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I. INTRODUCTION

Imagine that one day you are sitting on the couch, like usual, with a drink in one hand and the remote control in the other. Suddenly you hear a noise outside. You look out the front window, and there is a man walking up your steps carrying a very big gun. He kicks in your door, and tells you to leave. You reply that this is your house, that he has no right to make you leave, and that he will go to jail if he does. He laughs, points to the sawed-off double-barrel shotgun resting on his arm and says that your rules do not matter—he has a big gun. Realizing at this point you really have no choice, you hastily gather as much as you can and leave into the cold night. You try to go to the police, but they refuse to confront the man with the big gun. You try to go to the courts, but they too are afraid. So because this man with the big gun ignores your laws, he has been able to take your home and force you somewhere else. Would you be tempted to sneak back in and slice his throat while he was sleeping? Would you steal his children in hopes of ransoming them for your home? Or would you peacefully leave and start a new life somewhere else?

Admittedly, this story sounds ridiculous. But this is essentially what really happened to the indigenous population of North America once the Europeans landed on their shores some five hundred years ago. Not only have the Native Americans1 been forced off their homeland and onto reservations, but the population has been greatly reduced through continual violence and murder, not to mention the systematic destruction of the Native American way of life. In fact, whites and other Europeans have killed just as many Native Americans as the estimated number of people that would die if there were a nuclear holocaust.2

Whites3 have tried to justify their treatment of Native Americans through the rubric of "civilization." Throughout history, settlers coming to a new world have fought the inhabitants, then united to form a new order—"the primordial crime gives way to civilization."4 Think of Virgil’s account of Aeneas, who crossed the Tuscan Sea to Italy, where he made war upon the native inhabitants.5 After several years of war, the two groups united and a new civilization was born.6 The original violence was justified by "the subsequent stability embodied in law."7 Stories such as this exemplify a common theme in Western Civilization—that "aboriginal crime in the event becomes the fountainhead of civilization confirmed in law."8 As Thomas Jefferson stated with regard to Native Americans: "the ultimate point of rest and happiness for them is to let our settlements and theirs

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1 For the purpose of this article, I will use the term "Native Americans" in a very generic sense of including all indigenous people, and all tribes of indigenous people, in the United States. It is beyond the scope of this paper to debate whether this includes everyone who has at least one drop of Native American blood in them, or only those with at least 50% heritage, etc.

Furthermore, I realize that it is very dangerous to put people in "boxes" like this, because once you label an entire group something, then every member of that group is seen as having the same characteristics, when this is hardly ever true. Among Native Americans, for instance, there are the traditionalists, who still believe in the religious nature of the land and the special bond between themselves, the earth, and nature. On the other side are the non-traditionalists, who have assimilated into contemporary society and are pro-development when it comes to mining the land. Tribal governments are usually controlled by the latter group, so it becomes even more confusing because the voice that is often heard is not only not representative of Native Americans as a whole, but also a contrary view to what one would expect the Native American view to be in the first place. See Todd Howland, U.S. Law as a Tool of Forced Social Change: A Contextual Examination of the Human Rights Violations by the United States Government Against Native Americans at Big Mountain, 7 B.C. THIRD WORLD L.J. 61, 61-66 (1987).


3 For the purpose of this paper, I will use the term "whites" to refer to those European settlers in the new world and their descendants who have directly or indirectly taken land and sovereignty away from Native Americans.

4 Ball, supra note 2, at 7.


6 Id.

7 Ball, supra note 2, at 7.

8 Id. at 9.
meet and blend together, to intermix, and become one people.  

For the Native Americans, things did not quite work out that way. When European settlers first reached the new world, they attempted to respect the land rights of the native inhabitants. Then the fledgling United States needed the “Indian nations” to recognize its own sovereignty (for legitimacy) once the new nation won its independence from Great Britain in the late Eighteenth Century. Because of this need, the United States forged many treaties with the native population, promising to respect their rights.

In the Nineteenth Century, however, the U.S. began to break those treaties. They began to drive the Native Americans off of their homelands and onto reservations. Once the U.S. did not “need” the Native Americans anymore, it disregarded its own contracts with impunity. The federal government initiated a policy of extermination, in which over 250,000 Native Americans were killed.

The government took more and more land from the Native Americans, using policies like allotment. Under the General Allotment Act of 1887, the government allocated quarter-acre sections of tribal lands to individual tribal members in fee simple. The alleged impetus was to force the ideal of private ownership on the Native Americans, a concept foreign to their ideals. But by tying each of the then-existing 250,483 reservation peoples to these quarter sections, over 80 million acres of tribal land were left over for the government to distribute to white settlers. Allotment failed because most Native Americans could never grasp the concept of private ownership; instead, many used the allotted lands to maintain tribal ways.

The United States government then tried to do away with the tribes altogether through its policy of assimilation, which prohibited Native languages and religious practices, and forced Native Americans into unfamiliar settings and schools. Only recently have the Native American tribes won back some of their tribal independence and sovereignty. But Virgil’s “united civilization grounded in law” never materialized. Instead, the Native Americans have been relegated to second-class minority status, losing their land, their families, and their homes.

Non-Native Americans typically explain these results in terms of benevolence rather than hate or greed. “We” have persisted in doing something for “them,” or making “them” more like “us,” because in our Good Samaritan role, it is our duty to help those less fortunate than ourselves. This theme is not unique—witness the treatments of countless other minorities in the United States. This paper will describe exactly how the federal government and the courts have wronged the Native Americans, and then propose a different way for non-Native Americans to look at these people, which would enable them to keep their cherished identity and independence, and would make this country a better place for all.

II. HOW THE FEDERAL GOVERNMENT AND COURTS HAVE LEGITIMIZED THEIR DESTRUCTIVE POLICIES AGAINST NATIVE AMERICANS

A. The Government

There are three general ways that the United States government has taken power away from the Native American tribes. The first is by treaty. Under international law principles, a nation may voluntarily surrender its power through a treaty. However, there are two problems with the U.S.-Indian treaties. First, by signing the treaties, the U.S. was acknowledging the independence and sovereignty of the tribes in the first place. More importantly,
there is much evidence that the Native Americans were forced or misled into signing them, and then the U.S. government failed to honor them. The irony of these treaties is that they were a way to affirm a tribe's political integrity while at the same time a vehicle for stripping it of many powers.

A second way the government has taken power from the Native Americans is through statutes. However, under international law, U.S. legislation cannot nonconsensually reduce the inherent sovereignty of another nation; the only power such a statute could have must come from a treaty upon which it depends. Theoretically, the only way a U.S. statute could legitimately purport to govern a foreign sovereign like the Native American tribes would be by implementing an existing treaty provision. Yet a brief look at current law proves that this rule has been ignored: a Native American that commits a "major crime" is subject not to his or her tribal laws, but rather to the laws of the U.S.; the U.S. has imposed its own civil rights standards on tribal governments and Native Americans can only conduct "Class III" gaming activities—blackjack, slots, craps, etc.—if they do so in conformance with an agreement with the state in which they are located.

The third way the government has taken power from the Native Americans is through a policy the Supreme Court has labeled "implicit divestiture." This theory has at its base incorporation, by which the tribe has lost much of its sovereignty. To discover exactly what this theory of incorporation is, we must look to the Supreme Court and the various federal courts.

B. The Courts

Cases involving Native Americans are among the most frequently argued cases before the Supreme Court. In general, the Court has supplied whatever jurisprudential grounds were necessary to uphold a Congressional action involving Native Americans. In fact, as one commentator noted, "[t]he Court has never held a congressional exercise of power over Indian tribes to be illegal, and there is no reason to think it ever will." In essence, whatever Congress does, the Court will justify. Land is the most common source of conflict between Native Americans and non-Native Americans. Much of the Native American's identity is tied to the land, so there is no wonder that land is the most important thing to him or her.

There are two strands of cases that I will explore concerning Native Americans. The first strand involves cases that try to define exactly who may be classified as an "Indian." An early example of this is the 1876 case of United States v. Joseph. At issue in Joseph was a statute that allowed for a $1,000 penalty against anyone who settled on land granted by treaty to any "Indian" tribe. The defendant was accused of settling in the village of Taos, known as an Indian tribe. The Court had to decide if the people of Taos were indeed an Indian tribe under the meaning of the statute.

To decide this, the Court looked to the Taos people's way of life. These Native Americans had lived in villages, in fixed communities, each with its own local government; they were pastoral and agricultural people, raising flocks and cultivating the soil; they spoke Spanish and practiced Christianity; there

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25 U.S.C. §1153. (Any Indian who commits a crime of murder, manslaughter, kidnapping, maiming, incest, assault, arson, burglary, robbery, and other major felonies, even if within Indian country, is subject to the laws of the U.S. or the state in which the tribe is located; tribal governments lack jurisdiction for these crimes.)

2625 U.S.C. §1302 (stating that "[n]o Indian tribe in exercising powers of self-government shall—(1) make or enforce any law prohibiting the free exercise of religion . . . speech . . . press . . . assemble[y] . . . " as well as rest of the rights enumerated in first ten Amendments, such as double jeopardy, cruel and unusual punishment, unreasonable searches and seizures, etc.).

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27See United States v. Wheeler, 435 U.S. 313, 323 (1977) (Court stated that "[t]heir incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised ... Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status" (emphasis added)).
was a church in every town; the priest of each church was the town's spiritual advisor; they manufactured much of their own blankets, clothing, utensils, etc.; they encouraged and fostered integrity and virtue among each other; they were intelligent and well-educated; and they rarely committed criminal acts in the New Mexico territory. Thus, these Taos Pueblo Native Americans were:

- a peaceable, industrious, intelligent, honest, and virtuous people. They were Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof.

In contrast were:

- the nomadic Apaches, Comanches, Navajos, and other tribes whose incapacity for self-government required both for themselves and for the citizens of the country this guardian care of the general government.

Because of the degree of "civilization" that the Taos Native Americans had attained, the Court said they were more like the Shakers and other communalistic societies than Native Americans. And not only did the Court find them not to be Indians, but also because they were not Indians, their right to the land upon which they lived was superior to the right of the United States to the land. As a result of this superior title, the Court held the statute did not apply; instead the Taos people could punish or eject the defendant according to the laws regulating such actions (i.e., trespass) in the territory.

In essence, the Court removed these people from the classification of Native Americans because they were more civilized than the "average" Indian. This argument supposes first that the Court, as an outsider, can determine who is and who is not a Native American. Also, the Court only bestows this "honor" of not being an Indian on the Taos people because they were like whites. This is similar to feminism and other doctrines which strive for equality based on possessing rights similar to white males. But why should white males be the norm? If the Native Americans were here first, why are they not the norm? As usual, the Court is assuming that those like themselves are right and everyone else falls short.

Another example of this line of thinking is the 1913 case of United States v. Sandoval. This case involved a statute that made it a punishable offense to introduce intoxicating liquor into Indian country. Sandoval was convicted for introducing liquor into the New Mexico town of Santa Clara. The Court found these Indian people to be Native Americans: they lived in separate and isolated communities, followed primitive modes of life, were influenced by superstition and fetishism, were governed by crude customs inherited from their ancestors, and were "essentially a simple, uninformed and inferior people." The Court looked at the reports from the government's superintendents, and found that the Native Americans were both intellectually and morally inferior to other Indians; also, "they are easy victims to the evils and debasing influence of intoxicated people.

Even more condescending is what this label meant to the Government's treatment of the Native Americans. The U.S. treated the Native Americans with "special consideration and protection," by giving them farming tools and other utensils, giving them basic life instruction, educating their children, helping them to cultivate their farmlands through dams and irrigation, and providing them with their own attorney. Because the U.S. was a "superior and civilized nation," it had "the power and the duty of exercising a fostering care and protection over all challenged by feminists, and the underlying fundamental institutions must be changed as well.

See generally Patricia Smith, Feminist Legal Critics: The Reluctant Radicals, in Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice 73 (David S. Caudill and Steven Jay Gold, eds., 1995). Smith argues that mainstream feminism is incorrect and detrimental to women because it uses male-enforced norms that are inherently biased and not gender-neutral. Smith also charges that these norms must be
dependent Indian communities within its borders.\(^{53}\)
This benevolence was to continue until the best interests of the Native Americans dictated otherwise.\(^4\)

While all this sounds quite generous on the part of the United States government, it is important to remember exactly why the Native Americans needed protection and who they needed protection from. Because some white Americans thought that their way of life was civilized and other different ways were not, these others needed help. Native Americans had survived on this continent for hundreds of years without this benevolent protection; they only needed it once the Europeans came and started killing them off.\(^5\) And the Europeans' justification for all this was that the Natives were not like them, and thus needed to either change or perish. Again, this is supposing that the whites were the correct norm— that they were what was civilized and what was right.

Another example of this legal legacy that has allowed outsiders to define who is a Native American is the 1978 case Mashpee Tribe v. Town of Mashpee.\(^6\) In Mashpee, a jury found that the Mashpees were no longer a tribe, and therefore no longer under the protection of the Indian Nonintercourse Act in their land claims.\(^7\) These substantive findings ran against the view of the Mashpees themselves, who bound themselves through "self-identity, kinship, continuity, and common experiences."\(^8\) Again, this was a case of the majority deciding who was an Indian, based on white majoritarian values and standards.

A second line of cases has attempted to limit tribal sovereignty by taking away land and other rights. Wilcomb E. Washburn has called the Court's jurisprudence in this line "an amalgam of insight and greed, implicit bias and practical concern."\(^9\) Perhaps the most well-known of these cases was the Johnson v. M'Intosh case of 1823.\(^10\) In Johnson, Justice Marshall stated that the sovereignty of discoverers was inherently superior to that of indigenous populations.\(^1\) The general rule was that the conquered should not be wantonly oppressed, but their freedom should remain only to the extent compatible with the objects of the conquest.\(^2\) Marshall explained the U.S. policy of assimilation: until the conquest was complete and the conquered natives blended in with the conquerors, or were safely governed as a distinct people, the rights of the inhabitants to property should remain unimpaired.\(^3\) But because the Native Americans were "fierce savages, whose occupation was war," they could not be governed as a distinct people nor left alone in the wilderness.\(^4\) From this Marshall extrapolated that the native people of discovered lands occupied those lands at the sufferance of their discoverers, and not the other way around.\(^5\) This was the beginning of the rationalization for the U.S. government to take lands away from the Native population at will.

In classic discovery times, prior possession by aboriginal populations was commonly thought not to matter. One explanation for this comes from the famous philosopher John Locke. Locke felt that Native Americans did not have substantial claim to the New World they had so long occupied. The reason was because they had not expended enough labor to perfect a property interest in the soil. In other words, the Native Americans had no right to the land because they did not farm the land enough, they only lived off of it; Europeans and Americans, on the other hand, were industrious enough to cultivate the land to its fullest potential.\(^6\) This rationale was used by Europeans and Americans alike to take land away from the Native Americans.

Yet it was not Justice Marshall who coined the phrase "incorporation."\(^7\) That honor belongs to Justice Rehnquist in the 1978 case Oliphant v. Suquamish Indian Tribe.\(^8\) The issue in Oliphant was whether tribal courts could exercise jurisdiction over

\(^5\)See supra note 1, at 65 (explaining that before European settlers arrived, Native Americans possessed non-market, self-sufficient economy; once they became exposed to Western culture, this self-sufficiency declined to point where Native Americans needed U.S. government's help.

\(^6\)Id. at 46.

\(^7\)Id.

\(^8\)Howland, supra note 1, at 65 (explaining that before European settlers arrived, Native Americans possessed non-market, self-sufficient economy; once they became exposed to Western culture, this self-sufficiency declined to point where Native Americans needed U.S. government's help.


\(^10\)See Gloria Valencia-Weber, American Indian Law and History: Historical Mirrors, 44 J. LEGAL EDUC. 251, 262 (1994). In this article, Valencia-Weber gives an overview of her Advanced Native American Law class at the University of New Mexico. While most of the article concerns how and why she uses other disciplines, such as history and philosophy, to teach the class, she also provides a general outline of Native American jurisprudence and continuing problems they face today.

\(^1\)Id.

\(^2\)Id. at 253.

\(^3\)21 U.S. (8 Wheat.) 543 (1823).

\(^4\)Churchill, supra note 13, at 207.

\(^5\)21 U.S. at 589.

\(^6\)Id. at 589-90.

\(^7\)Id. at 590.

\(^8\)Churchill, supra note 13, at 207.

\(^9\)See generally Robert A. Williams, Jr., The American Indian in Western Legal Thought (1990).

\(^10\)Ball, supra note 2, at 36.

non-Native Americans who committed crimes in Indian territory. Rehnquist, for the majority, stated that tribal courts do not have such jurisdiction because they lost it through incorporation. As one commentator has noted, this is where the Court first used the term incorporation:

Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations, are necessarily diminished." But no matter what it has been called, the Court's attitude toward the federal government taking land and sovereignty away from Native Americans with impunity has not changed over the centuries—anything the government wants to do is defensible.

A recent case in which the Court has followed this policy of taking and assimilation is the *Solem v. Bartlett* decision of 1984. In *Solem*, the State of South Dakota charged and convicted the respondent with attempted rape. However, in a habeas corpus petition, Petitioner argued that the crime occurred on reservation land, and thus the State lacked jurisdiction over him. The issue involved whether the land, which Congress had opened by statute in 1908 for settlement by non-Indians, remained Indian country, or was the possession of the government. Justice Thurgood Marshall's majority opinion traced the government's policies toward Indian assimilation: in the late Nineteenth Century, Congress believed that the Indian tribes should abandon their nomadic lives on the reservations and settle into an agrarian economy on privately owned land; that this move to farming would help facilitate the Indian's assimilation into American mainstream society (as well as free up lands for white settlers); and that within a generation or so, "the Indian tribes would enter traditional American society and the reservation system would cease to exist." In *Solem*, however, the Court did not find an express congressional intent to diminish this particular reservation. Despite the fact that Congress had opened this land to non-Indians, it still belonged to Native Americans. However, the Court did not say that Congress could not take land from Native Americans in any case; it just explained that Congress can only do so with a clear and unambiguous intent, an intent not present in this case. In essence the Court was still upholding Congressional power to take land from Native Americans.

Another example of this line of jurisprudence is the 1976 case of *Harjo v. Kleppe* from the U.S. District Court for the District of Columbia. In *Harjo*, four members of the Creek Nation brought action against the Department of the Interior for recognizing and dealing with the principal chief of the Nation as the sole embodiment of the Creek government, and refusing to deal with the Creek National Council as a coordinate branch of that government. The D.C. Court stated that Congress "undoubtedly" has the power to both terminate the authority of the National Council and invest the principal chief with that authority, but it must be done with clear and explicit congressional action. Where the statutes and their legislative histories fail to establish this necessary intent, the Courts should avoid doing so itself. In fact, the Court even admitted that the U.S. has reneged on many of its promises to the Creek Nation:

While the credibility of these promises has been gravely undermined by various federal actions, culminating in the abolition of the tribe's territorial sovereignty, the essence of those promises, that the tribe has the right to determine its own destiny, remains binding upon the United States, and federal policy in fact now recognizes self-determination as the guiding principle of Indian relations.

While this case and others like it seem to imply that the federal government and the courts are willing to allow the tribes to maintain their sovereignty, there are important realizations to keep in mind. First, the courts have not said that the government has no right to take away the tribe's independence and identity—only that to do so requires a clear congressional mandate. Also, in many cases, there is not much left of the tribe's sovereignty to take away.
anyway, because of the tribe's necessary dependence on the U.S. government. Finally, these questions about whether or not the government has the power to do away with the tribe is at base level a ludicrous inquiry; would anyone even be discussing whether the Mexican government could take away the U.S.'s sovereignty in some circumstances? Or would Canada ever discuss whether the U.S. could take it over? The mere fact that the question is even being asked and answered, in any way, relates back to the original notion of superiority that the white European way is right and all others must join it or be forever inferior.

III. WHY WE MUST HALT AND REVERSE THESE POLICIES OF DESTROYING THE SOVEREIGNTY AND INDEPENDENCE OF THE NATIVE AMERICAN PEOPLE, AND HOW WE CAN DO SO

A. Harm Will Result If We Do Not Change

There are several reasons why our government and our courts must change their attitudes and policies toward Native Americans. For one, non-Native Americans could become a victim of their own aggression. Throughout U.S. history, our country has taken it upon themselves to help others. Sometimes this has been for valid reasons, as in World Wars I and II. Sometimes this has been very detrimental, as in Vietnam. There, thousands of U.S. soldiers died fighting against an enemy that we did not realize had much more on the line—their lives and their homes—than our democratic ideals. In fact, some commentators have directly compared the Vietnam War to the whites' aggression against Native Americans. The two are quite similar: the benevolent United States sought to "save" another inherently inferior civilization from itself—the Native Americans needed to learn Christianity, farming, and non-violence; the Vietnamese needed to be democratic and resist the influence of the Communists. What we did not understand in both instances is that what we thought was the "right way" was not necessarily what those people wanted and was not necessarily the "right way" for them. Both the Native Americans and the Vietnamese fought valiantly to defend their right to choose their own destinies. The difference was that in America, the U.S. had more guns and eventually more people to fight the Native Americans; in Vietnam, while we may have had the superior weapons, the sheer number of Vietnamese citizens—both men and women alike—that participated in the war for the North/Vietcong resulted in an endless supply of soldiers. If the Native Americans would have had as many people as the Vietnamese, the results for the U.S. in the Nineteenth Century Indian wars may have been different. (Just ask General Custer.)

Commentators have also argued that the Civil War was an extension of the aggression against Native Americans. Other instances in history have shown the dangers of becoming too infatuated by one's own power and dominance: the Soviet Union in Afghanistan in 1979, Napoleon marching into Russia in the early Nineteenth Century, Germany's attempt to conquer the world rebuffed by the tiny British island in World War II, and the United States' own failure in Korea. Just because we were successful against the Native Americans does not mean that there is not a lesson to be learned from the fighting and the needless loss of lives. This lesson is clear—it is usually very dangerous, and an enormous waste of lives and resources, to fight against people that you do not understand simply because you are bigger than they are. This lesson must be remembered today as the U.S. seeks to form a new world order in the post-Cold War era; this lesson has already been forgotten in places such as Somalia and Bosnia. As Santayana once said, "those who do not remember the past are doomed to repeat it." By undoing at least some of what was done to the Native Americans, we can hopefully avoid the repetition.

Secondly, our actions against the Native Americans are reflective of the typical American hypocrisy. As a nation, we espouse high ideals in our Constitution: explicitly things like freedom of speech, freedom of association, the right to property, and equal protection; implicitly values like freedom of thought, and the right to choose one's own destiny. But a lot of the time these values only seem to pertain to the white male majority. The U.S. has been notoriously bad in protecting these same ideals for minorities. During World War I, for instance, many European countries denounced U.S. involvement because a country that had such prominent and widespread racial segregation at home could not "make the world safe for democracy." And many

80Ball, supra note 2, at 6.
81Ragsdale, supra note 9, at 407 (explaining that like rhetoric it used to justify its involvement in Vietnam, United States Government claimed "it had to destroy the

Indians' reservations and way of life in order to save" Native Americans from "onrush of white civilization").
82Ball, supra note 2, at 6.
African-Americans refused to fight in the Vietnam War because they identified with the Vietnamese population more than they did their own white countrymen. Much of our leaders’ rhetoric, and much of our foreign policy-making, seems quite empty when there are minority groups like Native Americans that have been oppressed and restricted. As one commentator has stated:

Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercises unrestrained power over Indian nations, then what we say is not true, and we have a different kind of government than we think we have. And if our government is different in fact in relation to Native Americans, perhaps it is not what we believe it is in relation to other Americans, including ourselves. The Court is regarded as the institution of restraint and a protector of rights. If the Court restrains neither Congress nor itself in taking away tribal rights, then we are confronted by a fundamental contradiction between political rhetoric and our political realities.84

Thirdly, to do away with the Native Americans’ identity is to lose the chance of learning from people different than ourselves. The Native American way is very unique in many respects when contrasted to our Western traditions.85 This difference, however, does not mean less developed; the Native Americans have “806 different languages, a different spirituality, different aesthetics, different ways of living on and with the earth, different ways than capitalism and Marxism for putting people to work.”86 As with any group that is different from the norm, to acknowledge those differences and learn from them could only broaden the understanding and knowledge of those in the norm.87 For example, tribal governance predates our own government by hundreds, if not thousands, of years. There is much to learn from that history. Also, Native Americans in North America were divided into many different tribes, each with its own people, its own way of life, and its own identity. This is similar to the way the world is today—many different countries with different people and identities. The Native Americans were linked, and thus forced to get along, because they shared the same land; countries of the world today are forced to get along because they are linked through advances in media and travel. Maybe examination of how those hundreds of Native American tribes coexisted on the North American continent will give us a better idea how to coexist with other nations on the same planet. But to strip the Native Americans of their identity and their sovereignty is to lose these stories and these lessons forever.

B. A Proposed Solution

We should give the Native Americans back their sovereignty. This means that Native Americans should not be judged against the standard of white Americans as they have been for centuries. Just as radical feminists are not fighting for equal rights per se, but rather a whole new basis for determining rights in the first place, Native Americans should not strive for “equal rights.” Instead, they should fight to be judged by their own standards and on their own terms. This is the concept of sovereignty. Native American sovereignty can be defined in many ways, such as “an expression of the traditional Indian community [that] should be respected,” or allowing the Native Americans to regain control over their own institutions.88 As Laurence Tribe stated, “[t]o be free is not simply to follow our ever changing wants wherever they might lead. To be free is to choose what we shall want, what we shall value, and therefore what we shall be.”89 This sovereignty would include holism and balance of traditional Indian ideals, the remnants of which are still salvage-

83See Robert N. Strassfeld, The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy, 1994 Wis. L. Rev. 839, 887-8 note 199 (explaining that although probably minority within ranks of black soldiers, many African-Americans did protest war based on argument that they would not fight for “freedom” abroad when they could not secure “freedom” at home. Among those who protested were Martin Luther King, Jr. Among those who refused to fight were Muhammad Ali (although also for religious reasons)).

84Ball, supra note 2, at 61.

85Id.

86Id.

87An example of this is the field of comparative law, in which U.S. courts and policy-makers look to other countries to find alternative, and sometimes better ways, of doing things. This is the theory that Mark Visser espoused in his article on Hate Speech Codes—look to other countries to find Codes that may work.

88Howland, supra note 1, at 96.

able in forging a social order comprised of enduring 
harmony with the land and within it. 90

One problem this theory poses is that Native 
Americans live in a country surrounded by others,
and it would seem infeasible, if not impossible, to
allow them to follow their own laws and to govern
themselves. Problems would necessarily arise be-
cause of the inevitable contact between Native
Americans and non-Native Americans. But there are
similar problems everyday when U.S. citizens come
in conflict with foreigners, whether it be on our own
soil or while traveling abroad. Those conflicts are
worked out under the laws of the country in which
the incident occurred, or by general international
law principles, like amnesty and immunity. These
same principles could apply to Native American
tribes: non-Native Americans visiting reservations
would be subject to tribal laws and justice, and vice-
versa.

Another problem that this theory poses is how
to determine what the Indian way of life should be
after hundreds of years of U.S. domination. How-
ever, while Native Americans’ traditional life styles
may have been decimated by the policies of the gov-
ernment, the Native Americans are still a proud,
distinct people with very concrete ideas about how
they want to live and govern. 91 My solution does
not propose to return them to where they used to
be, but to allow them to choose where they want to
go now.

A final problem with my theory is that as an
outsider I do not know any better than anyone else
what the Native Americans want. A brief survey of
actual Native Americans and their perspectives may
help the inquiry. For instance, Native Americans do
not care about being monetarily compensated for
the land that the U.S. has taken from them—instead,
they want the land itself. 92 Also, Native Americans
have a different view of each other; they view the
earth as their mother, and thus everyone should help
everyone else out, in contrast to whites, some of
whom are starving and some of whom are rich. 93
Finally, Native Americans have little or no concept
of private ownership of land; rather, they see the
land, plants, animals, and humans as part of the
whole. 94 These perspectives lend themselves to giv-
ing the Native Americans back their sovereignty and
thus their ability to practice and adhere to these ide-
als.

The tenor of some of my earlier arguments
might suggest that I should propose a much stron-
ger solution than merely giving the Native Ameri-
cans back their sovereignty and their identity. After
all, we took their land and their homes; would not
the most logical solution be to give them back those
as well? I do not think such a solution is feasible, as
at least one commentator does. 95 The first step must
be to give back to these people their identity. Once
this is accomplished, then we could look to giving
back the land.

From a practical standpoint, the next question
is how to accomplish this project. First, there are
several ideas that would not work, or at least have
not worked yet. One is to search for limits on the
government’s power vis-a-vis Native Americans in
the basic concepts of federalism. 96 The Framers set
up our system of federalism so that the new United
States could grow in strength, but not at the ex-
panse of the people. States were to be responsible
for the everyday life, while the national government
was to be responsible for only national concerns. The
national government and the states are supposed to
be independent spheres, each with its own sover-
eignty. But this protection of the states has not trans-
ferred to Native American tribes. In many instances,
federalism has been a stimulus to state encroach-
ment upon Native American territory. 97 The Court
has viewed self government for the Native Ameri-
can tribes as not an end in itself, unlike for non-
Native Americans. 98 While Congress is forbidden
by the Constitution to take power away from the states
(although any law student can cite numerous cases
where it has done so), Congress has had practically
no restraints on taking power away from the Indian
tribes. Thus federalism does not apply to Native
Americans.

In fact, federalism can hurt Native Americans.
In a recent case, the U.S. Supreme Court held that
Congress could not abrogate a state’s sovereign im-

munity from suit brought by an Indian tribe. 99 The

90 Ragsdale, supra note 9, at 436.
91 Howland, supra note 1, at 96 (stating that "[i]t is
naive to believe that life can return to how it was 300
years ago. It is not naive to believe that if the traditional
Native Americans were given control of their futures, they
could build an admirable society").
92 Howland, supra note 1, at 66.
93 Ragsdale, supra note 9, at 403-4.
94 Id. at 404.
95 Churchill, supra note 13, at 220.
96 Ball, supra note 2, at 67.
97 Id. at 68.
98 Id. at 75.
(Indian Gaming Tribe provides that tribe may conduct cer-
tain gaming activities only if it signs compact with state;
case involved a statute which required that a tribe could only conduct certain gambling enterprises pursuant to a compact with the state. But after the Court's ruling, the state could disregard the Act, fail to negotiate with the tribe, and be safe from suit. Thus, because of federalism, the tribe would be unable to conduct its gaming enterprises.

Secondly, it could not work for Native Americans to look to the Bill of Rights for protection. After all, the Citizenship Act of 1924 naturalized all Native Americans born within U.S. territorial limits, and all citizens are protected by the Bill of Rights. For instance, the Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Historically however, this provision for compensation upon taking of property does not apply to aboriginal title. Only recognized property calls into effect this amendment, but recognized property does not count if the government took the land as trustee. Congress did attempt this solution with the creation of the Indian Claims Commission, which was a vehicle by which Native Americans could present claims for taken land in order to obtain money compensation. The Commission proved to be largely unsuccessful, and it has been abolished; in fact, in many instances Native Americans refused the paltry money awards because money was seen as no substitute for the land itself.

Another Fifth Amendment argument is that the U.S. government took Native American lands and thus Native American sovereignty without due process. However, the Court has dismissed such arguments, stating that it was "well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes," without mentioning any need for a rational basis behind the taking. Congress and the Court have never been restrained by any due process requirement of rationality.

A final losing Constitutional argument that Native Americans could attempt would be equal protection under the Fifth and Fourteenth Amendments. Of course this falls short of my proposed theory, which is that Native Americans should do more than just strive for equal protection from whites, and seek to govern on their own terms and by their own traditions. In any event, the Court has consistently rejected Native Americans' equal protection claims, often using equal protection ideals against Native Americans. For example, in one recent case in which a tribe brought action against a non-Indian for negligence and breach of contract, the North Dakota Supreme Court denied the tribe access to the state courts because it found that Native Americans may be treated in unconstitutional ways if non-Native Americans were involved, and thus the discrimination was permissible. The U.S. Supreme Court did not reach the Equal Protection issue, but remanded on other grounds.

In a 1974 case, the Court held that special treatment which favored Native Americans did not violate Equal Protection under the Fifth Amendment because of Congress' "unique obligation" to help the Native Americans. However, the Court implied that it would view Equal Protection issues involving Native Americans as being based on political, rather than racial classifications, thereby demanding a much lower level of scrutiny (i.e., rational basis) and opening the door for Equal Protection violations that could hurt Native Americans. Thus it is obvious that there is little or no hope for Native Americans as long as they attempt to win back their sovereignty through the majority's rules and standards. This is why more than just appeals to the Constitution are necessary. Any proposed solution must attack three fronts: the federal government, the courts, and the international community. First, grass roots lobbying efforts must continue from

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Act passed under Indian Commerce Clause, which court said gave Congress at least as much power as Interstate Commerce Clause; Act imposes duty of good faith on part of states to negotiate these compacts, and tribe can bring suit in federal court to compel performance; Seminole Tribe brought such suit, but Court held that Congress could not abrogate Florida's sovereign immunity granted to it under the Eleventh Amendment).

See supra note 26.

Ball, supra note 2, at 121.

Ball, supra note 2, at 113.

U.S. Const. amend. V.

Ball, supra note 2, at 119.

Id.

Id.


Ball, supra note 2, at 121.

Id. at 131.

See Three Affiliated Tribes v. Wold Eng'g, 321 N.W.2d 510 (N.D. 1982).


Ragsdale, supra note 9, at 434.
Native American rights groups like the American Indians Movement (AIM). Moreover, all citizens, not just Native Americans themselves (remember, they comprise a very small percentage of the population), should urge their elected representatives to pass legislation giving back to the tribes their identities. Such legislation could take the form of statutes recognizing the independence and sovereignty of Native American tribes, or possibly even a Constitutional Amendment along the lines of the Fourteenth. And such statutes should encompass all Native American tribes, which would take the decision about who is an Indian away from non-Native Americans. Of course, problems will arise among those groups who have lost many of their Native American characteristics over the years and are now on the "fringes" of Native American identity. However, a few logistical problems such as these should not deter Congress from the larger goal.

The second line of attack must come in the courts. Judicial decisions must recognize tribal independence and right to self-government. The starting point for this could be the Supreme Court itself: the Court has overturned many Congressional actions involving other issues before—such as in the endless number of takings, due process, and equal protection cases. The Court should refuse to uphold any action of Congress that takes sovereignty away from Native Americans.

This would entail a fundamental shift in the Court's jurisprudence. Such shifts are rare indeed, but they are possible. For example, the 1954 Brown v. Board of Education case overruled many years of "separate but equal" jurisprudence. Studies on what brought about this fundamental change show that certain NAACP lawyers brought an endless number of discrimination cases all over the country at the district court level, and eventually the tide was so strong that the Supreme Court had to follow the popular sentiment. The problem with this approach is that the plight of Native Americans, unfortunately, will never receive the same attention and widespread support that other minorities have received. It would be very difficult for a strong grass roots movement to sweep the nation, particularly because most Native Americans are concentrated in particular areas of the country, like Montana, South Dakota, and Oklahoma.

But there is some hope at the District Court level. In the Harjo v. Kleppe case, for instance, the U.S. District Court for the District of Columbia, in discussing relief for the tribes, recognized the tribe's right of self government. The court stated that it was not for it to "express any view" as to merits of the tribe's proposed constitution and the changes it would make in the Creek national government. That was a matter for the Creeks to determine for themselves: "the tribe as a whole is legally entitled to develop a new constitution to be adopted...as an exercise of the tribe's inherent sovereignty..." The Court proposed to consult the members of the tribe directly about the new Constitution, by means of a popular referendum. The Court also proposed a Commission selected by the different tribal factions that would help ensure members of the tribe were educated before the vote. The Court believed that through these processes, the political resourcefulness and resiliency exhibited for so long by the Creek Nation will finally enable the tribe to remove the uncertainty that has for so long dominated its political life and recapture the cherished self-determination that is its legal and moral right.

Critics of this theory will argue that the court in this case was only giving the Creeks a right to democratic self-determination. This is true—the court based its proposed solution on democratic principles like voting and a written constitution, and at one point stated that the right involved was a right to democratic self-government. This is counter to my theory that Native Americans should strive to regain their own identity on their own terms. But this case is at least a start in the right direction. Perhaps when more cases like these arise, then eventually that right to self-determination will be a right to govern in any way the tribe pleases, according to its own traditions. This case should be viewed as a step, albeit a small one, in the right direction.

The third line of attack would be in the international arena. Recently, the plight of indigenous

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114 One example of such a statute is the Indian Child Welfare Act, 25 U.S.C. §1901-63 (1982). This act gives greater rights to Indian parents than other parents, by allowing the natural parents' interests to take precedence over the adoptive parents', unlike the general rule once consent to adoption is given.

115 Harjo, 420 F. Supp. at 1143.
116 Id. at 1144.
117 Id.
118 Id. at 1146.
119 Id.
120 Id. at 1147.
121 Id. at 1143.
groups has garnered more and more attention among international human rights advocates. According to international law principles, there are four requirements for sovereign nation status: one, the entity must have a population, which the Native Americans obviously have as evidenced by their heritage; two, the entity must have a territory, which the Native Americans have in the form of reservations; three, the entity must have a structure of governance, which the Native Americans have in the form of tribal councils; and four, the entity must have the capacity to conduct relations with other nations, which the Native Americans have proven through their negotiations with the U.S. Critics would argue that the Europeans’ discovery some 500 years ago destroyed this sovereignty then, but discovery could not have destroyed the sovereignty of a stable, established society like the Native Americans. Critics may also argue that the Native Americans are not sovereign because they merged into the U.S. when they became citizens; however, international law dictates that governments can only impose citizenship on those who request it, and not unilaterally.

The Native Americans could look to the United Nations first. The U.N. Charter says that human rights and international law is designed to assist all people to reach their goals and advance without forced assimilation into Western culture. This lack of reliance on Western civilization is one reason international law may be better for the Native Americans than the U.S. Constitution. Another reason international law is better is that the Constitution only protects the rights of the individual, whereas international law protects both individual and group rights. Furthermore, because the state is the one who has usually violated the Native Americans’ rights, then it would be better for the international community to be entrusted with the protection of those rights.

Several recent international law “principles” may also aid the Native Americans. The Right to Development as a People, for instance, emphasizes collective self-reliance and institutions that allow members to fully participate and reach their potential. Indigenous Rights ensure the continuity of traditional ways, culture, language, education, land rights, etc. And there is the Right to a Clean Environment, which allows Native Americans to keep their lands from being overrun by factories.

The feasibility of this third solution is bolstered by two factors. First, Article 56 of the U.N. Charter says that member nations have to promote the rights of the charter; thus, human rights violations against the Native Americans can be brought in U.S. courts. Secondly, in addition to the many groups, both foreign and domestic, that are currently working to strive for Native American sovereignty, the U.N. itself has formed the Working Group on Indigenous Populations by the Sub-Commission on the Prevention of Discrimination of the U.N. Commission on Human Rights. While this group has not accomplished much yet, at least there is a forum in the U.N. for these claims for sovereignty to be heard.

IV. CONCLUSION

Through the policies of the federal government and the jurisprudence of the Supreme Court, the majority has cheated Native Americans out of most of their land and most of their identity. Native Americans today are left to fight for the right to self-government, but government on the majority’s terms. The key to this jurisprudence has been comparing Native Americans to whites. Whites are seen as the superior, civilized race, and thus anyone else is inferior. And the best thing to do is to try to make everyone else just like the whites. However, this is not what Native Americans should strive for, just like radical feminists do not merely strive for equal rights to men. Instead, Native Americans should strive for independence on their own terms. If we leave Native Americans to be themselves and follow their own traditions (or at least return them to such a position where they may do so), we as a country can learn much from them. And in so doing we would alleviate many of the dangers and the hypocracies in our own political system. Thus Congress, the Court, and the international community must go beyond mere democratic self-determination and equal rights, and move toward a separate identity for Native Americans.