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"A Desert Grows Between Us"¹—The Sovereignty Paradox at the Intersection of Tribal and Federal Courts

Caprice L. Roberts*

Having been raised in the white society, I can understand and communicate on your level—it is an adjustment I have had to make in order to succeed in your world. But I can also understand and communicate with my people, in our way. The many differences in our cultures (such as communication and understanding) may to you seem subtle or superficial when, in fact, they are quite profound. But this is because you think like a white man and I like an Indian. Our different perspectives make my attempt to impart to you the Native viewpoint that much more difficult—and that much more urgent.²

Anyone seeking to understand the role of American federal courts in our constitutional democracy would be well-served by reading Steve McNeill's note, *In a Class by Themselves: A Proposal to Incorporate Tribal Courts into the Federal System Without Compromising Their Unique Status as "Domestic Dependent Nations."*³ For the federal courts scholar, it is through an exploration of federal court interactions and limits that we can truly appreciate the expanse of federal power and the potential for abuses.⁴ Thus, McNeill's note holds interest for the (dominant) legal academy. The paramount value of

1. Frank Pommersheim, *Desert Father*, 28 LEGAL STUD. F. (OFF THE RECORD—AN ANTHOLOGY OF POETRY BY LAWS.) 135 (2004) (capitalization altered).

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2. Mark Delgado, *Dear Mr. Dalby*, in PRIZED WRITING: THE ESSAY SCIENTIFIC AND TECHNICAL WRITING (1989–1990), available at <http://prizedwriting.ucdavis.edu/past/1989-1990/delgado.html> (last visited Jan. 29, 2008) (on file with the Washington and Lee Law Review).

3. R. Stephen McNeill, *In a Class by Themselves: A Proposal to Incorporate Tribal Courts into the Federal Court System Without Compromising Their Unique Status as "Domestic Dependent Nations,"* 65 WASH. & LEE L. REV. 283 (2008).

4. See Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of Marbury v. Madison to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77, 77 (2004) ("[B]y examining Federal Indian Law one better understands that the American constitutional project includes many instances in which power is claimed by force and justified by necessity.").

McNeill's scholarship, however, lies in its aim to provide workable solutions for litigants. He seeks to honor the dignity of tribal sovereignty and further tribal aspirations, with due regard for the interests of non-Indians. The breadth and depth of McNeill's work leave no surprise as to why the *Washington and Lee Law Review* would bestow upon him its highest distinction.

McNeill offers a thoughtful treatment of issues critical to tribal jurisdiction. As Professor Frank Pommersheim observes, "[f]ederal Indian law has yet to resolve [certain] paradoxes, develop coherent theory, and establish a reliable conceptual and human framework within which to engage modern Indian law issues and tribal aspirations."⁵ McNeill's ambitious and detailed work seeks to inject some coherence by providing "a mechanism for tribal courts to fit in the American court system, while maintaining the uniqueness of tribal law."⁶

According to Professor Judith Resnik, "the official canon of the federal courts has not included the relationship between the federal courts and Indian tribes."⁷ In fact, she adds: "Little is said about the federal courts' role—sometimes destroying Indian tribal culture and occasionally respecting it."⁸ McNeill's treatment offers an opportunity to accomplish Professor Resnik's narrative prescription: "to review the stories we have been telling about the federal courts, to acknowledge the role played by brute force, [and] to make plain the limits of constitutionalism and of history in explicating constitutionalism."⁹ His diagnosis¹⁰ of existing tribal law in the federal system shows "the limits of constitutionalism."¹¹ Yet, McNeill's suggested solution¹² may demonstrate "the possibilities of lawmaking to enable dignified interactions among and across inter-dependent sovereigns so as to reflect the hopes for which *Marbury v. Madison* stands."¹³

Scholars describing such problems and proposing solutions encounter the potential pitfall of essentialism—the assumption that all who belong to a

5. FRANK POMMERSHEIM, *BRAID OF FEATHERS* 9 (1995).

6. McNeill, *supra* note 3, at 332.

7. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 758 (1989).

8. *Id.*

9. *Id.* at 759.

10. McNeill, *supra* note 3, at 297–309 (exploring problems presented by tribal jurisdiction with the federal structure and with the states).

11. Resnik, *supra* note 4, at 135.

12. McNeill, *supra* note 3, at 320–40 (outlining the multi-faceted components of his "more tailored solution").

13. Resnik, *supra* note 4, at 135.

particular group possess like concerns and traits. A fruitful dialogue here often necessitates that we speak in terms of "tribal courts," "Indian Americans," and "non-Indians." Yet, any relevant discourse benefits from acknowledging the anti-essentialist reality about which Professor Pommersheim respectfully reminds us:

A rich diversity of landscapes, cultures, histories, and people exists throughout Indian country. This country includes, for example, 278 federal reservations, ranging from that of the Navajo Tribe, with 160,000 members and fifteen million acres located in parts of Arizona, New Mexico, and Utah, to a few California rancherias that consist of only one or two families living on less than fifty acres.¹⁴

Recall the historical landscape: "Measured separatism soon gave way to a federal policy of vigorous assimilation, with dire consequences for the concept of reservations as islands of Indianness. Homelands were cut open, and the bright line separating Indians and non-Indians was obliterated."¹⁵ Further, "there is much to learn from thinking about both the differences and the similarities" between Indian tribes and the state,¹⁶ as well as between Indians and non-Indians. Accordingly, the uniqueness of the people, problems, and existing structures requires thoughtful implementation of any proposed solution. In addition, such issues cannot be ripped from their current and historical contexts. McNeill ventures into this complex arena with the goal of incorporating tribal courts into the federal court structure. This ambitious, big-picture solution dictates some leniency with assumptions in order to explore the theoretical benefits of his proposal, despite the ultimate precision and intricacy that would be necessary to implement any solution.

Like any serious scholar, McNeill situates his note in the context of an existing, impressive body of scholarship, and he conveys to the reader the import of his work. Notably and regrettably, "The bountiful literature of federal courts' jurisprudence does not, however, consider problems of the relationship between Indian tribes, the federal government, and the states."¹⁷ According to McNeill, his proposal is timely because of the increased likelihood for litigation between non-Indians and tribal members and the concomitant necessity for

14. POMMERSHEIM, *supra* note 5, at 7.

15. *Id.* at 38.

16. Resnik, *supra* note 7, at 701.

17. *Id.* at 676. In Professor Resnik's *Dependent Sovereigns* article, she seeks to "learn what that silence has to teach" and "show what Indian tribe cases have to bring to federal courts' jurisprudence, to what is meant by the concept of state sovereignty and allocation of power between the state and federal governments." *Id.* at 678-79.

access to a meaningful judicial forum.¹⁸ McNeill does not utilize the word "meaningful." Instead, he describes the imperative of access to tribal courts that would garner respect on par with parallel state and federal courts.¹⁹ The diminished respect for tribal courts stems, according to McNeill, from "unsettled" law regarding tribal court jurisdiction.²⁰ A symptom of the negative perception is non-Indians' attempts to avoid the jurisdiction of tribal courts altogether.²¹ In order to correct the *misperception* of tribal court import and "promote tribal sovereignty," McNeill calls for laws that create a "coherent role for the tribal courts within the federal system."²²

It should give one pause to read McNeill's antiseptic designation of "unsettled law" as the source of diminished respect for tribal court jurisdiction. Perception of tribal court jurisdiction by a majority legal culture constitutes a weighty topic unto itself. Professor Robert A. Williams, for one, suggests that the historical Supreme Court perspective of the purpose of tribal jurisdiction is regrettably "that Indians have always possessed diminished and inferior rights compared to the white population under United States law."²³ According to Professor Williams, William Rehnquist, then-Associate Justice, revived "blatantly racist nineteenth-century judicial language of Indian savagery and white supremacy."²⁴ Twenty years after *Brown v. Board of Education*,²⁵ the Court's language in *Oliphant v. Suquamish Indian Tribe*²⁶ offers a breathtakingly ethnocentric view of tribal sovereignty:

In *In re Mayfield*, the Court noted that the policy of Congress had been to allow the inhabitants of the Indian country "such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization."²⁷

18. McNeill, *supra* note 3, at 285–86.

19. *Id.* at 286.

20. *Id.* at 285.

21. *Id.* at 285–86.

22. *Id.* at 286.

23. ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON—THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA xxiii (2005).

24. *Id.*

25. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that school segregation violates "the equal protection of the laws guaranteed by the Fourteenth Amendment").

26. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that Indian tribes lack criminal jurisdiction over non-Indians even in cases involving crimes against Indians on Indian land) (citations omitted).

27. *Id.* at 204.

In this new millennium, is tribal sovereignty still a doctrine of convenience to a dominant population or a meaningful wellspring of intercultural respect?

McNeill's future work could benefit from grappling with the deeper roots of this diminished respect, both as a topic worthy of continued inquiry and for any ramifications such jurisdictional perspectives might have on his policy prescriptions. If he were to offer a different vision for the purpose of tribal courts than those expressed in *Oliphant* and its hostile progenitors, there could be significant import beyond the jurisdictional.

McNeill carefully explores and discards political solutions that attempt to "fix" the problems by reframing tribes as states, foreign countries, administrative agencies, or federal territories.²⁸ Instead, he presents and defends what he describes as "a more tailored solution." McNeill seeks an antidote to existing jurisdictional problems, e.g., (i) jurisdictional overlaps that create confusion and (ii) jurisdictional gaps that fail to provide needed justice. He desires clarity and uniformity to achieve tribal respect. His proposal calls for the expansion of tribal criminal and civil jurisdiction.²⁹ To balance this expansion, McNeill suggests diminishing existing state and federal court jurisdiction.³⁰ To achieve it, he demands federal congressional action.

Of course, added tribal responsibility necessitates an increase in the quantity and quality of tribal courts, i.e., McNeill's "A Court for Every Tribe,"³¹ appellate courts for larger tribes,³² and a new federal circuit court of appeals—the "Court of Appeals for the Indian Circuit."³³ McNeill should examine the sources and ramifications of any such exercise of congressional power vis-à-vis federal courts. Pursuant to Article III of the United States Constitution, "Congress may from time to time ordain and establish" inferior federal courts.³⁴ Further, "[t]he judicial Power" of such courts "shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ."³⁵ Accordingly, Article III provides broad congressional power to create and redraw federal courts and to alter the scope of federal court jurisdiction.³⁶ Any

28. McNeill, *supra* note 3, at 309–17.

29. *Id.* at 320–21.

30. *Id.* at 328–29.

31. *Id.* at 330.

32. *Id.* at 330–31.

33. *Id.* at 331–32. McNeill also suggests an array of procedural devices for streamlining interactions between tribal and state courts. *Id.* at 332–40.

34. U.S. CONST. art. III.

35. *Id.*

36. *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) ("The Congressional power to ordain

congressional maneuver, however, must comport with other constitutional strictures such as equal protection and separation of powers. Even granting congressional plenary power regarding the tenets of McNeill's proposal, the *wisdom*³⁷ of Congress disrupting the apple cart raises distinct, thorny challenges worthy of further exploration.

In an effort to maintain tribal uniqueness within new bounds of constitutionalism, McNeill further provides that "at least half the judges should be Indians" on the new federal circuit court. McNeill may have unwittingly stepped into the legal briar patch with this proposal. He has yet to analyze the full implications of federal court jurisprudence. Specifically, the composition of a new federal circuit court ostensibly would require any elevated tribal judge to undergo the "Advice and Consent" mechanisms—presidential nomination and Senate confirmation—as required for all Article III judges.³⁸ Significantly, all such Article III judges would receive life tenure.³⁹ Further, the creation of a new court likely would require a congressional expansion of the scope of federal appellate court decisionmaking authority to hear cases on review of tribal decisions. Putting the constitutional thicket aside, McNeill opines that Indians would preserve Indian culture and law by injecting an otherwise absent tribal perspective, while the non-Indians, "more familiar with the Constitution,"

and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845))). For a seminal exploration of the nuances of limits and consequences of congressional power over federal court jurisdiction, see Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). For the author's contribution regarding congressional efforts to remove federal court jurisdiction, see Caprice L. Roberts, *Jurisdiction Stripping in Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593 (2006).

37. See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 898 (1984) (acknowledging congressional plenary power over federal courts, but advising a wisdom analysis examining "what sound constitutional statesmanship admonishes").

38. U.S. CONST. art. II, § 2, cl. 2 (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States").

39. Perhaps McNeill would modify his proposal to create a new federal court that would be more comparable to an agency or bankruptcy court. Such a modification, however, may not render the desired respect and may raise other challenges. See Resnik, *supra* note 4, at 131 ("[G]iven Article III's vesting of judicial power in courts with life-tenured judges, one could readily question the legitimacy of adjudication within agencies and by bankruptcy and magistrate judges, all of whom render federal judgments but lack the constitutionally stipulated attributes of life tenure and protected salaries." (citing Judith Resnik, "Uncle Sam Modernizes His Justice": *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 625–43 (2002))).

will "better protect the rights of [non-Indians]."⁴⁰ This good-faith suggestion will no doubt garner criticism.⁴¹ For example, it embeds "identity-politics" assumptions and, even if relying on widely accepted generalizations, his proposal includes constitutionally problematic quota-like dictates.

Regardless of the ultimate solution, there are a number of lenses through which to view the issue of tribal jurisdiction. Tribal sovereignty coexists, and must contend, with the United States constitutional system, including the overlays of federalism and separation of powers. The result presents complex choices as to the appropriate analytical model for such trans-jurisdictional issues raised: diplomacy, federalism, or separation of powers.

Interestingly, McNeill chides Congress for its failure to wield its arguable *constitutional* plenary power,⁴² and he criticizes the federal judiciary for exerting too much power and misusing its reach by "drastically limiting the extent of tribal court jurisdiction over non-Indians" to the severe detriment of tribal sovereignty.⁴³ McNeill echoes Professor Pommersheim who has characterized the federal courts' exercise of plenary power to minimize tribal jurisdiction as "a rogue doctrine used to curb tribal sovereignty."⁴⁴ While the Supreme Court devises the modern jurisdictional doctrines of limitation for tribal courts that hinge on party classification,⁴⁵ McNeill laments that Congress sits idly by as tribal sovereignty suffers.⁴⁶

40. McNeill, *supra* note 3, at 332.

41. Before concluding the note, McNeill dutifully addresses some anticipated criticisms of assimilation and the costs of implementation. *Id.* at 343–45.

42. McNeill asserts that plenary power over Indians rests solely with Congress. *Id.* at 287. He reluctantly acknowledges the existence of broad criticism of this plenary power doctrine, but stands on the practical reality of Congress's historical reliance on this power. *Id.* For a collection of the scholarly criticism, see Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?*, 5 U. PA. J. CONST. L. 271, 271 n.4 (2003). McNeill adds that, despite the lack of significant constitutional grounding, the federal judiciary regularly and consistently recognizes Congress's plenary power over Indian tribes. McNeill, *supra* note 3, at 289.

43. McNeill, *supra* note 3, at 286. According to McNeill, the Supreme Court, via "its own brand of plenary power," has destroyed the effect of congressional plenary power over Indians by narrowly circumscribing tribal court jurisdiction. *Id.* at 289. Professor Pommersheim details the evolution of the Court's adoption of its own, albeit inferior, brand of plenary power in this arena. Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 327–29 (1997).

44. Pommersheim, *supra* note 42, at 284; McNeill, *supra* note 3, at 286 n.11.

45. See McNeill, *supra* note 3, at 289 (explaining that the modern federal judicial rationale keys tribal jurisdiction to whether the parties are: "non-Indian, Indian nonmember, and member" (quoting David A. Castleman, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. REV. 1253, 1259 (2006))).

46. *Id.*

The locus of power in determining federal court jurisdiction itself, without the complication of tribal-relations questions, presents vexing problems and generates significant scholarly debate. In many regards, McNeill's call for congressional action is a separation-of-powers critique. He would rather see the political branch establish the contours of tribal-federal jurisdictional relations than the courts. His method presents numerous questions sounding in political science and constitutional law. His solution requires an evaluation of which constitutional decisionmaker is best suited to decide such policy. His insistence on congressional action begs the question of whether Indian tribes will be better served by Congress's rather than the Court's dictates. Ultimately, a separation-of-powers critique that focuses on the import of court role posits: Isn't political failure the very danger for insular minorities addressed in *Carolene Products*' infamous footnote four?⁴⁷

McNeill proposes that Congress should pass a flexible, comprehensive statute regarding the scope of tribal court jurisdiction with the federal system.⁴⁸ He admirably seeks a comprehensive solution that sets its sights high. Specifically, he directs Congress to these primary aims: "(1) maximizing tribal sovereignty, (2) protecting the constitutional rights of non-Indians, (3) protecting Indian culture, and (4) providing a substantial amount of flexibility to better accommodate the various differences among individual Indian tribes."⁴⁹

The tribal sovereignty aim will prove tricky given the *cabined sovereignty* within which tribes exist. American infrastructure overlays onto tribes—it dictates when it desires and walks away when it pleases. American legal institutions, including Congress, have shaped, molded, mocked, rejected, and contained Indian law and culture. Now, do we prefer that Congress wield its supposed plenary power to cure all the ills resulting from the initial faulty premise? The inherent paradox of *dependent sovereignty* is that true tribal sovereignty will remain beyond grasp.

Perhaps, with a reader's fresh eyes to these problems, one wonders whether McNeill rejected a better model—the diplomatic paradigm.⁵⁰ It is

47. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (upholding a congressional prohibition on the interstate shipment of certain milk products, but proposing, in now-infamous footnote four, heightened judicial review for legislation affecting the rights of "discrete and insular minorities").

48. McNeill, *supra* note 3, at 286.

49. *Id.* at 320.

50. Federalism is not particularly attractive. The federalism and territorial models are inherently subservient, perhaps more even than originally constitutionally contemplated. This subservient cast is fatally flawed for any system seeking to achieve tribal sovereignty. McNeill rejects treating tribes as states because the treatment would result in forced assimilation and loss

arguably a better model because its premise is to give due regard to the coequality of equal power relationships. As McNeill acknowledges, legislation treating Indian tribes as "independent foreign nations," for example, "could provide the greatest amount of protection for inherent tribal sovereignty."⁵¹ Diplomatic transnational models, however, conjure cumbersome images of letters rogatory and nonbinding principles of comity. Thus, any diplomatic paradigm must focus its policy energy on eliminating cumbersome elements. McNeill discards the diplomatic route, however, because, for example, he views that Congress is "highly unlikely" to "surrender its plenary control" and would fear being at the "mercy of Indian tribes, who could demand whatever they wanted in exchange for passage through their territory."⁵² He continues on to paint a picture of dire straits if Congress abandons Indian tribes "to sink or swim on their own" because some tribes lack military force and court systems such that "lawlessness would run rampant."⁵³ McNeill's framework presents a "parade of horrors" that may overstate the consequences, especially if one views sovereignty as a "bundle of rights." Further, any ultimate solution may be unable to rely on one political branch, especially one like Congress with its investment in the plenary status quo. McNeill might reconsider whether perhaps a diplomatic approach, if designed flexibly via collective action of multi-branches and tribes, would allow us to keep the sights aimed high towards a fuller actualization of tribal aspirations.

Should McNeill consider stronger legislative action? For example, Professor Pommersheim maintains that Congress should pass a constitutional amendment.⁵⁴ He argues that the Constitution's one primary reference⁵⁵ to Indian tribes in the "Indian Commerce Clause"⁵⁶ assumes that the tribes possess

of tribal sovereignty. *Id.* at 311–13.

51. *Id.* at 314.

52. *Id.* at 315.

53. *Id.*

54. Frank Pommersheim, *Constitutional Shadows: The Missing Narrative in Indian Law*, 80 N.D. L. REV. 743, 757 (2004).

55. See Resnik, *supra* note 4, at 81 ("Yet, despite these slim references, a large body of United States law—'Federal Indian Law'—exists."); *id.* at 130 ("Federal Indian Law is a struggle to fabricate a legal regime in the context of a text-based constitutional discourse when textual dictates are absent.").

56. U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and *with* the Indian Tribes.") (emphasis added). According to Professor Pommersheim, "with" signals an assumed recognition of sovereignty and clarifies the Indian Commerce Clause's purpose "that in the two sovereign model in the United States Constitution the primary, if not sole, sovereign that has authority to interact directly with the tribes is the federal sovereign and that the states have no authority." Pommersheim, *supra* note 54, at 746. Another reference to Indian tribes is in the Treaty Making Clause. The Constitution further

separate sovereignty.⁵⁷ Yet, congressional action has since failed to recognize, at least fully and consistently, this realization of tribal sovereignty.⁵⁸ Accordingly, he passionately argues in favor of "an amendment to the United States Constitution, that for the modern era, clearly identifies the constitutional status of tribes, and recognizes in a true, permanent, constitutional sense for the future of constitutional status and recognition of tribal sovereignty."⁵⁹ A constitutional amendment would go far towards servicing the goal of tribal sovereignty. Ultimately, McNeill opts in favor of congressional action, rather than a constitutional amendment, presumably based on the relative political chances for success.

Assuming that McNeill's proposal for legislative reform warrants serious consideration, interested advocates would benefit from an exploration of contexts beyond the domestic. Comparative law models may offer creative solutions regarding the rights of indigenous peoples and the recognition of tribal legal decisions.⁶⁰ Further, international law may already provide a path to tribal aspirations if only the United States would follow such guides. For example, Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples provides: "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."⁶¹ The Declaration also commands that states employ a process for recognizing the legal structures of indigenous people.⁶² An American endorsement of such self-determination principles would service many of the tribal goals McNeill outlines. Notably, however, America's parallel declaration lacks any mention of self-determination.⁶³ Progress thus may depend on altering American hearts and minds as well as changing the laws.

excludes "Indians" from particular apportionment calculations. U.S. CONST. art. 1, § 2, cl. 3 (excluding Indians from apportionment calculations for Representatives); U.S. CONST. amend. XIV, § 2 (same).

57. Pommersheim, *supra* note 54, at 745.

58. *Id.* at 748–50.

59. *Id.* at 757.

60. See, e.g., Menno Boldt & J. Anthony Long, *Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians*, 17 CAN. J. POL. SCI. 537, 552–53 (1984) (considering alternative self-determination models and suggesting that the ideal model for Indian negotiation of self-determination may be stateless nationhood).

61. U.N. Human Rights Council, *Report to the General Assembly on the First Session of the Human Rights Council*, 61 art. 3, U.N. Doc. A/HRC/1/L.10 (June 30, 2006) (annexing the U.N. Declaration on the Rights of Indigenous Peoples).

62. *Id.* at 68 art. 27.

63. Russell A. Miller, *Collective Discursive Democracy as the Indigenous Right to Self-Determination*, 31 AM. INDIAN L. REV. 341, 343 (2007). Professor Miller provocatively extends

In sum, McNeill's title betrays the underlying paradox: How do you honor tribal sovereignty for tribes that are not de facto sovereign? In other words, if you have de facto subjugation of a population, is there any value to honoring the legal fiction of sovereignty? In the current situated existence, is real self-determination possible?

Reminiscent of Professor Derrick Bell's fundamental "American contradiction" for Black America,⁶⁴ will modern day reality continue to fail to deliver on the constitutional promise of equality and self-determination for all?⁶⁵ Could this shortfall include Native Americans? Technically, given the scant constitutional references to Indians in the Constitution,⁶⁶ Professor Bell's fundamental contradiction theory may require extra-constitutional bases, such as treaties, to reach Native Americans unless we agree with Professor Pommersheim's assumed sovereignty constitutional analysis. The underlying rationale of Professor Bell's sentiments, however, should extend through the force of logic. Specifically, Professor Bell and other critical race scholars worry that when we wrap ourselves in the cloak of liberty and freedom,⁶⁷

Jürgen Habermas's theory of discursive democracy to collectives—"indigenous peoples and the state in which they reside." *Id.* at 358. According to Professor Miller, this adaptation of discursive democracy aligns with indigenous self-determination and ultimately "respects the sovereignty and territorial integrity of states and imposes discursive obligations on indigenous peoples and the states in which they reside." *Id.* at 373.

64. Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 4 (1985). Professor Bell describes:

[T]he essential need to accept what has become the American contradiction[:] The framers made a conscious, though unspoken, sacrifice of the rights of some in the belief that this forfeiture was necessary to secure the rights of others in a society embracing, as its fundamental principle, the equality of all.

Id. Professor Bell continues: "And thus the framers, while speaking through the Constitution in an unequivocal voice, at once promised freedom for whites and condemned blacks to slavery." *Id.*; see also Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211-15 (1979) (offering the phrase, "fundamental contradiction," as a phenomenon when "[m]ost participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it").

65. Even if one indulges the contractual analogy, the notion of constitutional promises, even if made, may be illusory in the particulars of the alleged promises. For example, a promise of self-determination may have little meaning upon which reasonable minds could agree. Professor Miller notes "the imprecise, inconclusive and ill-defined nature of the international law right to self-determination." Miller, *supra* note 63, at 343; see also *id.* at 343 n.14 (collecting scholarship regarding the slippery nature of the term self-determination).

66. See *supra* notes 55-56 and accompanying text (discussing the existence and import of slim references to Indians in the Constitution).

67. Bell, *supra* note 64, at 7 ("Contradiction, shrouded by myth, remains a significant factor in blacks' failure to obtain meaningful relief against historic racial injustice.").

dominant culture "sleeps well at night,"⁶⁸ while "outgroups"⁶⁹ live the reality of the shortcomings of American myths. Native Americans are intimately familiar with this lived irony. Whatever the legal root of such rights and expectations—the Constitution, treaties, or other laws—America has utterly failed to deliver on its commitments. "The Constitution has survived for two centuries and, despite earnest efforts by committed people, the contradiction remains, shielded and nurtured through the years by myth."⁷⁰ Yet, must we surrender such ideals where the promises remain elusive to so many and the remedial path is fraught with peril?

Supreme Court jurisprudence and congressional action have paid lip service to tribal sovereignty but fail to be inspired by it. "In the midst of this American society, so well policed, so sententious, so charitable, a cold selfishness and complete insensibility prevails when it is a question of the natives of the country."⁷¹ The challenge, of course, inherent in the notion of "sovereignty" is to give honor and human tribal dignity by shifting the perspective from that of the federal policymaker to the stewards of tribal destiny, namely, Indians themselves. But at some point, these deeper troubling questions about our country's tortured history with its indigenous people have to give way to more practical concerns like whether litigants have sufficient and meaningful access to justice. This is where McNeill shines.

68. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413–14 (1989) ("Those in power sleep well at night—their conduct does not seem to them like oppression.").

69. *Id.* at 2412 (articulating the need for the narrative telling of "counterstories" by "outgroups, groups whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized").

70. Bell, *supra* note 64, at 7.

71. ALEXIS DE TOCQUEVILLE, *JOURNEY TO AMERICA* 200 (J.P. Mayer ed., George Lawrence trans., 1960).

JOHN RANDOLPH
TUCKER LECTURE
