances—the unconditional surrenders and subsequent occupations of Germany and Japan at the end of World War II, for example—it is understood that such outcomes are of a temporary nature, that the sovereignty of the defeated nations remains intact, and that their self-determining existence will resume at the earliest possible date. For elaboration of the legal and other principles involved, see Michael Walzer, *Just and Unjust Wars: A Moral Argument with Illustrations* (New York: Basic Books, 1977).

18. For an interesting array of perspectives on, and especially sensitive handling of, this matter, see R.B.J. Walker and Saul H. Mendlovitz, eds., *Contending Sovereignties: Redefining Political Community* (Boulder, CO: Lynne Rienner, 1990).

19. For a good summary, see Jack Weatherford, *Indian Givers: How the Indians of the Americas Transformed the World* (New York: Fawcett Columbine, 1988).

20. Felix S. Cohen, "Original Indian Title," *Minnesota Law Review* 32 (1947): 44, n. 34. Vitoria's *De Indis et de Ivre Belli Reflectiones* (Washington, D.C.:

Carnegie Institution, 1917 reprint of 1557 original), a compilation of meditations begun in 1532, was more or less definitive and endorsed as legal doctrine by both the Iberian monarch and the Pope. Among other things, Vitoria—and, by extension, the Vatican and the Spanish Crown—acknowledged indigenous peoples' ownership of their lands and other property, their right to govern themselves within these territories, and their right to convey citizenship; Felix S. Cohen, "The Spanish Origin of Indian Rights in the United States," *Georgetown Law Journal* 31:1 (1942); Lewis Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Philadelphia: University of Pennsylvania Press, 1947); Etienne Grisel, "The Beginnings of International Law and General Public Law Doctrine: Francisco de Vitoria's *"De Indis prior,"* in Fredi Chiapelli, ed., *First Images of America,* Vol. 1 (Berkeley: University of California Press, 1976). More broadly, see Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

21. See Howard Peckham and Charles Gibson, eds., *Attitudes of the Colonial Powers Toward the American Indian* (Salt Lake City: University of Utah Press, 1969).

22. Quoted in Francis Paul Prucha, *American Indian Policy in the Formative Years: The Trade and Intercourse Acts, 1790-1834* (Lincoln: University of Nebraska Press, 1970), 141.

23. Quoted in George Dewey Harmon, *Sixty Years of Indian Affairs: Political, Economic, and Diplomatic, 1789-1850* (Chapel Hill: University of North Carolina Press, 1941), 16.

24. *Worcester v. Georgia,* at 559. For further amplification, see Howard Berman, "The Concept of Aboriginal Rights in the Early History of the United States, *Buffalo Law Review* 27 (Fall 1978).

25. Edwin de Witt Dickenson, *The Equality of States in International Law* (Cambridge, MA: Harvard University Press, 1920). The principle at issue was consistently recognized by the U.S. judiciary with respect to American Indians as late as the 1883 case *Ex Parte Crow Dog* (109 U.S. 556), in which the court held that the United States lacked a jurisdictional standing to prosecute criminal offenses committed in Indian Country. Congress responded by passing the 1885 Major Crimes Act (ch. 120, 16 Stat. 544, 566, now codified at 25 U.S.C. 71), unilaterally extending the reach of U.S. courts into reserved territories with regard to seven felonious offenses. Hence, it was not until *U.S. v. Kagama* (118 U.S. 375 [1886]) that the Supreme Court began to speak of the federal government possessing an "incontrovertible right" to exercise jurisdiction over Native lands; see Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge, UK: Cambridge University Press, 1994). Usurpation of Native jurisdiction in Canada began earlier, with the 1803 Act for Extending Jurisdiction of the Courts of Justice in the Provinces of Upper and Lower Canada, to the Trial and Punishment of Persons Guilty of Crimes and Offenses within Certain Parts of North America Adjoining to Said Provinces (43 Geo. III, c. 138), amplified and extended into the civil domain by the 1821 Act for Regulating the Fur Trade

and Establishing a Criminal and Civil Jurisdiction within Certain Parts of North America (1 & 2 Geo. IV, c. 66); Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montréal: McGill-Queens University Press, 1990), 124-7. For a strongly articulated Native repudiation of the U.S. performance, see the testimony of Vine Deloria, Jr., during the 1974 "Sioux Sovereignty Hearing" conducted before a federal court in Lincoln, Nebraska; Roxanne Dunbar Ortiz, ed., *The Great Sioux Nation: Sitting in Judgment on America* (New York/San Francisco: International Indian Treaty Council/Moon Books, 1977), 141-6. On Canada, see the positions advanced by Ontario Region Chief Gordon Peters, John Amagolik, Doris Ronnenberg, and others in Frank Cassidy, ed., *Aboriginal Self-Determination: Proceedings of a Conference held September 30-October 3, 1990* (Lantzville, BC: Oolichan Books, 1991), 33-60.

26. This prescription for the interaction of nations was worked out very well by the time of Dutch jurist Hugo Grotius' *De Jure Belli ac Pacis Libri Tres: In quibus ius naturae & Gentium, item iuris publicipraecipua explicantur* (Paris: Buon, 1625). For interpretation, see, Hidemi Suganami, "Grotius and International Equality," in Hedley Bull, Benedict Kingsbury, and Adam Roberts, eds., *Hugo Grotius and International Law* (Oxford, UK: Clarendon Press, 1990).

27. A particularly astute rendering of this principle will be found in John Howard Clinebell and Jim Thompson, "Sovereignty and Self-Determination: The Rights of Native Americans Under International Law," *Buffalo Law Review* 27 (Fall 1978).

28. Suganami, "Grotius and International Equity," op. cit. Also see Hedley Bull, "The Grotian Conception of International Relations," in Herbert Butterfield and Martin Wright, eds., *Diplomatic Investigations: Essays in the Theory of International Politics* (London: Allen & Unwin, 1966); Cornelius J. Murphy, "Grotius and the Peaceful Settlement of Disputes," *Grotiana* 4 (1983). For translation of Grotian thought into the relatively more concrete terms of contemporary legal/diplomatic practice, see Martin Lachs, "The Grotian Heritage, the International Community and Changing Dimensions of International Law," in *International Law and the Grotian Heritage* (The Hague: T.M.C. Asser Instituut, 1985).

29. See generally, Vitoria, "On the Law of War," in *De Indis et De Jure Belli Relaciones*, op. cit. More particularly, see Walzer, op. cit., 51-3; and *Report of the Special Committee on the Question of Defining Aggression*, Gen. Ass. Off. Rec. No. A/9619, 29 sess. 19 (1974), 10-13. On the military dimension of U.S.-Indian relations, see, e.g., Alan Axelrod, *Chronicle of the Indian Wars from Colonial Times to Wounded Knee* (New York: Prentice Hall, 1993).

30. As the point is delineated in the United Nations Resolution on the Definition of Aggression, U.N.G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. No. 31, 142, U.N. Doc. A/9631 (1975), "No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful." This is an element of what has come to be known as the Nuremberg Doctrine; see, e.g., Quincy Wright, "The Law of the Nuremberg Trials," *American Journal of*

International Law 41 (Jan. 1947). For the text of the instrument by which the international community accepted this doctrine, see "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal" ("London Agreement," Aug. 8, 1945) in Burns H. Weston, Richard A. Falk, and Anthony D'Amato, *Basic Documents in International Law and World Order,* 2nd ed. (St. Paul, MN: West Publishing, 1990), 138-9. On the role of the United States in articulation of the Nuremberg principles and its endorsement of them, see Bradley F. Smith, *The Road to Nuremberg* (New York: Basic Books, 1981); *The American Road to Nuremberg: The Documentary Record, 1944-1945* (Stanford, CA: Hoover Institution Press, 1982). With respect to the crimes for which the German leadership was tried in this connection, see Office of United States Chief Council for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression* (Washington, D.C.: U.S. Government Printing Office, 1946).

31. The point is exceedingly well established; see, Pomerance, *Self-Determination in Law and Practice,* op. cit.; W. Ofuatey-Kodjoe, *The Principle of Self-Determination in International Law* (Hamden, CT: Archon Books, 1972); A. Rigo Sureda, *The Evolution of the Right to Self-Determination: A Study of United Nations Practice* (Leyden, Netherlands: A.W. Sijhoff, 1973); Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978); Ved Nanda, "Self-Determination Under International Law: Validity of Claims to Secede," *Case Western Journal of International Law* 13 (1981).

32. This principle was enunciated by Supreme Court Justice Robert H. Jackson, at the time serving as lead prosecutor for the United States, in his opening statement to the court at Nuremberg on November 21, 1945; International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal,* Vol. 2. (Nuremberg: Allied Control Authority, 1949), 98-155. Also see Jackson's *The Nürnberg Case* (New York: Alfred A. Knopf, 1947).

33. On the contrary, instruments such as the Universal Declaration of the Rights of Peoples ("Algiers Declaration," July 4, 1976), go in precisely the opposite direction; for text, see Richard Falk, *Human Rights and State Sovereignty* (New York: Holmes & Meier, 1981), 225-8.

34. This has been so since at least as early as publication of Grotius' 1625 *De Jure Belli,* op. cit., and was reconfirmed quite forcefully by the renowned jurist Emmerich de Vattel in his massive three-volume *The Laws of Nations* (Philadelphia: T. & J.W. Joseph, 1883 reprint of 1758 original; Washington, D.C.: Carnegie Institution, 1925 reprint). Most definitively, the Vienna Convention on the Law of Treaties (U.N. Doc. A/CONF.39/27 at 289 [1969], 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 [1969]) is explicit in positing that a "'treaty' means an agreement concluded *between States* in a written form and governed by international law (emphasis added)." It was agreed by those who met to formulate the convention that its contents are "merely expressive of rules which existed under customary international law"; *United Nations Conference on the Law of Treaties, Official Records, Second Session,* A Conf.39/11 Add.1 (1969). See

generally, Shabati Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention* (Leyden: A.W. Sijhoff, 1970); Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, UK: Manchester University Press, 1984). With particular reference to the fact that the Vienna Convention merely codified existing custom rather than creating new law, see Samuel Benjamin Crandell, *Treaties: Their Making and Enforcement*, 2nd. ed. (New York: Columbia University Press, 1916).

35. Oppenheim, *International Law*, op. cit., 146, 148; H. Chen, *International Law of Recognition* (Leyden, Netherlands: A.W. Sijhoff, 1951), 194. It is crucial to emphasize that one nation does not "create" another by entering into a treaty with it. Sovereignty is not *imparted* through treaty recognition. Rather, a treaty represents the acknowledgment by each party of the other's *preexisting* standing as a sovereign nation. In effect, then, the hundreds of European and Euro-American treaties with North America's indigenous peoples are all reiterations of the involved states' formal recognition that the Natives were and had always been inherently sovereign. For a good sampling of instruments deriving from the colonial era, see Alden T. Vaughan, *Early American Indian Documents: Treaties and Laws, 1607-1789* (Washington, D.C.: University Publications of America, 1979).

36. Art. I, § 10 of the U.S. Constitution precludes any private concern or level of government below that of the federal authority itself from entering into a treaty. The courts have interpreted this in terms of a "rule of reciprocity": Since lesser entities are prohibited from treating, the federal government is equally prohibited from treating with them. It follows that any entity with which the government treats must be, by definition, another sovereign national entity. This being true, Article VI, Cl. 2—the so-called "Supremacy Clause"—stipulates that ratified treaties "are superior to any conflicting state laws or constitutional provisions"; Rennard Strickland, et al., eds., *Felix S. Cohen's Handbook on Federal Indian Law* (Charlottesville, VA: Michie Co., 1982), 62-3.

37. A notable example is to be found in George III's Royal Proclamation of 1763 (RSC 1970, App. II, No. 1, at 127) and subsequent legislation; Jack Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Carlton University Press, 1981). A useful summary and assessment of implications will be found in Clark, *Native Liberty, Crown Sovereignty*, op. cit., esp. 134-46. Also see the opening chapter of Dorothy V. Jones, *License for Empire: Colonialism by Treaty in Early America* (Chicago: University of Chicago Press, 1982).

38. Under Art. II, Cl. 2 of the U.S. Constitution, treaties are negotiated by the president or his delegate(s), but do not become law until confirmed by two-thirds vote of the Senate. The standard count on ratified treaties has until recently been 371, the complete texts of which are collected in Charles J. Kappler, ed., *Indian Treaties, 1778-1885* (New York: Interland, 1973). Lakota scholar Vine Deloria, Jr., has, however, collected a further two dozen such instruments overlooked by Kappler (these are to be included in an as yet unpublished study). As concerns unratified treaties, it should be noted that

U.S. courts have in numerous instances opted to view them as binding upon Indians while exempting the United States from even a pretense of compliance with terms delineating reciprocal obligations. An especially egregious example concerns the more than forty unratified treaties with California's Native peoples used by the federal judiciary to impose the so-called "Pit River Land Settlement" during the late 1960s; see generally, Florence Connolly Shipeck, *Pushed into the Rocks: Southern California Indian Land Tenure, 1769-1986* (Lincoln: University of Nebraska Press, 1988).

39. *Canada: Indian Treaties and Surrenders from 1680 to 1890* (Ottawa: Queen's Printer, 1891; reprinted by Coles [Toronto], 1971; reprinted by Fifth House [Saskatoon], 1992). A useful interpretation will be found in John Leonard Taylor's "Canada's North-West Indian Policy in the 1870s: Traditional Premises and Necessary Innovations," in J.R. Miller, *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991).

40. *Opinions of the Attorney General* (Washington, D.C.: U.S. Government Printing Office, 1828), 613-8, 623-33. The validity of Wirt's equating the legal standing of indigenous nations to that of "any other nation" has been repeatedly conceded by the Supreme Court: e.g., *Holden v. Joy*, 84 U.S. 17, Wall. 211 (1872); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876); *Washington v. Fishing Vessel Association*, 443 U.S. 675 (1979).

41. Wilcomb E. Washburn, *Red Man's Land, White Man's Law: The Past and Present Status of the American Indian*, 2nd. ed. (Norman: University of Oklahoma Press, 1995), 57. It is worth noting, to reinforce the point, that under provision of the 1796 Trade and Intercourse Act (Ch. 30, 1 Stat. 469) all U.S. nationals intending to travel into Indian Country were required to obtain a passport.

42. Robert T. Coulter, "Contemporary Indian Sovereignty," in National Lawyers Guild, Committee on Native American Struggles, *Rethinking Indian Law* (New Haven, CT: Advocate Press, 1982), 117. He cites M. Whitman, *Digest of International Law* §1 at 2 (1963) on this point.

43. This is all but axiomatic; see, e.g., Wilfred C. Jencks, *Law in the World Community* (New York: Oxford University Press, 1967), 31, 83-7.

44. *Opinions of the Attorney General* (Washington, D.C.: U.S. Government Printing Office, 1821), 345

45. For a prime example of such argumentation, see Wilcomb E. Washburn, *The Indian in America* (New York: Harper & Row, 1975).

46. For good surveys of such contentions, see Reginald Horsman, *Expansion and American Policy, 1783-1812* (Lansing: Michigan State University Press, 1967); Richard Drinnon, *Facing West: The Metaphysics of Indian Hating and Empire Building* (Minneapolis: University of Minnesota Press, 1980). Also see Richard E. Buel, Jr., *Securing the Revolution: Ideology in American Politics, 1789-1815* (Ithaca, NY: Cornell University Press, 1972).

47. To be fair about it, the U.S. founders and their heirs are by no means the only parties to advance this sort of spurious argument. The English themselves, for example, claimed to have inherited discovery rights to Mikmakik (Nova Scotia) from France under the 1713 Treaty of Utrecht, despite a firm

French denial that they held title to what was in fact acknowledged Mi'kmaq territory. To further complicate matters, Canadian courts now contend that their country has inherited title from Great Britain, although they, no more than anyone else, can say exactly when or how Mi'kmaq title was ever extinguished; W.E. Daugherty, *The Maritime Indian Treaties in Perspective* (Ottawa: Indian and Northern Affairs Canada, 1981), 45-7; Peter A. Cumming and Neil H. Mickenberg, *Native Rights in Canada* (Toronto: General Publishing/Indian-Eskimo Association of Canada, 1972), 95.

48. The complete text of the Treaty of Paris (Sept. 3, 1783) is included in Ruhl J. Bartlett, ed., *The Record of American Diplomacy: Documents and Readings in the History of U.S. Foreign Relations*, 4th ed. (New York: Alfred A. Knopf, 1964), 39-42. Under both British common law and relevant international law, to quit a claim of interest in a property or territory means that unclouded title reverts to the original owners. In this case, other than in those relatively small areas to which the Crown had acquired an outright title through purchase or other agreement, this would be the indigenous nations whose lands were (and are) at issue.

49. Most important was Innocent III's bull *Quod super his*, promulgated in 1210 to legitimate the Crusades. Relying on the intervening theoretical work of Thomas Aquinas and others, Innocent IV subjected his predecessor's bull to the question of whether it was "licit to invade a land which infidels possess, or which belongs to them?" He ultimately answered in the affirmative, but only under specific circumstances and in recognition of the "natural rights" of those invaded to their property; James Muldoon, *The Expansion of Europe: The First Phase* (Philadelphia: University of Pennsylvania Press, 1977), 191-2. Also see Brian Tierney, *The Crisis of Church and State, 1050-1300* (Engelwood Cliffs, NJ: Prentice-Hall, 1964), 155-6. On development of the Innocentian position by Vitoria, et al., see Hanke, *Spanish Struggle for Justice*, op. cit.; Williams, *American Indian in Western Legal Thought*, op. cit.; John Taylor, *Spanish Law Concerning Discoveries, Pacifications, and Settlements Among the Indians* (Salt Lake City: University of Utah Press, 1980); L.C. Green and Olive P. Dickason, *The Law of Nations in the New World* (Edmonton: University of Alberta Press, 1989).

50. See generally, Mark Frank Lindsey, *The Acquisition and Government of Backward Country in International Law: A Treatise on the Law and Practice Relating to Colonial Expansion* (London: Longman's, Green, 1926); W.J. Mommsen and J.A. de Moor, *European Expansion and the Law: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia* (Oxford: Berg, 1992).

51. Bull *Sublimis Duis*, promulgated by Pope Paul III in 1537; quoted in Frank MacNutt, *Bartholomew de Las Casas* (Cleveland: Arthur H. Clark, 1909), 429. It is worth noting that understanding of the principle involved was still demonstrated by U.S. courts well into the twentieth century. In *Deere v. St. Lawrence River Power Company*, 32 F.2d 550 (2d Cir. 1929), for example, it was admitted that, "The source of [Native] title is no letters patent or other form of grant by the federal government.... Indians claim immemorial rights, arising prior to white occupation, and recognized and protected by treaties between

Great Britain and the United States and the United States and the Indians [under which] the right of occupation of [their] lands ... was not granted, but recognized and affirmed."

52. This amounted to a universalization of the principle expounded by Pope Alexander VI in his bull *Inter Caetera* of May 4, 1493, dividing interests in the southern hemisphere of the New World between Spain and Portugal; Paul Gottschalk, *The Earliest Diplomatic Documents of America* (Albany: New York State Historical Society, 1978), 21.

53. *Worcester v. Georgia* at 544.

54. *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) at 572.

55. Quoted in Washburn, *Red Man's Land*, op. cit., 56. Precisely the same understanding continued to be demonstrated by the federal judiciary, however occasionally, throughout the nineteenth century. In *Jones v. Meehan*, 175 U.S. 1 (1899), for instance, the court admitted that the "United States had [by a 1785 Treaty with the Wiandots, Delawares, Chippewas, and Ottawas] relinquished and quitclaimed to said nations respectively all the lands lying within certain limits, to live and hunt upon, and otherwise occupy as they saw fit; but the said nations, or either of them, were not at liberty to dispose of those lands, except to the United States."

56. Washburn, *Red Man's Land*, op. cit., 56. For an almost identical statement, this one made in a legal opinion rendered on May 3, 1790, see Andrew A. Lipscomb and Albert Ellery Bergh, eds., *The Writings of Thomas Jefferson*, Vol. VII (Washington, D.C.: Thomas Jefferson Memorial Association, 1903-1904), 467-9. Further comments will be found in Merrill D. Peterson's *Thomas Jefferson and the New Nation* (New York: Oxford University Press, 1970), 771, 820-1.

57. *Worcester v. Georgia* at 545.

58. See generally, David M. Pelcher, *The Diplomacy of Annexation: Texas, Oregon and the Mexican War* (Columbia: University of Missouri Press, 1973).

59. Cohen, "Original Indian Title," op. cit., 35; for the text of the Treaty Between the United States and France for the Cession of Louisiana (Apr. 30, 1803), see Bartlett, *Record of American Diplomacy*, op. cit., 116-7. Also see Alexander de Conde, *This Affair of Louisiana* (New York: Charles Scribner's Sons, 1976).

60. Treaty of Peace, Friendship, Limits, and Settlement Between the United States and Mexico, Feb. 2, 1848; for text, see Bartlett, *Record of American Diplomacy*, op. cit., 214-6. On the causes of the conflict preceding the treaty, see Gene M. Brack, *Mexico Views Manifest Destiny: An Essay on the Origins of the Mexican War* (Albuquerque: University of New Mexico Press, 1975).

61. The Hawaiian Archipelago was annexed by the United States in 1898, following an 1893 coup d'etat carried out by American nationals—supported by U.S. troops—against its indigenous government, a constitutional monarchy. In 1959, following a referendum conducted in a manner violating the most basic requirements of the United Nations Charter (the settler population as well as the much smaller Native population was allowed to vote), it was incor-

porated into the United States as its fiftieth state; Michael Kioni Dudley and Keoni Kealoha Agard, *A Call for Hawaiian Sovereignty* (Honolulu: Na Kane O Ka Malo Press, 1990); Haunani Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i* (Monroe, ME: Common Courage Press, 1993).

62. *American Journal of International Law* 22 (1928): 1928; reporting the *Island of Palmas* case (*U.S. v. Netherlands*, Perm. Ct. Arb., Hague, 1928).

63. 41 U.S. (6 Pet.) 367 (1842) at 409.

64. U.S. ambitions in North America were hardly confined to the forty-eight contiguous states and Alaska. There was, for example, serious consideration given during the late 1860s to the idea of seizing all of what is now Canada west of Ontario. The idea of gobbling up what remained of Mexico after 1848 was also a perennial favorite. For varying perspectives, see Albert K. Weinberg, *Manifest Destiny: A Study of National Expansionism in American History* (Baltimore: Johns Hopkins University Press, 1935); Frederick Merk, *Manifest Destiny and Mission in American History: A Reinterpretation* (New York: Alfred A. Knopf, 1963); Sidney Lens, *The Forging of the American Empire* (New York: Thomas Y. Crowell, 1971); Reginald Horsman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* (Cambridge, MA: Harvard University Press, 1981).

65. A point worth making is that, given the realities of global demography, the whole idea of *territorium res nullius* has always lacked applicability anywhere outside Antarctica and a few remote sandspits scattered across the seven seas. There were an estimated billion people on the planet when the Supreme Court penned its *Martin* opinion in 1842—upwards of three-quarters that number in 1492—less than 20 percent of them of European derivation; see, e.g., Kenneth C. Davis, *Don't Know Much About Geography: Everything You Ever Wanted to Know About the World but Never Learned* (New York: William Morrow, 1992), 300.

66. The idea found form in 1066, when Pope Alexander recognized the conquest of Saxon England, vesting underlying fee title to English land in the Norman invaders. Thereafter, as a part of their policy of abolishing the preexisting system of collective land tenure, the Normans established an evolving structure of rules to individuate Saxon property titles on the basis of certain forms of utilization or "development"; Carl Erdmann, *The Origin of the Idea of the Crusade* (Princeton, NJ: Princeton University Press, 1977), 150-60. More broadly, see Otto Freidrich von Gierke, *Political Theories of the Middle Ages* (Boston: Beacon Press, 1958). By the time of the American War of Independence, philosopher John Locke had discovered what he believed to be a liberatory usage of the Norman system, arguing that individual developmental usage of given tracts of land bestowed upon those who engaged in it a "natural right" to ownership which transcended all state prerogatives to preempt title; Crawford Brough Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford, UK: Clarendon Press, 1962). For application of all this specifically to North America, see Williams, *American Indian in Western Legal Thought*, op. cit., esp. 233-80.

67. This is the premise underlying the 1862 Homestead Act (*U.S. Statures at Large*, Vol. XII, 392) by which any U.S. citizen could claim a quarter-section (160 acres) of "undeveloped" land in exchange merely by paying an extremely nominal "patent fee" to offset the expense of registering it. He or she then had a specified period of time, usually five years, to fell trees, build a house, plow fields, etc. If these requirements were met within the time allowed, the homesteader was issued a deed to the property. For background, see Robert A. Williams, Jr., "Jefferson, the Norman Yoke, and American Indian Lands," *Arizona Law Review* 29 (1987).

68. For analysis, see Alden T, Vaughan, *The New England Frontier* (Boston: Little, Brown, 1965), 113-21; Francis Jennings, "Virgin Land and Savage People," *American Quarterly* 23 (1971).

69. Letter from the Massachusetts Bay Company to Governor John Endicott, Apr. 17, 1629; N. Shurtleff, ed., *Records of the Governor and the Company of the Massachusetts Bay in New England* (Boston: William White, 1853). At 100 of Vattel's *Laws of Nations, Book I* (op. cit.), the Puritans are praised for their "moderation" in adopting this posture, as are William Penn's Quakers in Pennsylvania.

70. *Cohen's Handbook*, op. cit., 55.

71. The U.S. invocation of *territorium res nullius* has proceeded along a number of tracks, not all judicial. An especially glaring illustration has been the deliberate and systematic falsification of indigenous historical demography to make it appear that the preinvasion population of North America was not more than a million when, in fact, the best available evidence suggests that it was at least 12.5 million and perhaps as large as 18.5 million. The methods used by major Euro-American historians and anthropologists in undercounting Native people are covered very well by Francis Jennings in the chapter entitled "The Widowed Land" in his *The Invasion of America: Indians, Colonialism and the Cant of Conquest* (New York: W.W. Norton, 1975). More credible estimates of the indigenous population, circa 1500, will be found in Henry F. Dobyns, *Their Number Become Thinned: Native American Population Dynamics in Eastern North America* (Knoxville: University of Tennessee Press, 1983). In any event, the aggregate Native population has been reliably estimated as having been reduced to something less than a million by 1800. The settler population, meanwhile, had burgeoned to approximately fifteen million. For regional breakouts, see Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* (Norman: University of Oklahoma Press, 1987).

72. Vattel, *The Laws of Nations*, op. cit., Book I, 99. This was not one of Vattel's more tenable positions. If settlement and cultivation were actually employed to determine the quantity of land nations "have occasion for," the territoriality of Canada, Australia, Brazil, Russia, and several other countries would be immediately diminished by more than half. Nothing in the formulation admits to the legitimacy of speculative acquisition such as the United States engaged in during the nineteenth century, or of current policies "banking" land against anticipated future needs. By the same token, no nation would

be able to maintain commons areas such as national wilderness areas, wildlife preserves, military training areas, and so forth, on pain of losing the right to possess them. Nor does Vattel's overall system of legal equity allow for the application of one set of standards to indigenous nations, another to settler states.

73. *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87 (1810). By all indications, this aspect of Marshall's opinion was an expediency designed to facilitate redemption of scrip issued to troops during the American decolonization struggle in lieu of cash. These vouchers were to be exchanged for land parcels in Indian Country once victory had been achieved (Marshall and his father received instruments entitling them to 10,000 acres apiece in what is now Kentucky, part of the more than 200,000 acres they jointly amassed there). The question was how to validate title to such parcels, a matter belatedly addressed by *Peck*. Having thus solved his and his country's immediate problem, all indications are that the chief justice promptly dropped Vattel's dubious premise—see note 72, above—in favor of a more subtle approach in his efforts to validate U.S. title to Native lands. For details on the Marshalls' Kentucky land transactions, see Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt, 1996), 74-5. On the case itself, see C. Peter McGrath, *Yazoo: The Case of* Fletcher v. Peck (New York: W.W. Norton, 1966).

74. Although there were obvious antecedents in New York state and elsewhere, the clearest early formal indication of this policy comes in the 1854 Treaty with the Omahas, Article 6 of which specifies that the Indians will accept a survey of their land and assignment of individual allotments at some future date; Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), 8. On the New York precedents, see Franklin B. Hough, ed., *Proceedings of the Commission of Indian Affairs, Appointed by Law for Extinguishment of Indian Title in the State of New York* (Albany, NY: John Munsell, 1861); Helen M. Upton, *The Everett Report in Historical Perspective: The Indians of New York* (Albany, NY: New York State Bicentennial Commission, 1980).

75. For an overview of Canadian practice, see, e.g., the description offered in George F.G. Stanley's *The Birth of Western Canada* (Toronto: University of Toronto Press, 1975); George Brown and Ron McGuire, *Indian Treaties in Historical Perspective* (Ottawa: Indian and Northern Affairs Canada, 1979). Perhaps the main distinction to be drawn between Canada and the United States in terms of setting aside reserved areas was that, in the latter, priority was given to concentrating all of a given people—sometimes several peoples—in one locality. This had the effect of creating vast expanses of "Native-free" territory, but often left indigenous nations with relatively large blocks of land on which we were able to hold ourselves together, socially and politically, at least for a while. Canada opted to reverse this emphasis, preferring a strategy of divide and rule which has resulted in an amazing proliferation of tiny "band" reserves scattered across the map; see generally, Boyce Richardson, *People of Terra Nullius: Betrayal and Rebirth of Aboriginal Canada* (Vancouver; Seattle: Douglas & McIntyre; University of Washington Press, 1993).

76. 25 U.S.C.A. § 331, also known as the Dawes Act in recognition of its primary congressional sponsor, Massachusetts Senator Henry Dawes; see generally, D.S. Otis, *The Dawes Act and the Allotment of American Indian Land* (Norman: University of Oklahoma Press, 1973).

77. The purpose of the act was sometimes framed in superficially noble-sounding terms, as when in 1881 President Chester A. Arthur described an early draft as a means to "introduce among the Indians the customs and pursuits of civilized life"; quoted in Deloria and Lytle, *American Indians, American Justice*, op. cit., 8. At other times, it has been officially referenced with far more accuracy, as when Indian Commissioner Francis Leupp called it "a great pulverizing engine to grind down the tribal mass"; Francis A. Leupp, *The Indian and His Problem* (New York: Scribner's, 1910), 93.

78. This in itself constituted a gross violation of Native sovereignty insofar as it was a direct intervention by the United States in the internal affairs of each indigenous nation for purposes of defining its citizenry. Insofar as the means employed to determine Native identity was explicitly racial—the use of a blood quantum system—this U.S. aggression was doubly sinister, representing as it did a prefiguration of apartheid; for analysis, see George M. Frederickson, *White Supremacy: A Comparative Study in American and South African History* (New York: Oxford University Press, 1981). Canada effected similar interventions, albeit without the U.S. larding of scientific racism, creating categories of "status" and "non-status" Indians; see, e.g., Bill Wilson, "Aboriginal Rights: A Non-Status Indian View," in Menno Boldt and J. Anthony Long, *The Quest for Justice: Aboriginal People and Aboriginal Rights* (Toronto: University of Toronto Press, 1985). On the problematic nature of the term *tribe*—as opposed to *nation* or *people*—see the essay, "Naming Our Destiny: Toward a Language of American Indian Liberation," in Ward Churchill, *Indians Are Us? Culture and Genocide in Native North America* (Monroe, ME: Common Courage Press, 1994). Of related interest, see Robert A. Williams, Jr., "Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law," *Arizona Law Review* 31:2 (1989).

79. Deloria and Lytle, *American Indians, American Justice*, op. cit., 9.

80. See generally, Janet A. McDonnell, *The Dispossession of the American Indian, 1887-1934* (Bloomington: University Press of Indiana, 1991). On railroads, etc., see, e.g., H. Craig Miner, *The Corporation and the Indian: Tribal Sovereignty and Industrial Civilization in Indian Territory, 1865-1907* (Columbia: University of Missouri Press, 1976).

81. Kirk Kicking Bird and Karen Ducheneaux, *One Hundred Million Acres* (New York: Macmillan, 1973); Otis, *Dawes Act and Allotment*, op. cit.; McDonnell, *Dispossession of the American Indian*, op. cit.

82. 34 Stat. 182. All told, only about eleven million acres actually remained reserved for Native usage by 1973; Washburn, *Red Man's Land*, op. cit., 145, 150.

83. Leaving aside property alienated as a result of the Burke Act, land was allotted in correspondence to the number of Indians surviving, circa 1890, the nadir point of indigenous population decline in North America; Thornton,

American Indian Holocaust and Survival, op. cit., 159-85. The Native population has by now "rebounded" to at least ten times its turn-of-the-century size. For implications, see Ward Shepard, "Land Problems of an Expanding Indian Population," in Oliver La Farge, ed., *The Changing Indian* (Norman: University of Oklahoma Press, 1943); Ethel J. Williams, "Too Little Land, Too Many Heirs: The Indian Heirship Land Problem," *Washington Law Review* 46 (1971).

84. A good example is that of the traditionalist Cherokees who refused even to enroll as such with the Dawes Commission during the early twentieth century. Not only were they accorded no land rights whatsoever, they were ultimately disenfranchised as Cherokees; Emmett Starr, *A History of the Cherokee Indians* (Oklahoma City: Warden, 1922).

85. 187 U.S. 553. For analysis, see Ann Laque Estin, "*Lonewolf v. Hitchcock*: The long Shadow," in Sandra L. Cadwalader and Vine Deloria, Jr., eds., *The Aggressions of Civilization: Federal Indian Policy Since the 1880s* (Philadelphia: Temple University Press, 1984).

86. *Tee-Hit-Ton v. United States*, 348 U.S. 272.

87. Most especially see *Badoni v. Higginson*, 638 F.2d, 10th Cir. (1980), cert. denied, 452 U.S. 954 (1981), otherwise known as the "Rainbow Bridge Case"; *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), otherwise known as the "G-O Road Case." Related opinions will be found in *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 109 S.Ct. 2994 (1989).

88. See, e.g., *United States v. Dann*, 470 U.S. 39 (1985).

89. *Attorney General of Ontario v. Bear Island Foundation*, 49 OR 353 (HC), affirmed (1989) 68 OR 394 (CA).

90. *Calder v. Attorney General for British Columbia*, SCR 313, 333, 344 (1973); *Cardinal v. Attorney General Alta*, 2 SCR 695 (1974). In substance, Canada wishes to have it both ways, claiming simultaneously that the legitimacy of its land title accrues from cessions made by Native peoples in their treaties with the Crown *and* that since the Canadian government itself never negotiated or ratified the instruments, it is not obligated to honor the range of reciprocal commitments the Crown made to Native people. A good overview of such thinking is provided in Peter Hogg, *The Liability of the Crown* (Toronto: Carswell, 1989).

91. For a fairly exhaustive overview of the official position, see Canada, *Lands, Revenues and Trust Review* (Ottawa: Supplies and Services, 1988-1990).

92. See, e.g., *Isaac v. Davey*, 5 OR (92d) 610 (1974); *Sandy v. Sandy*, 27 OR (2d) 248 (1979); *Four B. Manufacturing v. United Garment Workers of America*, 1 S.C.R. 1031 (1980). For interpretation and analysis, see Bruce Clark, *Indian Title in Canada* (Toronto: Carswell, 1987); Richardson, *People of Terra Nullius*, op. cit.

93. 59 Stat. 1031, T.S. No. 933, 3 Bevans 1153m 1976 Y.B.U.N. 1043 (June 26, 1945); U.N.G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1961). For texts, see Weston, et al., *Documents in International Law*, op. cit., 16-32, 343-4.

94. It is important to reiterate that the Vienna Convention merely codified

existing, customary treaty law. In other words, the Supreme Court's opinion in *Lonewolf* was legally invalid at the time it was rendered; Rosenne, *Law of Treaties*, op. cit.; Sinclair, *Vienna Convention on the Law of Treaties*, op. cit.

95. International Court of Justice, *Advisory Opinion on Western Sahara* (The Hague: International Court of Justice, 1975), 46. For analysis, see Robert Vance, "Questions Concerning Western Sahara: Advisory Opinion of the International Court of Justice, October 16, 1975," *International Lawyer* 10 (1976); "Sovereignty Over Unoccupied Territories: The Western Sahara Decision," *Case Western Reserve Journal of International Law* 9 (1977).

96. Aside from the several books already cited, see, as examples of academic usage, William H. Leckie's *The Military Conquest of the Southern Plains* (Norman: University of Oklahoma Press, 1963); Dan Thrapp's *The Conquest of Apacheria* (Norman: University of Oklahoma Press, 1967); Harry A. Stroud's *The Conquest of the Prairies* (Waco, TX: Texian Press, 1968); Patricia Nelson Limerick's more recent and much-touted *The Legacy of Conquest: The Unbroken Past of the American West* (New York: W.W. Norton, 1987).

97. *Tee-Hit-Ton v. U.S.* at 291.

98. Ibid. at 289-90.

99. There were two primary levels to this. The first was the "Trial of the Major Nazi War Criminals," in which both Supreme Court Justice Robert H. Jackson and former Attorney General Francis Biddle assumed leading roles—Jackson as lead U.S. prosecutor, Biddle as a member of the tribunal itself—in which diplomats Joachim von Ribbentrop and Constantin von Neurath were convicted of conspiring to wage aggressive war, largely on the basis of having pursued policies framed in terms precisely like those articulated in *Tee-Hit-Ton*. Ribbentrop was executed as a result, while Neurath was sentenced to fifteen years imprisonment, serving eight; Eugene Davidson, *The Trial of the Germans, 1945-1946* (New York: Macmillan, 1966), 147-76. The second was the so-called "Justice Case" of 1947, in which former Ohio Supreme Court Justice Carrington T. Marshall served as a tribunal member. In this case, fourteen high-ranking members of the German judiciary were tried and convicted of having committed crimes against humanity, mainly because of the various legalistic rationalizations they had advanced in justification of nazism's pattern of aggression; John Alan Appleman, *Military Tribunals and International Crimes* (Westport, CT: Greenwood Press, 1971 reprint of 1954 original), 157-62.

100. Nell Jessup Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered," *Hastings Law Journal* 31 (1980): 1215, 1244. The Pacific coast of North America, as far south as California, was claimed by Russia during the early 1740s; William Cortez Abbott, *The Expansion of Europe: A History of the Foundations of the Modern World*, Vol. 1 (London: G. Bell & Sons, 1919), 193-4. As has been mentioned, the U.S. purchased Russia's rights in what are now the states of Oregon, Washington, and Idaho in 1846. In 1867, with passage of the British North American Act making Canada a dominion of the Commonwealth, Russian claims to present-day British Columbia were also extinguished by purchase. The United States followed up the same year, buy-

ing out Russia's rights in Alaska; Samuel Eliot Morrison, *The Oxford History of the American People* (New York: Oxford University Press, 1965), 706, 765, 806.

101. "The Indian wars under the United States government have been more than 40"; U.S. Bureau of the Census, *Report on Indians Taxed and Not Taxed (1890)* (Washington, D.C.: U.S. Government Printing Office, 1894), 638. It should be noted that the term used is entirely inappropriate. Given that all the conflicts in question were precipitated by invasions of Indian Country rather than Indian invasions of someone else's domain, they should be referred to as "White Man's Wars," "Settlers' Wars" or, most accurately, "U.S. Wars of Aggression against Indians."

102. This was "Red Cloud's War" in present-day Wyoming, 1866-68; see the relevant chapter in Dee Brown's *Bury My Heart at Wounded Knee: An Indian History of the American West* (New York: Holt, Rinehart & Winston, 1970). On U.S. failure to comply with the terms and provisions of the treaty by which peace was temporarily restored, see Edward Lazarus, *Black Hills, White Justice: The Sioux Nation versus the United States, 1775 to the Present* (New York: HarperCollins, 1991).

103. On the "Riel Rebellions" of 1868 and 1885, see D. Bruce Sealey and Antoine S. Lussier, *The Métis: Canada's Forgotten People* (Winnipeg: Manitoba Métis Association Press, 1975).

104. As an example, when Governor Frederick Seymor of British Columbia observed in a December 1864 letter to the Colonial Office in London that he "might find [himself] compelled to follow in the footsteps of the Governor of Colorado ... and invite every white man to shoot each Indian he may meet," he was firmly rebuked by Secretary of State Edward Cardwell and reminded that the "imperial government's policy was to quite the opposite effect"; quoted in Clark, *Native Liberty, Crown Sovereignty*, op. cit., 61. Seymor's reference was to Colorado Territorial Governor David Evans, who had not only issued the statements indicated, but who had been complicit in the wholesale massacre of noncombatant Cheyennes and Arapahos at Sand Creek a month before Seymor's missive was written; David Svaldi, *Sand Creek and the Rhetoric of Extermination: A Case-Study in Indian White Relations* (Washington, D.C.: University Press of America, 1989).

105. Indeed, Canadian courts have themselves been exceedingly careful to avoid constructions based on notions of conquest. This has been so since at least as early as the 1773 case, *Mohegan Indians v. Connecticut*, in which the Privy Council opined that "the medieval concept" of conquest was simply "inadequate" to meet Crown needs in much of the New World. The "realities of colonial administration" in North America dictated, the Council affirmed, a more "prudent" course of recognizing the status of indigenous nations and guaranteeing our rights; J.H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950), 417. With this said, however, it is important to note that such policy by no means prevailed throughout the British Empire; see, e.g., Byron Farwell, *Queen Victoria's Little Wars* (New York: W.W. Norton, 1972).

106. This, again, is very close to—indeed, interchangeable with—the Hitlerian conception of the rights of the stronger over the weaker; see, e.g., the explanations of *Lebensraumpolitik* (politics of living space) offered in *Mein Kampf* (Boston: Houghton-Mifflin, 1962 reprint of 1925 original); *Hitler's Secret Book* (New York: Grove Press, 1961); *Hitler's Secret Conversations* (New York: Signet, 1961).

107. The Greek and Roman imperial systems, for example, manifested no conception of conquest rights remotely comparable to that voiced in *Tee-Hit-Ton*; see, e.g., William Scott Ferguson, *Greek Imperialism* (New York: Houghton-Mifflin, 1913); Earl of Cromer, *Ancient and Modern Imperialism* (New York: Longman's, Green, 1910). By the time of the Norman Conquest of 1066, it was articulated canon law that such seizures were valid only when occurring under the divine authority of the Church: See Erdmann, *Origin of the Idea of the Crusade*, op. cit., 150-60; Walter Ullmann, *Medieval Papalism: The Political Theories of the Medieval Canonists* (London: Methuen, 1949); James Muldoon, "The Contributions of the Medieval Canon Lawyers to the Foundations of International Law," *Traditio* 28 (1972). Accepted notions of natural law also run directly counter to that argued by the Supreme Court in *Tee-Hit-Ton*; see, e.g., Otto Frederick von Gierke, *Natural Law and the Theory of Society, 1500-1800* (Cambridge, UK: Cambridge University Press, 1934); Lloyd Weinreb, *Natural Law and Justice* (Cambridge, MA: Harvard University Press, 1987).

108. These ideas were tentatively codified in the 1512 Laws of Burgos; see generally, Hanke, *Spanish Struggle*, op. cit.; James Muldoon, *Popes, Lawyers and Infidels: The Church and the Non-Christian World, 1250-1550* (Philadelphia: University of Pennsylvania Press, 1979).

109. Vitoria, "On the Law of War," op. cit.; Jorge Díaz, "Los Doctrinas de Palacios Rubios y Matías de Paz ante la Conquista America," in *Memoria de El Colegio Nacional* (Burgos: Colegio Nacional, 1950). Overall, see Williams, *American Indian in Western Legal Thought*, op. cit., 85-108.

110. "[W]hatever is done in the right of war receives the construction most favorable to the claims of those engaged in a just war"; Vitoria, "On the Law of War," op. cit., 180.

111. Cohen, "Spanish Origins," op. cit., 44; Robert A. Williams, Jr., "The Medieval and Renaissance Origins of the Status of American Indians in Western Legal Thought," *Southern California Law Review* 57:1 (1983).

112. Nothing in international law precluded indigenous peoples from defending themselves when attacked or invaded. Nor did it prevent them from expelling or otherwise punishing missionaries who violated Native law while residing in Indian Country, or from breaking off trade relations with entities which could be shown to have cheated them. In every instance, without exception, in which bona fide Indian-white warfare is known to have occurred the requisite provocation to legitimate Native resort to arms is abundantly evident. *Ipso facto*, European and Euro-American claims to having engaged in just wars against the indigenous peoples of North America are invalidated. For a succinct overview of the presumptive right of any nation to defend its territorial

integrity and political sovereignty against violation by other nations, see Walzer, *Just and Unjust Wars*, op. cit., 53-5.

113. This goes back to the point made in note 30, above, and accompanying text.

114. This is essentially the conclusion drawn by the U.S. government's Indian Claims Commission, which, despite thirty years of exhaustive study, concluded in its final report that it had been unable to find any sort of title by which to validate the country's claims to approximately 35 percent of its purported territoriality; Indian Claims Commission, *Final Report* (Washington, D.C.: U.S. Government Printing Office, 1978). For analysis, see Russel Barsh, "Indian Land Claims Policy in the United States," *North Dakota Law Review* 58 (1982); "Behind Land Claims: Rationalizing Dispossession in Anglo-American Law," *Law & Anthropology* 1 (1986).

115. 1 Stat. 50. The British/Canadian counterpart—or, more accurately, precursor—is the Royal Proclamation of 1763 which specifies, among other things, that North America's indigenous peoples should remain "unmolested and undisturbed" by the Crown and its subjects; Stagg, *Anglo-American Relations*, op. cit.

116. See note 57, above.

117. *Johnson v. McIntosh* at 591.

118. See note 63, above.

119. U.S. Department of Interior, *Report of the Commissioner of Indian Affairs for 1890* (Washington, D.C.: U.S. Government Printing Office, 1891), xxix.

120. For academic articulations of the theme, see note 96, above. On the films, see Ralph and Natasha Friar, *The Only Good Indian ... The Hollywood Gospel* (New York: Drama Book Specialists, 1972); William Raymond Stedman, *Shadows of the Indian: Stereotypes in American Culture* (Norman: University of Oklahoma Press, 1982). On cinematic counterparts north of the border, see Daniel Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (Vancouver: Arsenal Pulp Press, 1992). On the capacity of such a disinformational onslaught to indoctrinate the general populace to accept sheer falsity as truth, see Jacques Ellul, *Propaganda: The Formation of Men's Attitudes* (New York: Alfred A. Knopf, 1965).

121. This brings the principle delineated in note 30 into play. More broadly, see C.A. Pompe, *Aggressive War: An International Crime* (The Hague: Martinus Nijhoff, 1953). For use of the referenced term, see Rudolfo Acuña, *Occupied America: The Chicano's Struggle for Liberation* (San Francisco: Canfield Press, 1972).

122. For excellent samples of rhetoric, see LeBlanc, *United States and the Genocide Convention*, op. cit.; Robert Davis and Mark Zannis, *The Genocide Machine in Canada: The Pacification of the North* (Montréal: Black Rose Books, 1973); Terrance Nelson, et al., *Genocide in Canada* (Ginew, Manitoba: Roseau River First Nation, 1997).

123. Questions as to when extinction occurred are largely academic since whenever the final die-out transpired—even if only in the past fifteen minutes—it remains presumptive that there are no heirs to contest title or receive compensation.

124. L.F.S. Lupton, "The Extermination of the Beothuks of Newfoundland,"

Canadian Historical Review 58:2 (1977).

125. The colonists sought "'to cut off the Remembrance of them from the Earth.' After the war, the General Assembly of Connecticut declared the name extinct. No survivors should be called Pequots. The Pequot River became the Thames, and the village known as Pequot became New London"; Drinnon, *Facing West*, op. cit., 55.

126. Mashantucket Pequot Indian Claims Settlement Act (S.1499; signed Oct. 18, 1983). At least one analyst has seized upon this fact to "prove" that what was done to Pequots was never really genocide in the first place; Steven T. Katz, "The Pequot War Reconsidered," *New England Quarterly* 64 (1991).

127. See generally, Paul Brodeur, *Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Pennobscot Indians of New England* (Boston: Northeastern University Press, 1985).

128. Road Island Indian Claims Settlement Act of 1978 (94 Stat. 3498). More broadly, see Harry B. Wallace, "Indian Sovereignty and the Eastern Indian Land Claims," *New York University Law School Review* 27 (1982).

129. See, e.g., Charles M. Hudson, "The Catawba Indians of South Carolina: A Question of Ethnic Survival," in Walter L. William, ed., *Southeastern Indians Since the Removal Era* (Athens: University of Georgia Press, 1979).

130. More broadly, see Lynwood Carranco and Estle Beard, *Genocide and Vendetta: The Round Valley Wars of Northern California* (Norman: University of Oklahoma Press, 1981).

131. James Fenimore Cooper, *The Last of the Mohicans* (New York: Barnes and Noble, 1992 reprint of 1826 original); *Ishi, Last of His Tribe* (Berkeley, California: Parnassus Press, 1964). For the record, the Mohicans were administratively amalgamated with the fragments of several other peoples under the heading "Stockbridge-Munsee" during the nineteenth century.

132. See, e.g., B.O. Flower, "An Interesting Representative of a Vanishing Race," *Arena* (July 1896); Simon Pokagon, "The Future of the Red Man," *Forum* (Aug. 1897); William R. Draper, "The Last of the Red Race," *Cosmopolitan* (Jan. 1902); Charles M. Harvey, "The Last Race Rally of Indians," *World's Work* (May 1904); E. S. Curtis, "Vanishing Indian Types: The Tribes of the Northwest Plains," *Scribner's* (June 1906); James Mooney, "The Passing of the Indian," *Proceedings of the Second Pan American Scientific Congress, Sec. 1: Anthropology* (Washington, D.C.: Smithsonian Institution, 1909-1910); Joseph K. Dixon, *The Vanishing Race: The Last Great Indian Council* (Garden City, NY: Doubleday, 1913); Stanton Elliot, "The End of the Trail," *Overland Monthly* (July 1915); Ella Higginson, "The Vanishing Race," *Red Man* (Feb. 1916); Ales Hrdlicka, "The Vanishing Indian," *Science* 46 (1917); J.L. Hill, *The Passing of the Indian and the Buffalo* (Long Beach, CA: n.p., 1917); John Collier, "The Vanishing American," *Nation* (Jan. 11, 1928). For implications of this literary barrage, see Ellul, *Propaganda*, op. cit.

133. Larry W. Burt, *Tribalism in Crisis: Federal Indian Policy, 1953-1961* (Albuquerque: University of New Mexico Press, 1982); Donald L. Fixico, *Termination and Relocation: Federal Indian Policy, 1945-1960* (Albuquerque: University of New Mexico Press, 1986). It is worth mentioning that termination

of recognition flies directly in the face of the international legal principle delineated in note 42 and accompanying text.

134. Nicholis Peroff, *Menominee DRUMS; Tribal Termination and Restoration, 1954-1974* (Norman: University of Oklahoma Press, 1982).

135. See, e.g., Theodore Stern, *The Klamath Tribe: The People and Their Reservation* (Seattle: University of Washington Press, 1965); Shipeck, *Pushed Into the Rocks*, op. cit.

136. The U.S. position is that any surviving Abnakis fled to Canada after they were subjected to wholesale massacre by George Rogers Clark's Ranger Company in 1759; see Collin G. Calloway, *The Western Abenaki of Vermont, 1600-1800: War, Migration, and the Survival of an Indian People* (Norman: University of Oklahoma Press, 1991).

137. See generally, L. Weatherhead, "What Is an Indian Tribe? The Question of Tribal Existence," *American Indian Law Review* 8 (1980); David Rotenberg, "American Indian Tribal Death: A Centennial Remembrance," *University of Miami Law Review* 41 (1986).

138. Wilson, "Aboriginal Rights," op. cit.; B. Morris and R. Groves, "Canada's Forgotten Peoples: The Aboriginal Rights of Metis and Non-Status Peoples," *Law & Anthropology* 2 (1987). A prime example of Canadian-style non-recognition concerns the Lubicon Lake Cree, a group overlooked in the process of negotiating Treaty 6. When the Ottawa government realized its error, it attempted to lump the Lubicons in with an entirely different, albeit related, group, and has yet to acknowledge the full extent of Lubicon rights; John Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntire, 1991).

139. For the original definition, see Raphaël Lemkin, *Axis Rule in Occupied Europe* (Washington, D.C.: Carnegie Institution, 1944), 79. With respect to black letter law, Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (U.S.T._____, T.I.A.S. No. _____, U.N.T.S. 277) makes it illegal to cause "serious bodily or *mental* harm ... with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (emphasis added)" or deliberately inflict "conditions of life calculated to bring about its physical destruction in whole or in part." Article III makes it a crime not only to commit such acts, but to conspire to commit them, to attempt to commit them, to incite others to do so, or to be in any way complicit in their perpetration; Weston, et al., *Documents in International Law*, op. cit., 297. For further analysis, see Rennard Strickland, "Genocide at Law: An Historic and Contemporary View of the American Indian Experience," *University of Kansas Law Review* 34 (1986).

140. On the U.S., see, e.g., American Indian Policy Review Commission, "Separate and Dissenting Views," *Final Report* (Washington, D.C.: U.S. Government Printing Office, 1976), 574. For analysis, see F. Martone, "American Indian Tribal Government in the Federal System: Inherent Right or Congressional License?" *Notre Dame Law Review* 51 (1976). On Canada, see, e.g., *Report of the Special Committee of the House of Commons on Indian Self-Government*

(Ottawa: Supplies and Services, 1983); *Response of the Government to the Report of the Special Committee on Indian Self-Government* (Ottawa: Indian Affairs and Supplies and Services, 1984).

141. Oppenheim, *International Law*, op. cit., 120.

142. Coulter, "Contemporary Indian Sovereignty," op. cit., 118.

143. 7 Stat. 18, 19 (1785).

144. *Worcester v. Georgia* at 560-1.

145. Such comparisons are made by Vine Deloria, Jr., in his *Behind the Trail of Broken Treaties: An Indian Declaration of Independence*, 2nd. ed. (Austin: University of Texas Press, 1984), 161-86.

146. Oren Lyons, "Introduction: When You Talk About Client Relationships, You Are Talking About the Future of Nations," in *Rethinking Indian Law*, op. cit., iv. Lyons is correct. There is nothing in international law establishing a minimum population level, below which a group loses its nationhood. Grenada, it should be remembered, has a total population of only 120,000, and, although it has recently suffered gross violation at the hands of the United States, is recognized as enjoying the same sovereign rights as any other nation.

147. Policy Review Commission, *Final Report*, op. cit.; *Response of the Government*, op. cit.

148. See generally, Henry E. Fritz, *The Movement for Indian Assimilation, 1860-1890* (Philadelphia: University of Pennsylvania Press, 1963); Fred Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920* (Lincoln: University of Nebraska Press, 1984).

149. See, e.g., William Hagan, *Indian Police and Judges: Experiments in Acculturation and Control* (New Haven, CT: Yale University Press, 1966); Curtis E. Jackson and Marcia J. Galli, *A History of the Bureau of Indian Affairs and Its Activities Among the Indians* (San Francisco: R&E Associates, 1977); Douglas Cole and Ira Chaikan, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver, BC: Douglas & McIntire, 1990); Katherine Pettitpas, *Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994).

150. Otis, *Dawes Act*, op. cit.; McDonnell, *Dispossession of the American Indian*, op. cit. Good readings with respect to Canada will be found in Brian Slattery's *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Center, 1983), and the early chapters of Michael Asch's *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984).

151. Perhaps the most striking example was when in 1873 General Phil Sheridan called for the deliberate extermination of an entire species of large mammals, the North American bison (buffalo), in order to "destroy the commissary" of the Plains Indians; General Philip Sheridan to Commanding General William Tecumseh Sherman, May 2, 1873; quoted in Paul Andrew Hutton, *Phil Sheridan and His Army* (Lincoln: University of Nebraska Press, 1985), 246. At one point in the mid-1870s, Congress considered legislation to

preserve what was left of the dwindling herds. Sheridan vociferously opposed it, suggesting that the legislators instead "strike a medal, with a dead buffalo pictured on one side and a discouraged Indian on the other," and present it to the buffalo hunters; John R. Cook, *The Border and the Buffalo: An Untold Story of the Southwest Plains* (New York: Citadel Press, 1976), 163-5. Also see William T. Hornaday, *Exterminating the American Bison* (Washington, D.C.: Smithsonian Institution, 1899); Tom McHugh and Victoria Hobson, *The Time of the Buffalo* (New York: Alfred A. Knopf, 1972).

152. For a contemporaneous and quite glowing affirmation of the centrality of "instruction" to the entire Canadian assimilation process, see Thompson Ferrier, *Our Indians and Their Training for Citizenship* (Toronto: Methods Mission Rooms, 1991). For a bit longer view on its role in the U.S., see Evelyn C. Adams, *American Indian Education: Government Schools and Economic Progress* (New York: King's Crown Press, 1946). Appropriate contextualization will be found in Martin Carnoy's *Education as Cultural Imperialism* (New York: David McKay, 1974).

153. The time period indicated represents only the most intensive phase of the process. It actually began earlier and lasted much longer in both countries. On the U.S., see Michael C. Coleman, *American Indian Children at School, 1850-1930* (Jackson: University Press of Mississippi, 1993); David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928* (Lawrence: University Press of Kansas, 1995). On Canada, see Celia Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Vancouver: Tillacum Library, 1988); J.R. Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996).

154. Col. Richard H. Pratt, *Battlefield and Classroom: Four Decades with the American Indian, 1867-1904* (New Haven, CT: Yale University Press, 1993 reprint of 1906 original), 293.

155. See, e.g., Leupp, *Indian and His Problem*, op. cit.

156. See generally, Jean Barman with Yves Hébert and D. McCaskill, eds., *Indian Education in Canada: The Legacy* (Vancouver: Nakoda Institute and University of British Columbia Press, 1986); Noel Dyck, *What Is the Indian "Problem"? Tutelage and Resistance in Canadian Indian Administration* (St. John's: Institute of Social and Economic Research, Memorial University of Newfoundland, 1991).

157. Not only do the criteria of the Genocide Convention delineated in note 139 apply here, but also the provision under Article II making it a crime of genocide to transfer children from targeted racial, ethnical, national, or religious groups systematically, with intent to bring about destruction of the group as such.

158. *Sero v. Gault*, 50 OLR 27 (1921). Robinson's position, adopted by the *Sero* court, totally ignores the fact that the treaties in question already existed and that the Crown had long maintained a formal diplomatic mission to the Mohawks and others of the Six Nations; James Thomas Flexner, *Lord of the Mohawks: A Biography of Sir William Johnson* (Boston: little, Brown, 1979). On the

service rendered to the Crown by Brant and the Mohawks, see Barbara Greymount, *The Iroquois in the American Revolution* (Syracuse, NY: Syracuse University Press, 1975).

159. S Prov. c 1857, c. 26. For analysis, see J. Tobias, "Protection, Civilization, Assimilation: An Outline of Canada's Indian Policy," *Western Canadian Journal of Anthropology* 4:2 (1976).

160. The racially idiosyncratic aspects of the law are hardly unparalleled; see, e.g., Noel Ignatiev, *How the Irish Became White* (New York: Routledge, 1995). More broadly, see Theodore W. Allen, *The Invention of the White Race: Racial Oppression and Social Control* (London: Verso, 1994).

161. In statutory terms, Canada's national policy was first given form by An Act for the Gradual Enfranchisement of the Indians, the Better Management of Indian Affairs, and the extend Provisions of the Act (31 Vict. c. 42, SC 1869, c. 6) and An Act to Amend and Consolidate the Laws Respecting Indians (SC 1880, c. 28). Despite Canada's supplanting of its original 1871 Constitution Act with another in 1982, evolution of its policy on Native citizenship has been consistent from start to finish: see, e.g., The Indian Advancement Act (1884, SC 1884, c. 28), the Indian Act (RSC 1886, c. 43), the second Indian Act (RSC 1906, c. 81), An Act to Amend the Indian Act (SC 1919-1920, c. 50), the third Indian Act (RSC 1927, c. 98), An Act to Amend the Indian Act (SC 1932-33, c. 42), the fourth and fifth generations of Indian Acts (SC 1951, c. 29; RSC 1952, c. 149; RSC 1970, c. 1-16), as well as 1988 amendments to the 1970 Indian Act; Indian and Northern Affairs Canada, *Indian Acts and Amendments, 1868-1850* (Ottawa: Treaties and Historical Research Center, 1981). For interpretation, see J. Leighton, *The Development of Federal Indian Policy in Canada, 1840-1890* (London, Ont.: University of Western Ontario, 1975); Bernard Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982-1984* (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1986).

162. Quoted in M. Montgomery, "The Six Nations and the MacDonald Franchise," *Ontario History* 57:1 (1965): 37. Although it was not until 1933 that a supplemental amendment to the Indian Act formally authorized the government to naturalize even non-applying Natives at its own discretion, this had been de facto policy for more than fifty years; Clark, *Native Liberty, Crown Sovereignty*, op. cit., 156-7.

163. Deloria and Lytle, *American Indian, American Justice*, op. cit., 9-10.

164. Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924), now codified at 8 U.S.C. § 1401 (a) (2).

165. Coulter, "Contemporary Indian Sovereignty," op. cit., 118. Also see Deloria, *Trail of Broken Treaties*, op. cit., 18.

166. Coulter, "Contemporary Indian Sovereignty," op. cit., 118.

167. Indigenous governments are now officially described as being a "third level of governance" in the U.S., below that of the federal and state governments, but generally above those of counties and municipalities; U.S. Senate, Select Committee on Indian Affairs, *Final Report and Legislative*

Recommendations: A Report of the Special Committee on Investigations (Washington, D.C.: 101st Cong., 2d Sess., U.S. Government Printing Office, Nov. 20, 1989). In Canada, on the other hand, it is official policy to view "federal and provincial governments as at a higher level than aboriginal governments"; Clark, *Native Liberty, Crown Sovereignty*, op. cit., 154; J. Anthony Long and Menno J. Boldt, eds., *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988).

168. Ch. 576, 48 Stat. 948; now codified at 25 U.S.C. 461-279; also referred to as the Wheeler-Howard Act, in recognition of its congressional sponsors. For an overly sympathetic overview, see Vine Deloria, Jr., and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Pantheon, 1984).

169. The constitutions were boilerplate documents hammered out by technicians at BIA headquarters in Washington, D.C.: see generally, Graham D. Taylor, *The New Deal and American Indian Tribalism: Administration of the Indian Reorganization Act, 1934-1935* (Lincoln: University of Nebraska Press, 1980).

170. See, e.g., the accounts of Rupert Costo and others in Ken Philp, ed., *Indian Self-Rule: First-Hand Accounts of Indian/White Relations from Roosevelt to Reagan* (Salt Lake City: Howe Bros., 1986).

171. On this and other sorts of fraud perpetrated in the "Sioux Complex" of reservations, see Thomas Biolosi, *Organizing the Lakota: The Political Economy of the New Deal on the Pine Ridge and Rosebud Reservations* (Tucson: University of Arizona Press, 1992).

172. Richard O. Clemmer, *Continuities of Hopi Culture Change* (Albuquerque: Acoma Books, 1978), 60-1. Also see Charles Lummis, *Bullying the Hopi* (Prescott, AZ: Prescott College Press, 1968).

173. Clemmer, *Continuities*, op. cit., 61.

174. Steven M. Tullberg, "The Creation and Decline of the Hopi Tribal Council," in *Rethinking Indian Law*, op. cit., 37.

175. The BIA official assigned responsibility for reorganizing Hopi was Oliver LaFarge. He compiled what he called a "running narrative" of the process which confirms all points raised herein, communicating his concerns to Indian Commissioner Collier as he went along. In the manuscript, which unfortunately remains unpublished (it is lodged in the LaFarge collection at the University of Texas, Austin), he remarks at p. 8: "[I]t is alien to [the Hopis] to settle matters out of hand by majority vote. Such a vote leaves a dissatisfied minority, which makes them very uneasy. Their natural way of doing is to discuss among themselves at great length and group by group until public opinion as a whole has settled overwhelmingly in one direction.... *Opposition is expressed by abstention.* Those who are against something stay away from meetings at which it is discussed and *generally refuse to vote on it* (emphasis added)."

176. Frank Waters, *Book of the Hopi* (New York: Ballantine, 1969), 386.

177. David C. Hawkes, *Aboriginal Self-Government: What Does It Mean?* (Kingston: Ont.: Institute for Intergovernmental Relations, Queen's University, 1983), 9.

178. This was subjected to legal challenge in the 1977 case of *Davey v. Isaac* (77 DLR (3d) 481 (SSC)). Predictably, the courts confirmed the "right" of the federal government to effect such interventions in the internal affairs of indigenous nations.

179. *Special Report on Indian Self-Government*, op. cit.; *Response of the Government*, op. cit.

180. Noel Lyon, *Aboriginal Self-Government: Rights of Citizenship and Access to Government Services* (Kingston, Ont.: Institute for Intergovernmental Relations, Queen's University, 1986), 15.

181. For analysis, see Asch, *Home and Native Land*, op. cit.; Schwartz, *First Principles*, op. cit.; E. Robinson and H. Quinney, *The Infested Blanket: Canada's Constitution: Genocide of Indian Nations* (Winnipeg: Queenston House, 1985).

182. One example of what is at issue here is Public Law 280 (ch. 505, 67 Stat. 588 (1953); now codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360 note), placing American Indian reservations in a dozen U.S. states under state rather than federal criminal jurisdiction. While the Indians involved ostensibly "consented" to this diminishment of their standing to essentially the level of counties, their alternative was outright termination. In California, the process has gone further, with the placement of many reservations under county jurisdiction as well; Carole Goldberg, "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," *UCLA Law Review* 22 (1975); "The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit," *Hastings Law Journal* 25 (1974). More recently, under the 1988 Indian Gaming Act (Public Law 100-497), a number of peoples have been coerced into placing themselves under state regulatory authority for purposes of engaging in gambling operations. In the alternative, they faced continuing destitution; see generally, William R. Eadington, ed., *Indian Gaming and the Law* (Reno: Institute for the Study of Gaming and Commercial Gambling, University of Nevada, 1990). Suffice it to say that such impositions do not conform to international legal definitions of "voluntary merger."

183. The French sought to circumvent the U.N. Charter requirement that they decolonize all "non-self-governing territories" under their control by declaring Algeria to be an integral part of the "Home Department" (i.e., France itself) pursuant to its 1834 annexation of the entire Maghrib region. Such sophistry was rejected by the international community; see, e.g., J.L. Miège, "Legal Developments in the Maghrib, 1830-1930," in *European Expansion and the Law*, op. cit.; Joseph Kraft, *The Battle for Algeria* (Garden City, NY: Doubleday, 1961).

184. See note 93, above, and accompanying text.

185. *Worcester v. Georgia* at 559-60.

186. 30 U.S. (5 Pet.) 1. For background, see Starr, *History of the Cherokee Indians*, op. cit.; Thurman Wilkins, *Cherokee Tragedy: The Ridge Family and the Destruction of a People* (New York: Macmillan, 1970). On the case itself, see J. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," *Stanford Law Review* 21 (1969).

187. *Cherokee v. Georgia* at 16.

188. Ibid. at 17.

189. A good overview of the flow and interrelationship of Marshall's "Indian cases," as well as their implications for both Native and Euro-American societies, will be found in G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* (New York: Macmillan, 1988), esp. chap. 10. Also see Robert A. Williams, Jr., "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing the White Man's Jurisprudence," *Wisconsin Law Review* 31 (1986).

190. For a fuller exposition, see Williams, *American Indian in Western Legal Thought*, op. cit., 312-7, 321-3.

191. A year later, in *Worcester* (at 559), Marshall again remarked upon how the doctrine "excluded [Native peoples] from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed" as being the "single exception" to the fullness of our sovereignty under international law. This time he framed the matter more correctly, however, by going on to observe that "this was a restriction which those European potentates imposed upon themselves, as well as upon the Indians." In other words, all parties being equal, there was no implication of supremacy or subordination involved. Even at that, Marshall overstated the case. Under the law, absent a treaty or agreement to the contrary, indigenous nations were free to trade with anyone they wished. It was the European powers themselves which were constrained from trading with Natives in one another's discovery domains; aside from the citations contained in note 52, above, see generally, Gordon Bennett, *Aboriginal Rights in International Law* (London: Royal Anthropological Association, 1978).

192. While Marshall was ostensibly writing about the specific circumstances of the Cherokee Nation, he couched his opinion in terms of all Native peoples within claimed U.S. boundaries. At the time, this already included the vast Louisiana Territory, to which the Jefferson administration had purchased French acquisition rights but in which there was virtually no U.S. settlement. Hence, while Marshall's characterization of the "domestic dependency" of indigenous nations might have borne a certain resemblance to the situation of the Cherokee, encapsulated as it was within the already settled corpus of the United States, the same can hardly be said of more westerly peoples like the Cheyennes, Comanches, Navajos, and Lakotas. In this sense, the views expressed in *Cherokee* were not so much an attempt to apprehend extant reality as they were an effort to forge a sort of judicial license for future U.S. aggression. There is thus considerable merit to the observation of Glenn T. Morris, offered during a 1987 lecture at the University of Colorado, that, far from constituting an affirmation of indigenous rights, as is commonly argued (e.g., Wilkinson, *Indians, Time and Law*, op. cit.), the Marshall doctrine is "fundamentally a sophisticated juridical blueprint for colonization."

193. A good illustration is that of the U.S. military campaign against the Lakota and allied peoples in 1876-77. During the late fall of 1875, the administration of President Ulysses S. Grant issued instructions that all Lakotas resid-

ing within their own territories, recognized by treaty in both 1851 and 1868, should assemble at specific locations therein by a given date in January 1876. When the Indians failed to comply, Grant termed their refusal of his presumption an "act of war" and sent in the army to "restore order"; for details, see John E. Gray, *Centennial Campaign: The Sioux War of 1876* (Norman: University of Oklahoma Press, 1988).

194. For elaboration, see Ward Churchill, "Perversions of Justice: Examining the Doctrine of U.S. Rights to Occupancy in North America," in David S. Caudill and Steven Jay Gould, eds., *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice* (Atlantic Highlands, NJ: Humanities Press, 1995).

195. On the nature of the Canadian case, see note 11, above.

196. SCR 313 at 380. Contextually, see John Hurley, "Aboriginal Rights, the Constitution and the Marshall Court," *Revue Juridique Themis* 17 (1983).

197. In concluding that the federal government of Canada enjoys a unilateral prerogative to extinguish indigenous rights, the court noted that it had been "unable to find a Canadian case dealing with precisely the same subject" and that it would therefore rely on a U.S. judicial interpretation found in *State of Idaho v. Coffee* (56 P 2d 1185 [1976]); 68 OR (2d) 353 (HC), 438 at 412-3.

198. In general, see Slattery, *Ancestral Lands, Alien Laws*, op. cit.; and "Understanding Aboriginal Rights," *Canadian Bar Review* 91 (1987).

199. At the point at which Great Britain abandoned its struggle to retain the thirteen insurgent American colonies, each became an independent state in its own right. Their subsequent relinquishment of sovereignty and consensual subordination to federal authority was exactly comparable to that imposed by the U.S. as a result of the *Cherokee* opinion upon indigenous nations; see generally, Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia: University of Pennsylvania Press, 1983).

200. See note 36 and accompanying text. Incidentally, the explanation offered by Bruce Clark of the difference between U.S. and Canadian approaches to Indian relations—that the Native right to sovereignty is protected in the Canadian Constitution but not in that of the U.S.—is erroneous; *Native Liberty, Crown Sovereignty*, op. cit., 56-7. Indigenous sovereignty *is* protected under Article I of the U.S. Constitution for reasons indicated herein. That the southern settler-state government ignores this fact as a matter of policy hardly negates its existence.

201. For a sustained but unsuccessful effort by several scholars to get around this problem, see Imre Sutton, ed., *Irredeemable America: The Indians' Estate and Land Tenure* (Albuquerque: University of New Mexico Press, 1986).

202. The description comes from Russell Means, in a lecture delivered at the University of Colorado, July 1986. With respect to formal repudiation, see note 93 and accompanying text.

203. It is important to note that resort to armed struggle by bona fide national liberation movements is entirely legitimate. United Nations Resolution 3103 (XXVII; Dec. 12, 1972) declares that "the struggle of people

under colonial and alien domination and racist régimes for the implementation of their rights to self-determination and independence is legitimate and in full accordance with the principles of international law." Accordingly, Section I, Clause 4 of Protocol I Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, done at Geneva on June 10, 1977, expressly includes "armed conflicts in which peoples are fighting against colonial domination or alien occupation and against racist régimes in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations...." Resolution 3103 goes on to state that "any attempt to suppress the struggle against colonial and alien domination and racist régimes is incompatible with the Charter of the United Nations ... and constitutes a threat to international peace and security"; Weston, et al., *Documents in International Law*, op. cit., 230-46. In effect, resort to arms in order to restore inherent sovereignty is lawful, while use of armed force to suppress or deny it is not.

204. On the fishing rights struggle, see American Friends Service Committee, *Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians* (Seattle: University of Washington Press, 1970). On Alcatraz, see Troy R. Johnson, *The Occupation of Alcatraz Island: Indian Self-Determination and the Rise of Indian Activism* (Urbana: University of Illinois Press, 1996). On the BIA building takeover, see Deloria, *Behind the Trail of Broken Treaties*, op. cit. On Wounded Knee, see Robert Burnette and John Koster, *The Road to Wounded Knee* (New York: Bantam, 1974).

205. On the early phases, see, e.g., Stan Steiner, *The New Indians* (New York: Harper & Row, 1968); Alvin M. Josephy, Jr., *Red Power: The American Indians' Fight for Freedom* (New York: McGraw-Hill, 1971). On the Anishinaabe Park occupation in northwestern Ontario and other subsequent events in Canada, see the various issues of *Akwesasne Notes*, 1970-75, inclusive.

206. On the growth of AIM, see Paul Chaat Smith and Robert Allen Warrior, *Like a Hurricane: The American Indian Movement from Alcatraz to Wounded Knee* (New York: New Press, 1996). On the repression, see Johansen and Maestas, *Wasi'chu*, op. cit.; Churchill and Vander Wall, *Agents of Repression*, op. cit.; Peter Matthiessen, *In the Spirit of Crazy Horse*, 2nd. ed. (New York: Viking, 1991).

207. Deloria, *Behind the Trail of Broken Treaties*, op. cit.

208. On the famous "Indian Summer in Geneva," see "The United Nations Conference on Indians" in Jimmie Durham, *A Certain Lack of Coherence: Writings on Art and Cultural Politics* (London: Kala Press, 1993).

209. Russell Tribunal, *The Rights of the Indians of the Americas* (Rotterdam: Fourth Russell Tribunal, 1980).

210. Sanders, "Re-Emergence of Indigenous Questions," op. cit. Also see Gordon Bennett, "The Developing Law of Aboriginal Rights," *The Review* 22 (1979).

211. 88 Stat. 2203; now codified at 25 U.S.C. 450a and elsewhere in Titles 25, 42 and 50, U.S.C.A. It is worth noting that in 1984 Canada made an abortive attempt to come up with its own version of this handy statute. Entitled "An Act

Relating to Self-Government for Indian Nations" (Federal Bill c-52), the measure dissolved in the mists of transition from liberal to conservative government; Clark, *Native Liberty, Crown Sovereignty*, op. cit., 169. As it stands, Canada relies upon the Section 35 (1) of the 1982 Constitution Act, a component of the so-called Charter of Rights and Freedoms specifically enumerating the "Rights of the Aboriginal Peoples of Canada." The provisions found therein seem clear enough—among other things, it states unequivocally that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and confirmed"—to assure indigenous self-determination in a genuine sense; L.C. Green, "Aboriginal Peoples, International Law, and the Canadian Charter of Rights and Freedoms," *Canadian Bar Review* 61 (1983); K. McNeil, "The Constitution Act, 1982, Sections 25 and 35," *Canadian Native Law Reporter* 1 (1988). It should be noted, however, that in practice the courts of Canada have quietly voided these apparent guarantees by subjecting them to "reasonability tests" during a pair of 1989 cases. In *R. v. Dick* (1 CNLR 132 [BC Prov. Ct.]), the Provincial Court of British Columbia found the exercise of aboriginal rights to be unreasonable insofar as it conflicted with provincial statutes. In *R. v. Agawa* (65 OR 92d) 505 [CA]), the Ontario Court of Appeal reached the same conclusion with respect to treaty rights; see generally, Venne, "Treaty and Constitution in Canada," op. cit.; Thomas Berger, "Native Rights and Self-Determination," *The Canadian Journal of Native Studies* 3:2 (1983).

212. Michael D. Gross, "Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Policy," *Texas Law Review* 56 (1978). For background, see Jack D. Forbes, *Native Americans and Nixon: Presidential Politics and Minority Self-Determination* (Los Angeles: UCLA American Indian Studies Center, 1981).

213. Samples of the rhetoric indulged in at the UN by U.S. representatives is laced throughout Jimmie Durham's *Columbus Day* (Minneapolis: West End Press, 1983). For responses, see Alexander Ewen, ed., *Voices of Indigenous Peoples: Native People Address the United Nations* (Santa Fe, NM: Clear Light, 1994).

214. Douglas Sanders, "The U.N. Working Group on Indigenous Peoples," *Human Rights Quarterly* 11 (1989); Jimmie Durham, "American Indians and Carter's Human Rights Sermons," in *A Certain Lack of Coherence*, op. cit.

215. José R. Martinez Cobo, *Study of the Problem of Discrimination of Indigenous Populations* (U.N. Doc. E/CN.4/Sub.2/1983/21/Ass.83, Sept. 1983). For context and amplification, see Independent Commission on Humanitarian Issues, *Indigenous Peoples: A Global Quest for Justice* (London: Zed Books, 1987).

216. On the decision to draft a new instrument, see S. James Anaya, "The Rights of Indigenous Peoples and International Law in Contemporary and Historical Perspective," in Robert N. Clinton, Nell Jessup Newton, and Monroe E. Price, eds., *American Indian Law: Cases and Materials* (Charlottesville, VA: Michie Co., 1991). For further background, see Dunbar Ortiz, *Indians of the Americas*, op. cit.; Sanders, "Re-Emergence of Indigenous Questions," op. cit.

217. Sanders, "U.N. Working Group," op. cit.

218. Article 1 (7) of the United Nations Charter specifically excludes intervention "in matters which are essentially within the jurisdiction of any state" and exempts member states from having "to submit such matters to settlement" by the community of nations; Weston, et al., *Documents in International Law*, op. cit., 17. For analysis, see generally, Joseph B. Kelly, "National Minorities in International Law," *Denver Journal of International Law and Politics* 3 (1973); L. Mandell, "Indians Nations: Not Minorities," *Les Cahiers de Droit* 27 (1983).

219. Article 1 (2) of the United Nations Charter has required since 1945 that all member states "respect ... the principle of equal rights and self-determination of peoples." Since then, it has become almost pro forma to incorporate the following sentence into international legal instruments: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development"; see, e.g., Article 1 (1) of the 1967 International Covenant on Economic, Social and Cultural Rights (U.N.G.A. Res 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, A/6316 (1967), reprinted in 6 I.L.M. 360 (1967); Article 1 (1) of the 1967 International Declaration on Civil and Political Rights (U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 368 (1967); and the Preamble to the 1986 Declaration on the Right to Development (U.N.G.A. Res. 41/128, 41 U.N. GAOR, Supp. (No. 53) U.N. Doc. A/41/925 (1986). The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (op. cit.) not only includes the same language as point 2, but obviously incorporates the concept into its very title. Moreover, as in point 1, it states that the "subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to world peace and cooperation"; Weston, et al., *Documents in International Law*, op. cit., 17, 371, 376, 485, 343-4. See generally, Pomerance, *Self-Determination in Law and Practice*, op. cit.; Ofuatey-Kodjoe, *Principles of Self-Determination*, op. cit.; Rigo-Sureta, *Evolution of the Right to Self-Determination*, op. cit.

220. See, e.g., Article 1 (3) of the International Labor Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries; International Labor Conference, *The Indigenous and Tribal Peoples Convention* (76th Sess., Prov. Rec. 25, 1989).

221. The timing, corresponding with the quincentenary of the Columbian landfall in America, was selected as optimal for obtaining speedy passage of the proposed declaration by the General Assembly.

222. See generally, Isabelle Schulte-Tenckhoff, "The Irresistible Ascension of the UN Draft Declaration on the Rights of Indigenous Peoples: Stopped Dead in Its Tracks?" *European Review of Native American Studies* 9:2 (1995).

223. It should be noted that the U.S. has conducted itself in a similar fashion throughout the history of the United Nations, beginning with the 1946 deliberations over the content of a draft convention on prevention and punishment of genocide. In that instance, U.S. representatives acted decisively to delete an

entire article on cultural genocide, which they correctly interpreted as describing much of their own country's Indian policy. Even then, the United States refused to ratify the law for forty years, until it felt it could exempt itself from aspects it found inconvenient; LeBlanc, *United States and the Genocide Convention*, op. cit. The same pattern of obstructing and subverting the formation of international law has continuously marked U.S. performance over the years, most recently with respect to its refusal to accept a universal prohibition against the use of antipersonnel mines unless it—alone among nations—could be formally exempted from full compliance.

224. The substance of this paragraph has been confirmed by several of the indigenous delegates in attendance, notably Sharon H. Venne, Moana Jackson, Glenn T. Morris, Josh Dillabaugh, Mona Roy, Troy Lynn Yellow Wood, Phyllis Young, and Russell Means.

225. Aside from the many references already made which bear on this point, see Robert T. Coulter, "The Denial of Legal Remedies to Indian Nations Under U.S. Law," in *Rethinking Indian Law*, op. cit.

226. It is unlikely that, absent at least some pretense of genuine Native endorsement, any form of declaration will be passed by the General Assembly at all. From an indigenous perspective, this would be an entirely acceptable outcome since, at least in this instance, something is definitely *not* better than nothing. From the settler-state perspective, of course, the precise opposite pertains. Hence, the U.S. in particular has set out to co-opt key indigenous organizations into accepting some compromise formulation. Ironically, it appears that the once militantly principled IITC—which has by now drifted *very* far from its roots, having long since incorporated itself (shedding control by the elders, original trustees, and grassroots supporters in the process)—has proven one of the more receptive in this regard; Churchill, "Subterfuge and Self-Determination," op. cit. The seeds for this ugly development were noted by some observers as far back as 1979; Jimmie Durham, "An Open Letter to the Movement," in *A Certain Lack of Coherence*, op. cit.

227. This is the route implicitly suggested in A. Kienetz, "Decolonization in the North: Canada and the United States," *Canadian Review of Studies in Nationalism* 8:1 (1986). Also see S. Powderface, "Self-Government Means Biting the Hand that Feeds Us," in Leroy Little Bear, Menno Boldt, and Jonathan Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984).

228. See notes 62 and 95, above, and accompanying text.

229. See 219, above.

230. Weston, et al., *Documents in International Law*, op. cit., 344. Both the U.S. and Canada will undoubtedly argue that Native territories within their borders are already self-governing—as the U.S. at least has already argued, they are self-determining under its laws—but neither can argue that indigenous nations presently enjoy complete independence, or that they have ever been afforded an opportunity to do so.

231. Ibid., 27-30.

232. As is stated at Point 6 of Resolution 1514, "Inadequacy of political, economic, social or educational preparedness should never be used as a pretext for delaying independence"; ibid., 344.

233. In cases where the colonizer is found to have falsified reporting data in ways which allowed it to rig outcomes, the colony is reinscribed on the list of non-self-governing territories and the entire process starts over under direct U.N. supervision (rather than monitoring). Witness the recent case of New Caledonia; G.A. Res. 41/41A UN GAOR Supp. (No. 53), UN Doc. A/41/53 (1986) at 49. Also see "Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples," 41 UN GAOR (No. 23), UN Doc A/41/23 (1986). For further background, see Stephen Bates, *The South Pacific Island Countries and France: A Study of Inter-State Relations* (Canberra: Australian National University, 1990), 77. Both Hawaii and Puerto Rico are presently subject to this same procedure. On Hawaii, see note 61, above, and accompanying text, as well as Ramon Lopez-Reyes, "Reinscription: The Right of Hawai'i to be Restored to the United Nations List of Non-Self-Governing Territories," in Ward Churchill and Sharon H. Venne, eds., *Islands in Captivity: Findings of the International Tribunal on the Rights of Indigenous Hawaiians* (Boston: South End Press, forthcoming). On Puerto Rico, see, e.g., Ronald Fernandez, *Prisoners of Colonialism: The Struggle for Justice in Puerto Rico* (Monroe, ME: Common Courage Press, 1994).

234. A colonized people is not legally required to opt for complete independence in order to exercise its complete independence and separation from its colonizer in exercising its right to self-determination. Instead, it may elect to limit its own sovereignty to some extent, as in the case of Greenland; Gudmunder Alfredsson, "Greenland and the Law of Political Decolonization," *German Yearbook of International Law* 25 (1982); Nannum Hurst, *Autonomy, Sovereignty and Self-Determination* (Philadelphia: University of Pennsylvania Press, 1990). Colonizing states, however, are legally required to acknowledge without qualification the right of colonial subjects to complete independence and separation and to do nothing at all to orchestrate any other outcome to the process of decolonization. Independence is thus legally presumed to be the outcome of any decolonizing process unless the colonized themselves demonstrate unequivocally that they desire a different result; Nanda, "Self-Determination Under International Law," op. cit.; Buchheit, *Secession*, op. cit.

235. Weston, et al., *Documents in International Law*, op. cit., 17, 344.

236. The principle was adopted in response to the "Belgian Thesis," a proposition put forth by that country as it was being forced to relinquish the Congo, that each of the Native peoples within the colony would be at least as entitled to exercise self-determining rights as would the decolonized Congolese state (which Belgium, after all, had itself created); *The Sacred Mission of Civilization: To Which Peoples Should the Benefit be Extended?* (New York: Belgium Government Information Center, 1953). While the Belgian position, that each indigenous nation possessed a right equal to or greater than the state, was

essentially correct, it was advanced for transparently neocolonialist purposes and was therefore rebuffed; Roxanne Dunbar Ortiz, "Protection of American Indian Territories in the United States: Applicability of International Law," in *Irredeemable America*, op. cit., esp. 260-1.

237. For discussion, see, e.g., Russel Barsh, "Indigenous North America and International Law," *Oregon Law Review* 62 (1983).

238. For elaboration of this argument, see Catherine J. Jorns, "Indigenous People and Self-Determination: Challenging State Sovereignty," *Case Western Reserve Journal of International Law* 24 (1992). Potentially applicable precedents will be found in Jencks, *Law in the World Community*, op. cit.