Coming Full Circle: American Indian Treaty Litigation From an International Human Rights Perspective

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Introduction

For many in Minnesota, the summer of 1994 was a season of heated anticipation. After several years of emotionally charged debates and highly publicized negotiations, *Mille Lacs Band of Chippewa v. Minnesota*[1] went to trial to settle a century-old dispute. At stake were the sovereignty rights of a state government and an Indian people[2] within the state's borders; at issue was the validity of certain rights the Mille Lacs and other bands of Chippewa[3] had reserved in an 1837 Treaty with the United States.[4] In that treaty, the Chippewa ceded a large area in what is now Minnesota and

1. 861 F. Supp. 784 (D. Minn. 1994).

2. It is not without a little discomfort that I employ the word "Indian," a blanket term imposed indiscriminately upon the diverse nations of the Western hemisphere by European explorers. Nevertheless, the law, unlike many other written traditions, is particularly bound to the words it comes to use—however incidentally—to classify things, actions, and the legal position of people in various kinds of relationships. Indeed, to purge the word "Indian" from American law would require the redrafting of countless treaties, ordinances, and statutes, not to mention the Constitution itself. This is not to say that the law's use of language cannot be changed, only that it is not so easy a matter as to be taken on in a footnote. In order to reconcile my own misgivings with what I perceive to be the inevitability of using words like "Indian" and "Native American" in this article, I have come to view them as reminders of how far we have yet to go to move beyond the legacy of conquest, and that any changes in terminology are merely cosmetic if they are not accompanied by real changes in the ways human beings perceive and treat one another.

3. The word "Chippewa" illuminates another side to the problem of finding acceptable words to refer to a people. "Chippewa" is the English word used in the early nineteenth century to refer to a particular confederation of bands inhabiting the western Great Lakes region and, consequently, it is the word which came to be used in the U.S. treaties which were made with these peoples. In other genres, the Chippewa may be referred to as "Ojibwe," "Ojibwa," or "Ojibway." In their own language, the Chippewa refer to themselves as *Anishinabe*.

4. Treaty with the Chippewa of 1837, 7 Stat. 536.

Wisconsin[5] on which they reserved for themselves the right to hunt, fish, and gather.[6] Some fifty years later, the new State of Minnesota began enforcing its hunting and fishing regulations against Natives and non-natives alike.[7] The Chippewa bands that were party to the 1837 Treaty were able to exercise their reserved rights only at the risk of arrest, fine, and jail-time.[8] In August 1990 the Mille Lacs Band filed suit against the State of Minnesota in federal district court.[9] Afterwards, negotiations between tribal and state officials began in earnest in the hope of reaching an out-of-court agreement.[10] Two years later the parties drafted a settlement proposal in which both sides made concessions,[11] but the proposal was rejected by the Minnesota state legislature in May of 1993.[12] Litigation resumed, and in June 1994 the Mille Lacs Band took their grievance to court, seeking a declaration of their rights.[13]

It was also a summer of anticipation at the United Nations where the U.N.'s Working Group on Indigenous Populations was holding hearings on its recently completed Draft Declaration on the Rights of Indigenous Peoples.[14] At issue were the sovereignty

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5. *Id.* art. 1.

6. *Id.* art. 5.

7. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 820-21.

8. *Id.* at 789.

9. The Band filed the complaint on August 13, 1990. *Id.*

10. The State of Minnesota in particular was highly motivated to negotiate a settlement in light of the recent series of cases in Wisconsin that had found the same 1837 Treaty rights to be valid. Lac Courte Oreilles Band v. Voigt, 700 F.2d 341 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983). In those cases, the Lac Courte Oreille Band of Chippewa, also a party to the 1837 Treaty, claimed and won off-reservation fishing rights in the ceded land within Wisconsin. If the State of Minnesota was unable to negotiate an agreement with the Mille Lacs Band, it would have to defend its position regarding the Mille Lacs Band's 1837 Treaty rights in the face of contrary precedent. The lesson of Wisconsin was discouraging in another way: by the time the legal battle was over, Wisconsin had incurred over $20 million in legal and law enforcement costs. John Welsh, *State Wants to Keep Dispute out of Court*, ST. CLOUD TIMES, Jan. 14, 1993, at 1C. That Minnesota was willing to bargain at all may be an indication of how high the stakes were, or perhaps Minnesota really believed it would be able to distinguish its case from the Wisconsin case. As the State of Minnesota would later argue, the 8th Circuit was not bound by the 7th Circuit's ruling on the treaty. *See infra* part II.B.2. In addition, the State of Minnesota urged that the Mille Lacs Band's 1837 rights had been extinguished by subsequent federal actions which had not necessarily applied to other Chippewa Bands party to that treaty. *Id.*

11. Ron Schara, *A Settlement "Both Could Live With"; DNR's Sando Talks About Agreement with Chippewas*, STAR TRIB. (Minneapolis), Nov. 22, 1992, at 20C.

12. Robert Whereatt, *House Rejects Mille Lacs Plan: Chippewa to take case to court*, STAR TRIB. (Minneapolis), May 4, 1993, at 1A.

13. Pat Doyle, *Judge Allows Suit by Chippewa: Band Seeks Wide Fishing Privileges*, STAR TRIB. (Minneapolis), May 14, 1994, at 1B.

14. *Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, Draft Declaration as Agreed upon by the Members of the Working Group at its Eleventh Session*, Sub-Commission on Prevention of Discrimination and

rights of national governments and the human rights of Native peoples within their borders.[15] Although the U.N.'s initial use of the phrase "self-determination" in 1946 seemed to refer to the internal sovereignty of established nation states, subsequent U.N. reports and conventions gradually broadened the concept to address issues of decolonization until, by 1966, self-determination had achieved the status of an international human right.[16] In the 1970s, indigenous peoples of the world, whose voices had been stifled by centuries of colonial subjugation, took their grievances to the international community to seek recognition of their rights. Many insisted their rights could only be assured if self-determination were central among them.[17]

On August 23, 1994, Native peoples gained an important first step when the Draft Declaration affirming the right of self-determination was formally adopted by the Working Group's parent U.N. body.[18] From there it would be passed on for consideration to the

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Protection of Minorities, 46th Sess., Item 15 of Provisional Agenda, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 [hereinafter *Draft Declaration*]. The term "indigenous peoples" is generally understood to mean "culturally distinctive non-state groupings" that "are threatened by the legacies of colonialism." S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1, 4 (1991). The United Nations has defined the term to include communities which have a "historical continuity with pre-invasion and pre-colonial societies" in their territory, which currently represent "non-dominant sectors of society" who consider themselves distinct from other sectors of society, and which are determined to preserve their territories and cultures. *Id.* at 4, n.17 (quoting *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, ¶ 379 (1986)).

15. *See infra* parts I.B.1, 3.

16. Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 4, 12 (1993). The term "self-determination" first appeared in the U.N. Charter which stated that one of the purposes of the United Nations was the development of "friendly relations among nations based on respect for the principle of . . . self-determination." U.N. CHARTER art. 1, ¶ 2. The evolution of the United Nation's use of the concept is discussed in greater detail *infra* part I.B.1.

17. Anaya, *supra* note 14, at 3-5 and nn. 13, 18-19. *See also infra* part I.B.

18. The Draft Declaration was formally adopted by the Sub-Commission on August 23, 1994. *Descrimination Against Indigenous Peoples, Draft Resolution on the Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 46th Sess., Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/1994/L.54/Rev.1 (1994).

The organization of the many organs in the United Nations can be confusing, and the complex genealogies of committees and sub-committees are not made easier by the equally complex and lengthy names of these bodies. The Working Group on Indigenous Populations was established under the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which is under the Commission on Human Rights, which is under the Economic and Social Council, which is under the General Assembly, the main governing body of the United Nations. For a brief overview of the United Nations human rights organs and their organization, see FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 3-16 (1990).

U.N. Commission on Human Rights. The precise nature of indigenous self-determination was, however, yet to be determined. At the Working Group's 1994 session, the Draft's inclusion of an indigenous right to self-determination aroused such intense controversy that it was ultimately left undefined so that the drafting process might move forward.

Although a significant number of participants at the session felt that self-determination was "the pillar on which all the other provisions of the draft declaration rested,"[19] there was considerable debate as to how an indigenous right of self-determination could be balanced against the identical right possessed by the surrounding nation state.[20] In response to this dilemma the U.S. observer at the session said "that her country could offer a working model of how indigenous rights could be recognized and implemented in domestic law."[21] She went on to describe the political autonomy of Native American entities and stated that President Clinton had endorsed the "concept of self-determination for tribal governments and had noted their unique government-to-government relationship with the Federal Government."[22]

Meanwhile, in Minnesota, rights crucial to the self-determination of the Mille Lacs Band and other Native American peoples were being battled out in federal court. On August 24, 1994, the Mille Lacs Band won a partial victory in the recognition of its rights. While the Court held that the rights guaranteed in the 1837 Treaty continued to be valid, it also reminded the parties that the "full parameters of those rights" were "[s]till to be determined."[23]

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19. *Discrimination Against Indigenous Peoples, Report of the Working Group on Indigenous Populations on its Twelfth Session*, U.N. Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 46th Sess., Agenda Item 15, at 13, U.N. Doc. E/CN.4/Sub.2/1994/30 (1994) [hereinafter *Working Group's 12th Session Report*].

20. On one end of the spectrum, many government representatives held firm to the position that self-determination for indigenous peoples should not be construed as granting such peoples the right to secede from their respective states. Russel L. Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L. L. 369, 371 (1986). On the other end, many indigenous groups held fast to the contention that anything less than a full-blown right of secession was not self-determination at all. Hannum, *supra* note 16, at 41-44.

21. *Working Group's 12th Session Report*, *supra* note 19, at 14.

22. *Id.*

23. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 840. Before litigation commenced, the parties agreed to divide the case into two parts: the first, which culminated in the August 24th decision, was to determine whether the 1837 Treaty rights remained valid; if the rights were held valid, a second trial would consider to what extent those rights could be restricted by Minnesota State law. *Id.* at 790-91. Consequently, the very reason the Mille Lacs Band brought suit—to be free of state regulation of their off-reservation rights—may yet be for naught. Settled case law permits state regulation of Indian usufructuary rights if such regulation is proved

The victory was only partial in another way, in that it exemplifies a judicial methodology tainted by values and assumptions inherent in colonial domination of Native peoples. While the earliest foundations of federal Indian jurisprudence were built around the centerpiece of Indian sovereignty, judicial practices in the mid-eighteenth century became entangled with the policies and expediencies of a rapidly expanding national government. Consequently, the canons conventionally used in treaty litigation bear the ideological imprint of an era in which Native peoples were seen as neither self-determining nor entitled to internationally recognized rights.

This article urges that self-determination and other indigenous rights emerging in the international arena are a necessary place to begin reevaluating domestic law and policy regarding Native American peoples. Indeed, this article begins with the premise that it is no longer appropriate, if indeed it ever was, to view the relationship between the United States and its Native peoples as solely, or even primarily, a domestic affair. To the contrary, the forces and patterns of colonialism which brought these disparate cultures into coexistence were part of a global phenomenon, the ongoing ramifications of which must be envisioned from a global perspective. This article offers the platform of international human rights as a focusing device, a means of reframing the picture to explore issues long overlooked by the paradigm of colonialism. Such a perspective need not constitute a departure from traditional domestic jurisprudence. The concept of self-determination finds a ready fit in the traditional doctrine of Indian sovereignty originally informed by principles of international law.

Part I traces the evolution of self-determination from its roots in sixteenth century international law, through its development in U.S. jurisprudence under the doctrine of sovereignty, to its re-emergence in international law as a goal for indigenous peoples. Part II explores the role of treaties in structuring the relationship between Native and non-native cultures, describes the canons of treaty construction which developed in domestic law, summarizes their application in *Mille Lacs Band of Chippewa*, and concludes that the

necessary to the interest of conservation, Antoine v. Washington, 420 U.S. 194, 207 (1975), or to prevent or decrease a substantial risk to the public health or safety. Lac Courte Oreilles Band v. Voigt, 668 F. Supp. 1233, 1241-42 (1987). Even given such state interests, however, a state must show that its regulation of Indian rights is comprised of the least restrictive measures available, *id.* at 1239, and it may not impose such measures if the Indian party has its own regulations which adequately meet the state's conservation or public safety needs. United States v. Michigan, 653 F.2d 277, 279 (1987). The outcome of the second phase of *Mille Lacs Band of Chippewa* will undoubtedly pose its own set of issues with regard to the Band's self-determination, but that is beyond the scope of the present article.

canons as they are currently employed are in harmony with neither international nor domestic views on self-determination. Finally, Part III proposes a reformulation of the canons which would render them more congruent with both the emerging concept of self-determination and the doctrine of sovereignty on which they were founded.

I. From Sovereignty to Self-Determination

A. The American Story

1. Tribal Sovereignty: A Judicial Doctrine

The American doctrine of Indian sovereignty finds its genesis in international legal theories of the sixteenth century.[24] In 1532, largely in reaction to Spanish mistreatment of aboriginal peoples in the New World, legal scholar Francisco de Victoria promulgated the twin doctrines of the "right of discovery" and "Indian title."[25] Under the doctrine of discovery, a European power was the exclusive colonial sovereign in the regions which it discovered, yet its authority there was circumscribed by the doctrine of Indian title under which Native peoples retained "dominion in both public and private matters," and whose land could only be acquired from them by treaty or as the result of a just war.[26] In the early period of colonialism, colonizing governments abided by these doctrines for the very practical reason that they maintained a balance of power between countries competing for new lands. Once a colonial presence established itself in a region, other foreign powers were barred from moving in, acquiring land, or establishing relations with native inhabitants.[27] In theory, the implication for Native peoples was that the discovering power did not denounce their sovereignty but merely limited it to the colonizer's exclusive right to acquire land from them by legal means.[28] The rights of Native peoples to land and sovereignty were founded on "the natural law rights of *all* peoples, including 'strangers to the true religion,'" rights which

24. Anaya, *supra* note 14, at 39.

25. S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 HARVARD INDIAN LAW SYMPOSIUM 191, pt. I (1990).

26. *Id.* pt. I (quoting F. VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES (Classics of International Law ed. 1917) (translation based on Boyer ed. 1557, Muñoz ed. 1565 & Simon ed. 1696)).

27. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1225-26 (1990).

28. *See infra* note 33. This is not to paint a benign face on the machinery of colonialism which, more often than not, involved bloodshed, slavery, and genocide. The discussion here focuses on what was occuring in legal theory, which by no means should be taken to reflect what was happening on the ground of "discovered" lands.

also entailed "the ability to enter into treaty relationships."[29] Consequently, treaties became the vehicle through which relationships between indigenous peoples and colonial powers were created and managed.[30]

In the early nineteenth century, Chief Justice John Marshall imported the international doctrines of discovery and Indian title into domestic law through a series of landmark cases which ultimately laid the foundations for the development of American Indian jurisprudence.[31] In 1823, *Johnson v. M'Intosh* invoked these doctrines and held that an Indian tribe could transfer valid land title only to the United States government.[32] In 1831, *Cherokee Nation v. Georgia* invoked the international doctrines again to hold that Indian nations were sovereign peoples, though not in the same sense of a sovereign foreign state. Rather, Indian nations were domestic, dependent sovereigns to whom the U.S. government owed a special "duty of care."[33] A year later, in *Worcester v. Georgia*, Marshall invoked the history of Britain's relations with Native American peoples in order to more fully explicate the duty of care alluded to in *Cherokee Nation*.

Marshall observed that when the British Crown began colonizing North America it abided by the principles of international law which governed relations among colonial powers and between colonial governments and Native peoples.[34] Consistent with the doc-

29. Anaya, *supra* note 25, pt. I (quoting H. GROTIUS, ON THE LAW OF WAR AND PEACE 38-39 (Classics of International Law 2d ed. 1964) (1925)).

30. *Id.*

31. Professor Philip Frickey credits Marshall as being "the creator of much of whatever constitutes our federal Indian law tradition." Frickey, *supra* note 27, at 1223. The cases which earned Marshall this recognition are Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. 515 (1832).

32. *Johnson*, 21 U.S. (8 Wheat.) at 543.

33. *Cherokee Nation*, 30 U.S. (5 Pet.) at 15-17. Marshall described the federal government's duty of care toward Native peoples by likening it to the duty owed by a "guardian" to his "ward." *Id.* at 17. This unfortunate choice of words, besides evidencing Marshall's own paternalistic conception of Native peoples, was to have dire consequences for Indian sovereignty in later Supreme Court case law. *See infra* notes 47-50 and accompanying text. Part III.A.1 will return to Marshall's guardian-ward analogy and consider what he likely intended in light of the circumstances surrounding *Cherokee Nation* and *Worcester*.

34. Marshall explained the purpose of the doctrine of discovery as follows:

> To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle . . . was, "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments. . . ."

Worcester, 31 U.S. at 543-44 (citation omitted). The principle of discovery gave to the discoverer:

trines of discovery and Indian title, the British government did not infringe upon the sovereign right of Native peoples to govern themselves, but exercised only the discovery rights to acquire land through treaties and to preclude Native peoples from entering into relations with other foreign governments.[35] In short, Great Britain treated the original inhabitants of North America "as nations capable of . . . peace and war; of governing themselves, under her protection," in light of which "she made treaties with them, the obligations of which she acknowledged."[36] When the United States won its independence, it inherited Britain's relationship with the original inhabitants of the country. Like the Crown before it, the United States took the Indian nations under its protection, leaving to them all the elements of sovereignty they enjoyed before European contact with the exception of the limitations implied by their dependent status, namely, the ability to dispose of land to, or enter into relations with, other foreign powers.[37]

> the sole right of acquiring the soil and of making settlements on it. It was . . . not [a principle] which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession . . . as aboriginal occupants. . . .
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> . . . The extravagant and absurd idea, that the feeble settlements made on the sea coast . . . acquired legitimate power by them to govern the [Native] people, or occupy the lands from sea to sea, did not enter the mind of any man.

Id. at 544-45. Marshall next examined various charters and land grants which the Crown conveyed to its colonial governments in North America and concluded that, "[t]hey demonstrate the truth, that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defence, not for conquest." *Id.* at 546.

35. In light of the "[f]ierce and warlike" character of the country's first occupants, Marshall considered it quite probable that the European arrivals would recognize that such peoples "might be formidable enemies, or effective friends." *Id.* at 546. It was therefore unthinkable, nor did history prove differently, that the discovering power would contemplate trying to exert total dominion over Native American peoples.

> Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances.

Id. at 547.

36. *Id.* at 548-49.

37. Here again, Marshall found the strength and ferocity of Native peoples an important factor in his reasoning. Because the Natives had become allies of Great Britain through their earlier relations with her, "the colonists had much cause" to fear that the Indians might "add their arms to hers." *Id.* at 549. Accordingly, the colonists were "anxious" to "conciliate the Indian nations" and quickly appointed commissioners to make treaties with them "to prevent their taking any part in the present commotions." *Id.* By the act of making treaties with Indians, the United

Marshall's trilogy of cases essentially transformed the international doctrines of discovery and Indian title into the domestic doctrines of Indian sovereignty and federal trust: Indian peoples were sovereign, domestic polities whose relationship with the United States was under the exclusive control of the federal government and over whom the laws of individual states could have no effect.[38] At the same time, the federal government's own power was constrained both by the inherent sovereignty of Indian peoples and its own trust responsibility to them.[39]

As a result of the sovereign-to-sovereign relationship Marshall established between Native peoples and the U.S. government, Indians continue to occupy a unique status within the U.S. federal system.[40] For example, the U.S. Constitution does not apply to Indians in the same way it does to other citizens. Because the roots of Indian sovereignty predate the Constitution, tribal authority is not seen as deriving from it. A tribe's autonomy in a given area of law derives from either the tribe's inherent sovereignty or a congressional delegation of authority to the tribe.[41] Consequently, constitutional limits on governmental power do not automatically apply to tribal governments.[42] Furthermore, Congress' responsibility is to Indians as peoples rather than as individuals; enactments that single Indians out from other citizens do not violate constitutional equal protection.[43]

States subsumed the relationship that had existed with the British. With regard to the Cherokees, Marshall observed:

> The extinguishment of the British power in their neighborhood, and the establishment of . . . the United States in its place, led naturally to the declaration, on the part of the Cherokees, that they were under the protection of the United States, and of no other power. They assumed the relation with the United States, which had before subsisted with Great Britain.

Id. at 555. Part of what that "protection" involved was federal "protection from lawless and injurious intrusions into their country." *Id.*

38. *Worcester*, 31 U.S. at 561.

39. Marshall was careful to emphasize that "protection" did not mean dominion; rather, "[i]t merely bound the [Indian] nation to the British Crown, as a dependent ally, claiming the protection of a powerful friend and neighbor . . . without involving a surrender of their national character." *Id.* at 552. The same stipulation carried over in the Indians' relationship with the United States; as Marshall put it, "[p]rotection does not imply the destruction of the protected." *Id.*

40. United States v. Antelope, 430 U.S. 641, 646 (1977) (asserting that federal regulation of Indian affairs is rooted in the unique status of Indians as "a separate people" with their own political institutions).

41. *See, e.g.*, Montana v. United States, 450 U.S. 544, 564-65 (1981); United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

42. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

43. The Supreme Court has "repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalves when rationally related to the Government's 'unique obligation toward the

Had the post-Marshall judiciary guided the development of Indian law in a manner consonant with Marshall's vision, the United States today might indeed have something to contribute to the international dialogue on indigenous self-determination. However, shortly after Marshall laid its foundations, the development of American Indian jurisprudence broke free from its international moorings to set course in purely domestic waters. Not that international principles would have contributed much by that time; as colonies became independent nation states and the boundaries among them became fixed, the plight of Native peoples was swept out of the sphere of international scrutiny and left to the discretion of domestic governments.[44] Consequently, as the mid-nineteenth century ushered in a new wave of federal expansionism, the judiciary fell in line with the political branches' will to power over Indians.

In 1871 Congress ended the practice of treaty-making.[45] Thereafter, law-making regarding Indians became a unilateral affair with the government passing legislation and adopting measures with little or no substantive input from the very people those actions would affect.[46] Toward this end, the federal trust doctrine

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Indians.'" Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) (quoting Morton v. Mancari, 417 U.S. 535, 555 (1974) (citations omitted). For example, hiring preferences for Indians in the BIA does not violate constitutional equal protection. Morton v. Mancari, 417 U.S. 535, 552 (1974). The Constitution "singles Indians out as a proper subject for separate legislation." *Id.* To those who would criticize this practice as being improperly founded on race, the Supreme Court has said:

> [F]ederal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Antelope, 430 U.S. at 645.

44. *See infra* part I.B.1.

45. The end of treaty-making was the result of a power play between the House of Representatives and the Senate. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 87-88 (2d. ed. 1988) (West Publishing Co.). Jealous of the Senate's predominant role in negotiating treaties with Indians, the House froze the purse. *Id.* Although the resulting act did not impair already existing treaties, no new groups of Indians would be recognized as tribes and no further treaties would be made. *Id.*

46. Another ramification of the end of treaty-making has occurred in the courts. Indian litigation in the past century has increasingly involved the interpretation, not of treaties, but of statutes, executive orders, and agency regulations. Philip Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 421 (1993). Although theoretically this change should not "substantially alter judicial methodology" in addressing Indian law, *id.*, the reality is that "creeping canons of statutory construction," which are less protective of Indian autonomy than the treaty canons, have infiltrated the litigation of Indian issues. Frickey, *supra* note 27, at 1174 n.205.

A telling example of this is the courts' use of preemption analysis, a method for assessing the scope of state statutory authority. In general, the preemption doctrine

became more a sword than shield[47] which ultimately rent the fabric of Indian sovereignty. Rather than wield federal trust as an objective standard against which to measure congressional enactments, in 1877 the Supreme Court invoked it to support a presumption that Congress "would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."[48] In 1886, the Court's presumptions of Native ignorance and federal benevolence led the Court further to erect a new doctrine of congressional plenary power which virtually freed congressional actions toward Indians from its prior constraints.[49] By the twentieth century, the plenary power of Con-

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bars the application of state laws in areas where the federal government has occupied the field through comprehensive regulation. In matters of state authority over Indians, the doctrine was originally more stringently applied. Because of the federal government's special interest in "the right of reservation Indians to make their own laws and be governed by them," Williams v. Lee, 358 U.S. 217, 220 (1959), state authority in Indian country was presumed preempted absent an act of Congress that granted the states power in a particular area of law. *Id.* In recent years, however, preemption analysis in Indian issues has begun to look more and more like the preemption analysis applied to non-Indian matters, and state authority over Indians has broadened accordingly. *See generally* Frickey, *supra*; Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZ. L. REV. 81 (1993). As the Supreme Court observed in 1962, "Congress has to a substantial degree opened the doors of reservations to state laws." Organized Village of Kake v. Egan, 369 U.S. 60, 74 (1962). In 1973 the Court stated that "[a]lthough treaties and statutes have been construed to reserve tribal self-government, recent cases have established a 'trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." Rice v. Rehner, 463 U.S. 713, 718 (1983). By 1989 the Court had seemingly turned preemption analysis as applied to Indians "on its head." Frickey, *supra*, at 422. Rather than barring state law from Indian country in the absence of federal delegation, the Court suggested that state tax law would be permitted in the absence of federal prohibition. *Id.* (citing Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 189 (1989)).

The American Indian Movement in 1972 presented President Nixon with a list of twenty points which it claimed were essential if Native rights and tribal autonomy were to be protected in the future. Laura Waterman Wittstock & Elaine J. Salinas, *A Brief History of the American Indian Movement* (unpublished report, on file with author). Among these points were the claim that "all Indians [should] be governed by treaty relations," a call for a "review of treaty commitments and violations" and the "restoration of treaty making," and the "establishment of a treaty commission to make new treaties." *Id.*

47. Frickey, *supra* note 27, at 1176.

48. Beecher v. Wetherby, 95 U.S. 517, 525 (1877). For a critical examination of what became of Marshall's legacy, see Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 110-23 (1993).

49. United States v. Kagama, 118 U.S. 375 (1886). In *Kagama* the Supreme Court upheld the Major Crimes Act, Act of March 3, 1871, ch. 120, 3, 16 Stat. 544, 570 (codified at 18 U.S.C. § 1153 (1988 & Supp. III 1991)), which gave federal courts jurisdiction over certain specified crimes committed by Indians against Indians in Indian territory. The Act was the first federal statute to "displace Indian social con-

gress included the power to break treaties with Indian nations through subsequent statutory enactments.[50]

2. Tribal Self-Determination: A Federal Policy

During the century which followed the end of treaty-making the political branches proved to be decidedly ambivalent about their relationship to Native peoples. Federal Indian policy vacillated between the alternative visions of separatism, which contemplated Indian nations as separate, semi-autonomous entities,[51] and assimilation, which anticipated the eventual amalgamation of Indians into mainstream society.[52] Yet no matter which direction national opinion and federal policy swung, they were consistently founded on underlying assumptions of Indian incompetence and the superiority of non-Indian culture.[53] Separatism was often assumed to be a temporary arrangement to protect Indians from bad influences until they were properly prepared for assimilation.[54] Alternatively,

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trol mechanisms and substitute western non-Indian courts and law on reservation Indians to resolve purely tribal matters." Clinton, *supra* note 48, at 98.

50. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

51. Separatism seems to be what Chief Justice Marshall had in mind in his articulation of Indian sovereignty. In *Worcester v. Georgia,* for instance, he found "the treaties and laws of the United States [to] contemplate the Indian territory as completely separated from that of the states." 31 U.S. at 557. It is unlikely, however, that Marshall contemplated the form separatism would take under the federal government's "removal" policy of the mid-1800s which demarcated a region west of the Mississippi as Indian territory and sought to move tribes from their respective home lands to that region. *See Mille Lacs Band of Chippewa*, 861 F. Supp. at 793. What Marshall confronted in *Worcester* was a separate Cherokee territory within the boundaries of the State of Georgia. *See infra* part III.A.1. It seems likely therefore that Marshall's "Indian territory" was meant to indicate a political boundary around Indian homelands rather than a geographical boundary on the outer fringe of the United States.

52. Clinton, *supra* note 48, at 86. The policy of assimilation first gained force when the notion of an "Indian territory" was abandoned in favor of creating smaller reservations for Indians within states. *See Mille Lacs Band of Chippewa*, 861 F. Supp. at 807-09.

53. The ethnocentrism of the times was frequently explicit in judicial opinions. In 1913 the Supreme Court observed:

> [The Pueblos of New Mexico,] although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. . . . [A]dhering to primitive modes of life, largely influenced by superstition . . . and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people.

United States v. Sandoval, 231 U.S. 28, 39 (1913).

54. In 1853, the new Commissioner of Indian Affairs believed that reservations would "allow Indians to learn the necessary skills to assimilate into Euro-American society while protecting them from the bad influences of traders and liquor dealers." *Mille Lacs Band of Chippewa*, 861 F. Supp. at 808. The assimilation policy found a receptive audience in the judiciary, which had by this time twisted Marshall's guardian-ward analogy to permit full federal control over the nation's original inhabitants.

where political separatism was seen as a long-term or permanent condition, it was generally assumed that true tribal autonomy could only be achieved when Indians adopted Euro-American values, social institutions, and forms of government.[55] Policies of assimilation were even more overtly ethnocentric and destructive.[56] Indians were dispossessed of their land[57] and punished for engaging in traditional religious practices.[58] Federal agents removed In-

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See supra notes 47-50 and accompanying text. As one judge wrote of the court system established by the Bureau of Indian Affairs to handle minor crimes on the reservations,

> These "courts of Indian offenses" are not the constitutional courts provided for in [the Constitution], . . . but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there . . . for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.

Unites States v. *Clapox*, 35 F. 575, 577 (1888).

55. The Indian Reorganization Act of 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1988)), was heralded by many government officials and private supporters of Indian "rights" as a landmark in refurbishing tribal sovereignty. Yet, in the end, it did little more than provide tribes with the opportunity of setting up "governments" after the United States' model of democracy under the tight, discretionary control of the Secretary of the Interior. *See* VINE DELORIA, JR. & CLIFFORD LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 66-100 (1984). The Act and the closely monitored form of government which it authorized were strongly resisted by many Indians, *id.* at 101-21, and many of the instances where tribes elected to reorganize under the Act have been criticized as being under suspicious circumstances. *See generally* Russel L. Barsh, *Another Look at Reorganization: When Will Tribes Have a Choice*, INDIAN TRUTH, No. 247 (Oct. 1982).

56. Assimilation sought to "decimate the separate Indian tribes by attacking their political systems and destroying the traditional economic bases of their political organizations and to assimilate their members, often involuntarily, into the . . . American melting pot." Clinton, *supra* note 48, at 101.

57. One of the most devastating strategies of forced assimilation was land allotment which, by attempting "to break-up the 'tribal mass' by ending communal land ownership," became the "primary vehicle for this drastic federal policy." Joranko & Van Norman, *supra* note 46, at 82. The Allotment Act of 1887 parceled out reservation land to individual tribal members and opened the land left over to non-Indian settlement. 25 U.S.C. § 331. The land allotted to Indians would be held in trust by the federal government for 25 years, after which the allottee would be granted a patent in fee, making the land freely alienable and subject to state and county jurisdiction. 25 U.S.C. §§ 348, 349. The Act was amended in 1906 to allow the Secretary of the Interior to shorten the trust period or waive it altogether if, in the Secretary's view, the allottees appeared to be competent and able to manage their own affairs. Act of May 8, 1906, c. 2348, 34 Stat. 182. Within a few short decades substantial portions of reservation land fell out of Indian ownership through fraudulent sales, purchases from minors, tax forfeitures, and the opening of left over land to non-Indian homesteaders. Joranko & Van Norman, *supra* note 46, at 82-83. Between 1887 and 1934, Indian land holdings had shrunk from 138- to 48-million acres and 80% of Indian land value was lost. *Id.*

58. Suzan Shown Harjo, *Native Peoples' Cultural and Human Rights: An Unfinished Agenda*, 24 ARIZ. STATE L. J. 321, 322-23 (1992). One of the most glaring and

dian children from their homes and placed them in boarding schools where they were often forced to adopt Christian religions and forbidden to speak their own language.[59]

The continuing catastrophic results of Congressional policies, and steadfast Native resistance to those policies, eventually gave rise to a search for new solutions.[60] Since the 1960s Indians have

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dramatic examples of the United States government's intolerance of Native religious practices led to the massacre now known as Wounded Knee. In 1890 a Minneconjou brought back to his people in Dakota country the teachings he learned in Nevada from a Paiute holy man named Wovoka in Nevada. DEE BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST 431-32 (1970). The sect was a cross between Christianity and Native hopes for salvation from white oppression. The Paiute Messiah's "Ghost Dance" religion advocated pacifism; the people were called to dance and sing, to hurt no one and to practice brotherly love. *Id.* at 434-35. If these teachings were followed, the ghosts of warriors would be resurrected, the white soldiers would sink into the ground, and Indian peoples would be restored to a life of peace and plenty on their land. *Id.* In spite of the overall peaceful nature of the doctrines of the Ghost Dance, federal Indian agents took a dim view of the practice. "Indians are dancing in the snow and are wild and crazy . . ." a Pine Ridge agent telegraphed to Washington; "[w]e need protection and we need it now. The leaders [of the Ghost Dance] should be arrested and confined . . . [T]his should be done at once." *Id.* at 436. Indeed it was. The Indian Bureau ordered reservation agents to collect a list of all the "fomenters of disturbances" to be arrested and army troops were sent to Pine Ridge. *Id.* Four days after the Christmas of 1890, a misunderstanding between soldiers and a deaf Indian erupted into violence when the soldiers opened fire. *Id.* at 442-44. A few hours later, around 300 Indians, men, women, and children, were dead and many others wounded. *Id.* at 444-45.

Lest this appear to be an aberration, it is important to note that religious persecution under the more benign face of Christian evangelism was also prevalent on many reservations. In the early part of this century, an agent of the White Earth reservation collaborated with the local Episcopal church to outlaw participation in the "Big Drum" religion by persons under 50 years old. White Earth Land Recovery Project, Summary of Mississippi Anishinabeg Treaty Submission Paper, at 5 (1994) (on file with the author) [hereinafter WELRP Summary]. Many people "went into the woods and practiced the religion in secret," yet the numbers diminished. *Id.* By the 1950s there were no more "drum keepers" to lead the ceremonies and all of the drums had been destroyed or stowed away—one of them in the Episcopal church's rafters. *Id.* at 6.

59. Harjo, *supra* note 58, at 323; WELRP Summary, *supra* note 58, at 7. The boarding school system made efforts to "forcibly stamp out all traces of tribal culture." Clinton, *supra* note 48, at 102. The system was a major contributor to the extinction of many Indian languages, traditional teachings, and religious practices. *Id.* Nor were the schools particularly successful in assimilating their students into non-Native culture. Young Indian persons graduating from the schools were often left "stranded between reservation life for which they were no longer culturally equipped" and a mainstream society for which they were equally unprepared and which was unwilling, in any event, to accept them as equals. *Id.*

60. The failure of land allotment has already been described, *see supra* note 57. The end of the forced assimilation policy occurred in the 1950s when Congress conducted a termination experiment on a number of tribes. Clinton, *supra* note 48, at 121-22. The tribes selected lost their tribal status, their unique relationship with the federal government, and any benefits or burdens accruing from that unique relationship. *See* CANBY, *supra* note 45, at 25-27. Fortunately, the policy was experimented with before it was implemented on a massive scale. Within a few years Congress admitted the strategy was a failure and observed that "Indian people will

forged their way into the legal field to "become a direct and visible presence in the development of the law which so critically affects them."[61] The growing crescendo of Indian dissent, buoyed by the currents of the civil rights movement, forced many members of government to realize that what had been missing in Indian policy-making of the past was participation from Indian peoples.[62] In 1970, President Nixon called for a legislative program to allow tribes to manage their own affairs with a maximum degree of autonomy.[63] In 1975, Congress passed the Indian Self-Determination Act, prefaced with the acknowledgement that Native peoples had been denied "an effective voice in the planning and implementation of programs" which would be "responsive to the true needs of Indian communities."[64] Since that time federal measures in both political branches have made a notable shift toward increasing tribal control over services, diminishing the federal presence on reservations, and removing economic barriers to tribal self-sufficiency.[65]

The U.S. representative at the U.N. Working Group's 1994 session was at least partially justified in her assertion that her country now embraced a policy of Native self-determination.[66] Indeed, federal actions over the past two decades suggest an overall pattern more consistent with the principle of Indian sovereignty, as

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never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons." The Indian Self-Determination Act, 88 Stat. 2203 (codified at 25 U.S.C. § 450).

61. Clinton, *supra* note 48, at 91-92. In 1967, there were only an estimated several dozen Indian attorneys in the United States. *Id.* Today, the number has grown to over 1200. *Id.*

62. *Id.* at 106-07.

63. CANBY, *supra* note 45, at 30.

64. Indian Self-Determination Act, *supra* note 60.

65. *See, e.g.*, the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (giving greater recognition to tribal governments and requiring tribal consent to state assertions of jurisdiction over reservations); the Indian Self-Determination Act of 1975, *supra* note 59 (giving tribes greater control over managing federally funded programs and social services); the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (maximizing tribal jurisdiction in child custody and adoption proceedings); the Indian Tribal Government Tax Status Act of 1982, 96 Stat. 260 (extending to tribal governments many of the tax advantages enjoyed by state and local governments); the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (providing for greater tribal control over its mineral resources); the Indian Land Consolidation Act of 1982, 25 U.S.C. §§ 2201-2211 (authorizing tribes to take measures to consolidate their land base).

66. *See supra* notes 21-22 and accompanying text. A caveat is in order here, however. As in the case of sixteenth century legal theory, modern law and policy should not be relied upon as indicative of what actually occurs in actual daily life. During the 1960s and 1970s, while the federal government was paying lip service to Native peoples, life on many reservations had reached a particularly ugly stage marked by violence and oppression under federal agents, as well as a steady degradation of tribal natural resources.

Chief Justice Marshall conceived it. Nonetheless, the judiciary has yet to fall in line with the trend.

B. The International Story

1. Self-Determination: From A Right of Nations to a Human Right

The international concept of self-determination owes its name to U.S. President Woodrow Wilson who introduced the phrase in 1919 to the League of Nations. He defined it as "the right of every people to choose the sovereign under which they live, to be free of alien masters, and not to be handed about from sovereign to sovereign as if they were property."[67] When the United Nations was formed in the aftermath of World War II, its charter stated that one of its purposes was the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[68]

Indigenous peoples, however, were not originally included within the scope of this ideal. Although native peoples enjoyed a modicum of empathy, at least in theory, in the jurisprudence of the 1500s,[69] international concern for indigenous peoples eventually collapsed under the weight of massive colonization. The welfare of native populations was left to the conscience of the colonizing government, and other nation states respectfully stayed out of what was viewed as a domestic matter.[70] The re-emergence of indigenous issues in the international arena owes much to indigenous groups from the United States and other American countries who two decades ago began mobilizing international human rights standards in their favor.[71] Their efforts were bolstered by some of the

67. Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 23-24 (1992) (quoting Eric M. Amberg, *Self-Determination in Hong Kong: A New Challenge to an Old Doctrine*, 22 SAN DIEGO L. REV. 839, 842 (1985)).

68. U.N. CHARTER art. 1, para. 2.

69. *See supra* notes 24-30 and accompanying text.

70. Anaya, *supra* note 14, at 3 n.13. Even Great Britain, whose relationship with America's Native peoples provided a model for Chief Justice Marshall's doctrine of sovereignty, *see supra* notes 34-37 and accompanying text, eventually abandoned its hands-off approach to indigenous peoples in favor of all-out expansion of its empire. In its colonization of the Near East, the British took it as a matter of course to dominate, govern, and civilize the peoples they found there. *See* EDWARD W. SAID, ORIENTALISM 31-38 (1978).

71. Anaya, *supra* note 14, at 4 nn.18-19. In 1974 the American Indian Organization called a meeting at Standing Rock, South Dakota, to establish the International Indian Treaty Council (IITC), an organization which would work "for the Sovereignty of Indigenous Peoples and the protection of their human rights, cultures, and sacred lands." INT'L INDIAN TREATY COUNCIL, INTRODUCTORY HANDBOOK FOR THE U.N. STUDY ON TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS

very historical events that gave rise to the United Nations as an arena for rethinking international relations. As the Western world turned its attention to the repercussions of World War II, problems once characterized as national were increasingly recast in regional and even global terms. Under the fallout from political tyranny, military aggression, nuclear weapons, and genocide, it was no longer acceptable to turn a blind eye toward the conduct of states within their own borders. The U.N. provided an important forum for the generation of new standards that might balance the sovereignty rights of states against the safety and welfare of their citizens.

Two particular developments paved the way for instating indigenous peoples as a subject appropriate for international concern. The first was the cultural integrity norm, a derivative of the very first U.N.-sponsored human rights treaty. The 1948 Anti-Genocide Convention defined genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such."[72] In 1966 the International Covenant on Civil and Political Rights declared the right of all persons "to enjoy their own culture."[73] The U.N. Education, Scientific and Cultural Organization (UNESCO) stated in another 1966 Declaration that:

> 1. Each culture has a dignity and value which must be respected and preserved.
>
> 2. Every people has the right and duty to develop its culture.
>
> 3. In their rich variety and diversity, and in the reciprocal influence they exert on one another, all cultures form part of the common heritage belonging to all mankind.[74]

BETWEEN INDIGENOUS POPULATIONS AND STATES (December 1993) (no pagination). More than 5000 representatives from 98 indigenous nations gathered at that first meeting, and in 1977 the IITC became the first indigenous organization to attain recognition from the United Nations "[a]s a Non-Governmental Organization with Consultative Status to the United Nations Economic and Social Council." *Id.*

The 1977 International Non-Governmental Organization Conference on Discrimination Against Indigenous Populations in the Americas was among the major developments of international indigenous organizations. Anaya, *supra* note 14, at 4 n.18. At this conference, held in Geneva, indigenous representatives drafted and distributed a Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere. The Declaration "became an early benchmark for indigenous peoples demands upon the international community." *Id.*

72. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280, art. II (entered into force Jan. 12, 1951).

73. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 27.

74. 1966 UNESCO Declaration of the Principles of International Cultural Cooperation, 14th Sess., Nov. 4, 1966, art. 1 *reprinted in* United Nations, Human Rights: A Compilation of International Instruments at 409, U.N. Doc. ST/HR/1/rev. 3, U.N. Sales No. E.88.XIV.1 (1988).

Both the U.N. Human Rights Committee and the Organization of American States' Inter-American Commission on Human Rights have interpreted the cultural integrity norm to apply to indigenous peoples and "to cover all aspects of an indigenous group's survival as a distinct culture, understanding culture to include economic or political institutions, land use patterns, as well as language and religious practices." Furthermore, the norm requires affirmative state action "to protect the cultural matrix of indigenous groups" and not merely to end coerced assimilation.[75]

The second important development was the expansion of the concept of self-determination that occurred as part of a shift away from colonialism. In the years immediately following World War II, after European colonial powers withdrew from large areas of Africa and Indo-China, the international community began seeking ways to redress the economic and cultural ramifications of colonialism in the Third World.[76] Colonialism was rejected as being directly contradictory to the legal concept of self-determination for all peoples.[77] In 1966 the United Nations adopted two covenants which transformed self-determination from a right of states into a human right.[78] The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (1966 Covenants) contain the identical first article:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources . . . In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties [sic] to the present Covenant . . . shall promote the realization of the right of self-determination . . .[79]

The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities commissioned a study of the 1966 Cov-

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75. Anaya, *supra* note 14, at 17.

76. *Id.*; Clinton, *supra* note 48, at 105.

77. Robert Clinton's definition of colonialism is sufficient for purposes of this discussion. He defines colonialism as a nation's "exploitation of or annexation of lands and resources previously belonging to another people, often of a different race or ethnicity, or the . . . expansion of political hegemony over them, often displacing, partially or completely, their prior political organization." Clinton, *supra* note 48, at 86.

78. For a brief summary of the development of the 1966 Covenants, *see* Hannum, *supra* note 16, at 17-19.

79. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. I; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. I.

enants' implementation among colonized populations. The final 1980 report stated that the U.N.'s adoption of the Covenants "provided the basis for unquestioned acceptance in international law of the fact that self-determination is a right of peoples under colonial and alien domination."[80] A separate Sub-Commission study on discrimination against indigenous populations paved the way for extending the right of self-determination to indigenous peoples.[81] The investigation found that human rights were neither fully applied to indigenous peoples nor adequate to the task, and concluded that self-determination "must be recognized as the basic pre-condition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future."[82]

In 1982 the United Nations established its Working Group on Indigenous Populations to provide a forum for indigenous representatives to voice their concerns and participate in the shaping of policies affecting them.[83] The Working Group, in its first session, departed from usual U.N. practice by waiving the requirement of formal consultative status and permitting oral as well as written participation by any indigenous organization.[84] In 1989 the United Nations, for the first time, admitted representatives of nongovernmental organizations not only as participants but as officers of an official meeting. In its seminar on racial discrimination and relations between indigenous peoples and States, indigenous organizations were invited to participate on an equal footing with governmental representatives.[85]

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80. H. Gros Espiell, The Right to Self-Determination: Implementation of the United Nations' Resolutions, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, at 8-16 (1980).

81. Anaya, *supra* note 14, at 4 n.16, 15-16 nn.63, 65. *See generally* Barsh, *supra* note 20.

82. Barsh, *supra* note 20, at 371 (citing U.N. Doc. E/CN.4/sub.2/1983/21/Add. 8, ¶ 580).

83. In 1981, the Conference on Indigenous Peoples and the Land called for the establishment of a special United Nations working group so that "indigenous nations and peoples [could] submit their complaints and make their demands known." Barsh, *supra* note 20, at 372 (citing Sub-Commission Res. 2 (XXXIV) (Sept. 8, 1981); Commission Res. 1982/19 (Mar. 10); ECOSOC Res. 1982/34 (May 7)). The Working Group was proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in September 1981, endorsed by the Commission on Human Rights in March 1982, and authorized by the Economic and Social Council in May 1982. *Working Group's 12th Session Report*, *supra* note 19, ¶ 1, at 4.

84. Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 657-62 (1988). The Working Group has become unique among all of the U.N.'s organs in that it allows anyone to speak at its public meetings. Other U.N. organs limit participation to "designated experts, special invitees or representatives of nongovernmental organizations with recognized consultative status with the Economic and Social Council." Anaya, *supra* note 14, 10 n.44.

85. Russel L. Barsh, *United Nations Seminar on Indigenous Peoples and States*, 83 AM. J. INT'L L. 599, 600 (1989).

The United Nations has demonstrated its commitment to indigenous issues through its ongoing support of the Working Group. In the mid-1980s, it commissioned the Working Group to begin drafting a declaration of indigenous rights.[86] While this work was still in progress, the U.N. declared 1993 the "year of indigenous peoples" and resolved to prolong the discourse by declaring a "decade of indigenous peoples" to begin in December 1994.[87] In 1994, the U.N. General Assembly assigned the Working Group to investigate the possible establishment of a permanent forum for indigenous peoples.[88] At the 1994 session, the Working Group affirmed its view "that an ongoing process of consultation and agreement with indigenous peoples and Governments was required in order to deal justly with that important subject, in the spirit of partnership and collaboration."[89]

2. Self-Determination: A Right of Indigenous Peoples

One of the first U.N. instruments to address indigenous issues directly was the International Labor Organization's Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention), adopted in 1989.[90] The purpose of the Convention was "to eliminate the paternalistic and integrationist approach" of the ILO's former 1957 Convention[91] that had em-

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86. Anaya, *supra* note 14, at 10.

87. *International Decade of the World's Indigenous People*, G.A. Res. 48/163, U.N. GAOR, 48th Sess., at 1 (referring to General Assembly Resolution 45/164 of 18 December 1990); *id.* at 2 (referring to the declared "decade of indigenous peoples") U.N.Doc. A/RES/48/163 (1994). The goal of the decade was to strengthen "international cooperation for the solution of problems faced by indigenous people in such areas as human rights, the environment, development, education and health." *Id.* at 1. Each year is to focus on a particular topic for international programs, research, and activities. As of August, 1994, the tentative program was:

1995 - Social development and the family;
1996 - Subsistence, survival and health;
1997 - Language, education and cultural integrity;
1998 - Protecting spiritual and cultural heritage;
1999 - Restoring relationships with land and resources;
2000 - Achieving environmentally-sound development;
2001 - Law, justice, individual rights and dignity;
2002 - Self-government and self-determination;
2003 - Indigenous peoples in peace and security;
2004 - Partnership in international governance.

Note by the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Mrs. Erica-Irene A. Daes, International Decade of the World's Indigenous People, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/52, at 2-3 (1994).

88. *Working Group's 12th Session Report*, *supra* note 19, ¶¶ 20 and 23, at 11.

89. *Working Group's 12th Session Report*, *supra* note 19, ¶ 148, at 32.

90. Anaya, *supra* note 14, at 5, 7.

91. *Report of the Working Group on Indigenous Populations on its Seventh Session*, U.N. Doc. E/CN.4/Sub.2/1989/36, at 10 (1989).

braced assimilation, a policy now seen as "outdated" and "destructive in the modern world."[92] The preamble of the new ILO Convention observed that "in many parts of the world [indigenous] peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and . . . their laws, values, customs and perspectives have often been eroded."[93] Self-determination was not specified among the rights recognized in the Convention. Indeed, Article 1 insured that the right would not be found implicitly by stating that the use of the word "peoples" was not to "be construed as having any implications as regards the rights which may attach to the term under international law."[94] This clause was undoubtedly added to appease those states that had protested that the word "peoples" might invoke the right of self-determination as defined in Article I of the 1966 Covenants.[95]

The Convention was nevertheless significant for its realignment of the position of indigenous peoples within their respective states. Numerous provisions called for a greater respect for indigenous culture and institutions by requiring indigenous participation in matters of their own development.[96] Also, it required governments to give due regard to an indigenous people's customs, values,

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92. Anaya, *supra* note 14, at 7.

93. ILO Convention on Indigenous and Tribal Peoples (No. 169) pmbl. (1989), *in* International Labour Conference, Report of the Committee on Convention 107 at 25/25-33, *Provisional Record*, No. 25, 76th Sess. (1989) [hereinafter ILO Convention].

94. *Id.* art. I, ¶ 3.

95. Anaya, *supra* note 25, pt. IV; Anaya, *supra* note 14, at 34-35 n.146.

96. ILO Convention, *supra* note 93. According to Article 7:

> 1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. . . .
>
> 3. Governments shall ensure that . . . studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. . . .

Article 15 addressed indigenous control of their resources:

> 1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right . . . to participate in the use, management and conservation of these resources.
>
> 2. In cases in which the State retains the ownership . . . or rights to . . . resources pertaining to [indigenous] lands, . . . [it] shall consult these peoples . . . The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Id.

and beliefs, and take into consideration the people's own views on issues that affect them.[97]

A second major instrument addressing indigenous rights is the Draft Declaration itself, which confirmed the rejection of assimilation by recognizing that "all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind."[98] In light of this, "all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust. . . ."[99] Accordingly, the Draft declared that indigenous peoples have the right to be free from "any action which has the aim or effect of depriving them of their integrity as distinct peoples"[100] and from "any form of assimilation or integration" imposed on them by another culture.[101] Unlike the ILO Convention that preceded it, the Draft Declaration did not side-step the issue of self-determination. It explicitly condemned the historical dispossession of indigenous lands and resources and proclaimed that self-determination is necessary if indigenous peoples are to maintain their cultures and "promote their development in accordance with their aspirations and needs."[102] Toward that end, Article 3 boldly declared: "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."[103]

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97. *Id.* Article 7 required that indigenous peoples "participate in the formulation, implementation and evaluation of plans and programmes . . . which may affect them directly," *id.* ¶ 1, and Article 8 stated:

> 1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs of customary laws.
>
> 2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. . . .

Id. Regarding education, Article 27 required that indigenous communities participate in curricular development and that educational programs "incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations." *Id.* art. 27, ¶ 1.

98. *Draft Declaration*, *supra* note 14, pmbl.

99. *Id.*

100. *Id.* art. 7(a).

101. *Id.* art. 7(d).

102. *Id.* pmbl.

103. *Id.* art. 3.

3. The Scope of Self-Determination: A Balancing Act

In early debates about indigenous self-determination, the general arguments against it presumed that giving special rights to indigenous groups would actually put them at a disadvantage. According to this thesis, "individual freedom can be realized only in multi-cultural states where different ethnic groups compete and counteract one another's prejudices through the majoritarian democratic process."[104] Such was the initial perspective of the United States in the 1980s, "that access to the electoral process in a multicultural democracy is all the self-determination that anyone needs."[105] As the ILO Convention demonstrated, this integrationist approach has been largely abandoned.[106]

While neither the ILO Convention nor the Draft Declaration defined the full scope of indigenous self-determination, they lent support to the more moderate view of self-determination as a kind of "functional sovereignty" within the nation state. This approach contemplates indigenous peoples as having "the powers necessary to control political and economic matters of direct relevance to them," yet at the same time considers the legitimate interests of the surrounding state.[107] The ILO Convention, for example, recognized "the aspirations of these indigenous peoples to exercise control over their own institutions, ways of life and economic development . . . within the framework of the States in which they live."[108] Similarly, the Draft Declaration stated "that indigenous peoples have the right freely to determine their relationships with the States in a spirit of coexistence, mutual benefit and full respect."[109]

It may be remembered that, during the decline of Native sovereignty in the United States, federal policy was marked by a tension between separatism and assimilation. The paradigm of self-determination blurs the distinction between the two concepts, for it involves elements of both separatism and assimilation. Effective self-governance requires a "homeland" within which indigenous peoples maintain control over their resources, economic development, and the education of their children.[110] At the same time, in-

104. Barsh, *supra* note 20, at 377.

105. *Id.*

106. Anaya, *supra* note 14, at 31-32; *see supra* notes 90-92 and accompanying text.

107. Hannum, *supra* note 16, at 66.

108. ILO Convention, *supra* note 93, pmbl.

109. *Draft Declaration*, *supra* note 14, pmbl.

110. Indigenous representatives in the 1989 U.N. Seminar on racism and indigenous peoples stressed the need for "bottom-up" strategies for development and the "importance of land, not as a mere commodity or productive resource, but as a 'territory' defining a distinct economic and social space." Barsh, *supra* note 85, at 603.

digenous peoples must remain active in the larger society whose values and practices frequently impact upon them. To secure these imperatives, the ILO Convention and the Draft Declaration included measures that both strengthened the autonomy of indigenous governments[111] and augmented their participation in the larger state.[112]

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111. For example, Article 6 of the ILO Convention required governments to "establish means for the full development of these [indigenous] peoples' own institutions and initiatives." ILO Convention, *supra* note 93, art. 6 ¶ 1(c). The Draft Declaration asserted this imperative with even greater vigor; Article 4 affirmed "the *right to maintain and strengthen their distinct political, economic, social and cultural characteristics*, as well as their legal systems," an idea which was repeated in Article 21 which adds the rights "to be secure in the enjoyment of their own means of subsistence" and to "engage freely in all their traditional and other economic activities." *Draft Declaration*, *supra* note 14. Other Articles reiterated this theme as follows:

> Article 23
>
> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, [they] have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.
>
> Article 31
>
> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.
>
> Article 32
>
> . . .
>
> Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.
>
> Article 33
>
> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Id. Article 31 was "based in part on the recommendations of the United Nations Expert Meeting to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples. . . ." *Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, Note by the Secretariat*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 46th Sess., ¶ 102, U.N. Doc. E/CN.4/Sub.2/1994/2, at 20 (1994) (citing U.N. Doc. E/CN.4/1992/42, recommendation 12).

112. Toward this end the ILO required governments to "consult the peoples concerned . . . whenever consideration is being given to legislative or administrative measures which may affect them directly" and assure that such peoples "can freely participate, to at least the same extent as other sectors of the populations, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them." ILO Convention, *supra* note 93, art. 6, ¶ 1 (a)(b). The Draft Declaration likewise recognized the right

The emerging vision is one of dual citizenship,[113] where indigenous persons would be endowed with the rights and responsibilities of self-governance as well as those associated with membership in the larger state. Precisely how this relationship is to be institutionally structured is ripe for exploration and discussion. As discussed earlier, one historical means of regulating the relationship between a Native people and a colonialist government was the institution of the treaty.

II. Treaties, Rights, and the Cultural Divide

The state of Minnesota's infringement on the Mille Lacs Chippewa Band's treaty rights, and the lawsuit that followed, reflect several critical aspects of the confrontation between indigenous peoples and nation states occurring throughout the world. The dispute over hunting and fishing rights in particular demonstrates the context of cultural misunderstanding against which indigenous peoples must struggle. In addition, the case illustrates the way indigenous values may be compromised or misrepresented when litigated in a forum of non-Native society. Finally, the case highlights the way treaties may serve to secure indigenous rights in the face of misunderstanding and prejudice.

Interestingly, the rights at issue in the case—hunting, fishing and gathering on traditional lands—were addressed in the ILO Convention and the Draft Declaration. The ILO Convention pro-

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of full participation "at all levels of decision-making." *Draft Declaration*, *supra* note 14, arts. 19, 20.

In terms of education, the ILO Convention required governments to take measures "to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community." ILO Convention, *supra* note 93, art. 26. The goal of national education was to be the "imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully . . . in their own community and in the national community." *Id.* art. 29. The Draft Declaration took this a step further:

> Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have . . . the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
>
> Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

Draft Declaration, *supra* note 14, art. 15.

113. The Draft Declaration affirmed the right of indigenous peoples to collectively "determine their own citizenship in accordance with their customs and traditions" and stated that "[i]ndigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live." *Draft Declaration*, *supra* note 14, art. 32.

vided that governments were to "respect the special importance for the cultures and spiritual values" of an indigenous peoples' relationship to the land or territories "which they occupy or otherwise use."[114] Moreover, governments were obliged to take positive action to "safeguard" the peoples' right "to use lands not exclusively occupied by them, but to which they have *traditionally had access for their subsistence and traditional activities*."[115] Hunting, fishing and gathering were explicitly recognized "as important factors in the maintenance of [indigenous] cultures and in their economic self-reliance and development," and governments were to "ensure that these activities are strengthened and promoted."[116] The Draft Declaration carried similar provisions regarding subsistence and land-based activities. The Draft called for protection of "cultural traditions and customs"[117] involving traditional "knowledge of the properties of fauna and flora,"[118] and recognized indigenous peoples' right to:

> own, develop, control and use the lands and territories, including the . . . flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, . . . and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.[119]

As the above provisions suggest, activities such as hunting, fishing, and gathering often have cultural as well as economic relevance for Native peoples, factors often not appreciated by non-native culture. The general lack of understanding on the part of non-native culture forms the basis for much conflict.

A. *Indigenous-State Relations: A Context of Cultural Misunderstanding*

The roots of cultural differences run much deeper than language, clothing, or religious rites. One of the earliest definitions of culture comes from a nineteenth century anthropologist who defined it as "that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits ac-

114. ILO Convention, *supra* note 93, art. 13, ¶ 1.
115. *Id.* art. 14, ¶ 1 (emphasis added).
116. *Id.* art. 23, ¶ 1.
117. *Draft Declaration*, *supra* note 14, art. 12.
118. *Id.* art. 29.
119. *Id.* art. 26.

quired" by members of a society.[120] In recent decades, anthropology has come to emphasize culture as an invisible force consisting of "abstract values, beliefs, and perceptions of the world" that people unconsciously use to interpret their experiences, shape their behavior, and express themselves.[121] Consequently, a people may change drastically over time in terms of their material goods, technology, or economic practices, and still remain culturally distinct from their neighbors.

A recent author used the analogy of "apples" and "oranges" to illustrate one aspect of the cultural difference between Native and Western perceptions of the world. Where Western culture perceives the world like an orange, "fragmented into separate sections or compartments" such as law, religion, and economics, Native American, and other indigenous cultures, perceive the world as an apple, with all aspects of life integrated into a unified whole.[122] In addition, Western culture tends to pair up the segments of its world into dialectical opposition, e.g., sacred versus secular, light versus darkness, good versus evil.[123] The Native perspective, in contrast, sees its unified world as held together by interdependence and harmony rather than oppositional tension. The natural and supernatural, the past and present, things of nature and things of humankind are seen as co-existing in balance and equality.[124]

Because the "fundamental approaches" of Indian and Western cultures occupy "opposite ends of the scale of perception," understanding between the two is often difficult.[125] The incompatibility of Native and non-native perspectives is particularly acute when the subject of communication is land and resources. For Native cul-

120. WILLIAM A. HAVILAND, ANTHROPOLOGY 304 (7th ed. 1994) (quoting EDWARD BURNETT TYLOR, PRIMITIVE CULTURE: RESEARCHES INTO THE DEVELOPMENT OF MYTHOLOGY, PHILOSOPHY, RELIGION, LANGUAGE, ART AND CUSTOMS (1871)).

121. *Id.*

122. Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 181 (1992).

123. *Id.* at 182-83.

124. *Id.*

125. *Id.* at 181. For a provocative exploration of the differences between Western and Native American values from the perspective of law and economics, see Robin Paul Malloy, *Letters from the Longhouse: Law, Economics and Native American Values*, 1992 WIS. L. REV. 1569 (1992). Malloy argues that:

> To comprehend . . . the Native American position on a number of important legal and economic issues we must first free ourselves from our own ideological prisons. We must deconstruct our own social institutions and reconstruct them as they are seen from the outsider's position. Then, and only then, we can begin to grasp the nature of our disagreement and the roots of our unrest.

Id. at 1586.

tures generally, land is an inherent part of their identity as a people, not merely a source of subsistence. The ancestral homeland is the embodiment of their spiritual beliefs, the manifestation of their ongoing relationship with the earth.[126] Land use activities are thus imbued with an element of the sacred, an aspect of indigenous culture which the international community has come to recognize.[127] The Draft Declaration stated, "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands . . . and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard."[128]

Hunting, fishing, and gathering, therefore, represent much more to Native peoples than mere subsistence or sport. They are vehicles through which people connect with their history, share their common heritage, and transmit traditional values and knowledge to new generations.[129] Western culture, on the other hand, views land as separate from culture. Rather than embrace land as an inherent extension of one's people, the Western ethos reflects a commitment "to *take* possession without becoming possessed," to take hold of land "and yet hold [it] at a rigidly maintained spiritual distance."[130] This "spiritual distancing" is reinforced by the Western Judeo-Christian heritage that conceptualizes the relationship between humanity and the natural environment as one of "domin-

126. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989). After living for many years on a reservation in South Dakota, Pommersheim observed that "[l]and is inherent to Indian people; they often cannot conceive of life without it. They are part of it and it is part of them; it is their Mother." *Id.* Besides being an Indian culture's historical source of subsistence, land "is the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape." *Id.*

127. *See* Anaya, *supra* note 14, at 24 n.102. Justice Blackmun wrote in 1988, "Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. . . . [L]and is itself a sacred, living being. . . . [L]and, like all other living things, is unique, and specific sites possess different spiritual properties and significance." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 460-61 (1988) (Blackmun, J., dissenting) (disagreeing with majority's holding that the Free Exercise Clause of the Constitution did not bar federal government from building a logging road which would destroy a site used by an Indian tribe for religious ceremonies).

128. *Draft Declaration*, *supra* note 14, art. 25.

129. A member of the Iroquois said of the teachings of her people, "Our instructions are . . . founded on the law of nature, implanted in us by Creation . . . . We are created to take care of the plants and animals and guard the land. We integrated our spiritual, political and economic life around this reality." Malloy, *supra* note 125, at 1596 (quoting Kahn-Tineta Horn, *Mohawk War at Oka: A Study of North American Indians in the "New World Order"*).

130. Pommersheim, *supra* note 126, at 250 (quoting F. TURNER, BEYOND GEOGRAPHY 238 (1986)).

ion."[131] Land and its resources have no inherently spiritual quality, but rather exist merely to serve human needs. Such was the view espoused by John Quincy Adams in an 1802 address:

> Shall the lordly savage . . . forbid the oaks of the forest to fall before the ax of industry and rise again transformed into the habitations of ease and elegance? . . . Shall the mighty rivers, poured out by the hands of nature as channels of communication . . . roll their waters in sullen silence . . . ? [S]hall every *purpose of utility* to which . . . [the bounties of Providence] could apply be prohibited by the tenant of the woods?[132]

The controversy over the Mille Lacs Band's treaty rights highlights the difference between Indian and non-Indian conceptualizations of land and its resources. Some of the strongest opposition to the Band's assertion of its rights came from recreational and sporting groups for whom hunting and fishing constitute utilitarian activities, be they recreational or commercial.[133] Accordingly, opponents of the Mille Lacs Band's rights argued that it is unfair that members of the Mille Lacs Band should be able to enjoy sport-fishing and hunting free of the regulations by which other Minnesotans must abide. Others argued that certain species of fish important to the state's tourism and sporting industry would become endangered.[134] Both arguments demonstrate the lack of knowledge members of a dominant society may have of their indigenous neighbors. In all of the opposition's public clamor little if any mention was made of the fact that the Chippewa bands implicated in the suit have their own fish and game regulations that all members must follow on or off their reservations.[135] Moreover, the opposition's rhetoric fails to account for Chippewa values which may make Indian hunting and fishing practices far more environmentally sound than those of other Minnesotans.

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131. *Genesis* 1:26-29.

132. ROBERT N. CLINTON, ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 669-70 (3rd ed. 1991) (quoting Royce, *Indian Land Cessions in the United States*, 18 UNITED STATES BUREAU OF ETHNOLOGY, pt. 2, at 535-37, 548-57 (1897)) (emphasis added).

133. A number of these groups came together and formed the Save Lake Mille Lacs Association with former Minnesota Vikings coach Bud Grant as their spokesperson. Robert Whereatt, *Chippewa Fishing Rights Settlement Faces Challenge: Hunting, Fishing Coalition Takes Case to Legislators*, STAR TRIB. (Minneapolis), Dec. 12, 1992, at 1B. The opposition did not end with the court's decision in favor of the Mille Lacs Band. Dennis Anderson, *Foes Promise to Fight as Long as Necessary*, STAR TRIB. (Minneapolis), August 25, 1994, at 1A. Undaunted by what they saw as a minor loss, public leaders of opposition groups asserted their determination that the fight would continue, all the way to the Supreme Court if necessary. *Id.*

134. *See, e.g.*, John Welsh, *Treaty Plan Gets Open House*, ST. CLOUD TIMES, Jan. 14, 1993, at 1C.

135. *See* GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION, CHIPPEWA TREATIES: UNDERSTANDING AND IMPACT 6-8 (n.d.).

Misunderstanding and ignorance about another culture often results in oversimplified caricatures of what other people are like. Stereotyping, long a problem faced by indigenous peoples both at home and abroad,[136] is augmented by Western culture's tendency toward "all or nothing" classification.[137] Under this "either-or" logic, the dominant culture tends to perceive Native traditionalism and modernization as mutually exclusive.[138] Native culture is seen as either vanishing or persisting, either resisting or assimilating.[139] In sum, Native peoples "either hold on to their separateness or 'enter the modern world.' "[140]

This dichotomy is evidenced in non-native media and other public portrayals of Native Americans. On one hand, Indians are frozen in a romanticized past by both the entertainment industry and the scientific community. While Hollywood propagates the image of pony-riding primitives, museum exhibitions authenticate this "false image by portraying Native Americans as people who existed back in time but who have now vanished."[141] On the other hand, portrayals of contemporary Indians and Indian issues tend to emphasize sensational topics such as casino profits or tax advan-

136. Over twenty years ago the American Indian Movement (AIM) stated that "[o]ne of the main issues in changing society is to wipe out the stereotyped images of Indian people. . . ." AIM (AMERICAN INDIAN MOVEMENT) ANNUAL REPORT, Feb. 1970, at 7. *See also Working Group's 12th Session Report*, *supra* note 19, at 18. In response to repeated testimonies from indigenous representatives regarding media misrepresentation, the Draft Declaration included the right of indigenous peoples "to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information." *Draft Declaration*, *supra* note 14, art. 16.

The problem of stereotyping has intensified since the dawn of the media age. In his exploration of the history and ramifications of western colonization of the Near East, Edward Said observes that stereotypes have been reinforced by television, films, and other forms of media that force information into "more and more standardized models." SAID, *supra* note 70, at 26.

137. Strickland, *supra* note 122, at 182.

138. JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART 341-42 (1988).

139. *Id.*

140. *Id.* Anthropologist James Clifford witnessed this false dichotomy in action in a 1977 trial in which the Mashpee community of Indians sued for federal recognition of their tribal status. *Id.* at 279. Members of the Mashpee community, Clifford observed, "were active in the economy and society of modern Massachusetts. They were businessmen, schoolteachers, fishermen, domestic workers, small contractors." *Id.* at 278. To complicate matters further, few of the Mashpees "looked" Indian; after two centuries of interracial marriage, some of them could pass for black or white. *Id.* at 285. The jury was thus confronted with a "collection of highly ambiguous images" from which to reach its decision of whether the Mashpee community constituted a "tribe" in continuous existence since the 16th century. *Id.* at 284. "Looked at one way, they were Indian; seen another way, they were not. Powerful *ways of looking* thus became inescapably problematic." *Id.* at 289.

141. Gene A. Marsh, *Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items*, 24 ARIZ. ST. L.J. 79, 85 (1992).

tages, equating "modern" with "assimilated" by implying that Indians doing "nontraditional" things should be subject to the same laws as everyone else.[142] In the end, there is no middle ground for describing contemporary American Indians, and "few people today appreciate that Native American culture is not a thing of the past."[143]

Yet, however inaccurate or uninformed non-native perceptions may be, it is within this context that indigenous peoples must struggle to protect their cultural integrity. As noted earlier, culture provides the interpretive machinery with which people approach their experiences and make sense of their world.[144] This interpretive scheme provides a basis for communication among a society's members. As one author explains, societies employ "sign systems" in expressing ideas and making comparisons among otherwise unlike things. Each "sign system" has at its base a "common denominator" into which things are translated in order to make meaningful comparisons.[145] In the sign system of economics, for example, the common denominator is money, and dissimilar things may be rendered comparable by assigning them a monetary value.[146] Because incompatible sign systems may make meaningful discourse between them impossible, cultural misunderstanding often boils down to a "symbolic" struggle over the "legitimate" vision of the world.[147] When the struggle is between groups of unequal power, the "categories" and "vision" of the dominant group tend to trump those of the weaker. "There is an official point of view, which is the point of view of officials and which is expressed in official dis-

142. During his research on comparing Indian values with those of the market economy, Malloy observed for the first time the prevalence of non-Indians' ignorance toward the large Indian population right at their doorstep: "For the vast majority of people I spoke to in central New York, the first thing that came to mind when I asked about the local Native American population was bingo. After bingo came tax-free cigarettes and gasoline." Malloy, *supra* note 125, at 1582. *See also* CLIFFORD, *supra* note 138, at 284 (observing that a "troubling uncertainty" has found "its way into the dominant image of Indians in America" since Indians have begun doing "sophisticated, 'nontraditional' things").

143. Marsh, *supra* note 141, at 85.

144. *See supra* notes 120-24 and accompanying text.

145. Malloy, *supra* note 125, at 1572-73.

146. *Id.* In the "market place" paradigm:

> [E]verything is equated with everything else. To equate things means to give them a price and thus to make them exchangeable. To the extent that economic thinking is based on the market, it takes the sacredness out of life, because there can be nothing sacred in something that has a price. Not surprisingly, therefore, if economic thinking pervades the whole of society, even simple non-economic values like beauty, health, or cleanliness can survive only if they prove to be "economic."

Id. at 1573 n.7.

147. PIERRE BOURDIEU, IN OTHER WORDS 134 (1990).

course. . . . [It is] an almost divine discourse, which assigns to everyone an identity . . . . [and] says what people have to do, given what they are."[148]

The elements of cultural misunderstanding are compounded in the courtroom. There, Native peoples must not only combat the non-native society's stereotyped "vision" of Native identity, but must do so in a sign system often totally incompatible with their own.[149] Because the courtroom is an institution of the dominant society, the adversary system is inextricably tied to the values and meanings of Western culture.[150] Indian litigants must therefore present themselves and their interests in ways which will be recognized by the surrounding culture, regardless of whether those representations are consistent with their own perceptions.[151] True dialogue in Indian issues is thus stifled by many powerful factors which affect both Indians' ability to communicate and non-Indians' presumptions about what Indians will likely say. Too often, Indian advocates must make use of doctrines that are easily confused with the Indians' true perspective on an issue, as when a tribal claim is based on the federal trust doctrine.[152] It should "go without saying that litigation of that sort does not necessarily mean that Indians approve of domestic dependent nationhood status and plenary congressional power."[153]

It is here, in the context of cultural misunderstanding and imbalanced power, that treaties potentially play an important role in helping Native peoples protect their cultural integrity through the exercise of self-determination. Whether they address hunting, fishing, mineral resources or issues of self-government, the rights reserved by a Native people in a treaty represent things of value. Ideally, the existence of such an agreement provides both parties with some assurance that the rights so secured will be protected in the years to come, regardless of economic, ideological, or other shifting trends in either culture. Indeed, in the early period of European relations with non-European peoples, the treaty was the standard means of cementing and cultivating those relations.[154] Now, half a millenium later, the international community turns its attention

148. *Id.* at 136.

149. *See* Malloy, *supra* note 125, at 1576.

150. *See* CLIFFORD, *supra* note 138, at 329.

151. As Clifford observed, in the Mashpee trial the discourse of Indian litigants and their attorneys may be compromised and crippled not only by the law "but by powerful assumptions and categories underlying the common sense that support[s] the law." *Id.* at 337.

152. *See supra* notes 33, 47-49, and accompanying text.

153. Frickey, *supra* note 27, at 1230 n.435.

154. *See supra* notes 24-30, 34-36, and accompanying text.

once again to the institution of treaty making in its search for ways to structure indigenous rights within the matrix of a sovereign state. In 1988 the Working Group commissioned a study on the contemporary role of treaties and other constructive agreements in shaping indigenous-state relationships.[155] In addition, the Draft Declaration recognized treaties and other official agreements between nations and their indigenous peoples as a matter "of international concern and responsibility."[156] Accordingly, the Draft declared: "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States . . . according to their original spirit and intent. . . ."[157]

The institution of treaty-making with Native peoples has deep roots in American tradition.[158] The very designation of such agreements as "treaties" elevated them to a particularly high degree of authority as, under the Constitution, all United States treaties are part of the supreme law of the land.[159] While the notion of sovereignty on which the Indian treaty rested suffered greatly under the ideological trends of the late nineteenth century, the treaties themselves continue to be relied upon by the descendants of the peoples who made them. Because the courts have become the main governmental arena in which treaty rights are protected, the judicial canons of treaty construction are crucial to Native sovereignty. It is thus of great consequence that the canons, as currently used, fall short of both the original conception of sovereignty and the emerging concept of indigenous self-determination.

B. Treaty Litigation in American Courts

1. The Canons of Treaty Construction: A Marshall Legacy

The importance of Chief Justice John Marshall in the development of American Indian jurisprudence has already been discussed. However, his reasoning in *Worcester v. Georgia*[160] is especially rele-

155. *Report of the Working Group on Indigenous Populations on its Sixth Session*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 40th Sess., U.N. Doc. E/CN.4/Sub.2/1988/24, at 25-30 (1988).

156. *Draft Declaration*, *supra* note 14, pmbl.

157. *Id.* art. 36.

158. *See supra* note 37 and accompanying text.

159. U.S. CONST. art. VI, cl. 2.

160. 31 U.S. 515 (1832). For Chief Justice Marshall, the frequent use of the term "nation" to refer to Indian peoples was no less significant, for it denoted "a people distinct from others" and "consequently admit[ted] their rank among those powers who are capable of making treaties." *Id.* at 559. Marshall went on:

> The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, hav-

vant in light of the Mille Lacs Band's case and the international struggle for indigenous rights at the United Nations. Not only is *Worcester* the source of the canons of treaty construction used in *Mille Lacs Band of Chippewa*, it also reflects the tensions which continue to exist between Native peoples and non-native governments today. Marshall began his *Worcester* opinion with the following observations:

> This cause, in every point of view in which it can be placed, is of the deepest interest.
>
> . . . .
>
> The legislative power of a state, the controlling power of the constitution and laws of the United States, [and] the rights, if they have any, [and] the political existence of a once numerous and powerful people . . . are all involved in the subject now to be considered.[161]

The issue in *Worcester* was the validity of certain laws of the State of Georgia that purported to divest the Cherokee Nation of its political existence and bring it entirely within the scope of Georgia law.[162] Marshall's "first step . . . in the inquiry" was to examine the history of relations between Native peoples and colonial power back to the first treaties with Great Britain and to consider under what principles such relations were carried out.[163] Marshall found that the British Crown had abided by the doctrines of discovery and Indian title, under which they assumed only the power to exclude other European powers from the discovered region and to acquire land through treaties with the Native peoples living there.[164] By making its own treaties with Native peoples, the United States ratified the policy followed by Great Britain and subjected itself to the same terms.[165]

> ing each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Id. at 559-60.

161. *Id.* at 536 (citations omitted).

162. Through the statutes in question, the State of Georgia sought to "seize on the whole Cherokee country, parcel it out among the neighbouring counties of the state, extend her code over the whole country, abolish [the Cherokee nation's] institutions and its laws, and annihilate its political existence." *Id.* at 542.

163. *Id.*

164. *See supra* notes 34-36 and accompanying text. While Marshall does not explicitly mention "Indian title," he nonetheless invokes it in principle in his discussions of the doctrine of discovery. For example, he found that discovery "gave the exclusive right to purchase, but did not found that right on a denial of the right of the [Native] possessor to sell." *Worcester*, 31 U.S. at 544.

165. *See supra* notes 37-39 and accompanying text. As Marshall emphasized throughout the opinion, "This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their na-

Because the United States did not have the power to unilaterally extinguish the inherent sovereignty of Native peoples, Marshall turned to the Cherokee Nation's treaties with the United States to see whether the Cherokees themselves had relinquished their sovereignty in any way.[166] Marshall found that there were, indeed, several provisions that could be construed as relinquishing sovereignty, in particular, a provision that read:

> for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and *managing all their affairs*, as they think proper.[167]

In spite of the possible ways such provisions might be interpreted, Marshall considered the Cherokee Nation's relationship with Great Britain, and the similar relationship which ensued with the United States, and found it impossible that the Cherokees would have understood any term or phrase in the treaties as constituting a relinquishment of their sovereignty.[168] With regard to the provision which granted Congress the power of "managing all their affairs," Marshall noted that the subject matter of the article in which this passage occurred was the regulation of trade. Consequently, he concluded, it was "inconceivable" that:

> [the Cherokees] could have supposed themselves, by a phrase thus slipped into an article, . . . to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties . . . . It would convert a treaty of peace covertly into an act, annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.[169]

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tional character, and submitting as subjects to the laws of a master." *Worcester*, 31 U.S. at 555.

166. *Id.* at 551-56.

167. *Id.* at 553.

168. After reviewing a number of provisions in the treaty of Hopewell which might have indicated the Cherokees' surrender of self-governing power to the United States, Marshall noted that "[t]hese terms had been used in [the Cherokees'] treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government." *Id.* at 553.

169. *Id.* at 554. A similar provision regarding congressional regulation of trade appeared in a second treaty between the Cherokees and the United States, upon which Marshall commented, "No claim is made to the management of all their affairs. This stipulation has already been explained. The observation may be repeated, that *the stipulation is itself an admission of [the Cherokee's] right to make or refuse it.*" *Id.* at 556 (emphasis added).

In sum, Marshall determined that, notwithstanding the precise terminology employed, a treaty's interpretation should be governed by the "spirit" of the sovereign-to-sovereign relationship on which the treaty was based.[170]

Marshall's reasoning in *Worcester* laid the groundwork for the canons of treaty construction still used today. First, his consistent pattern of considering the likely expectations the Cherokees brought to their treaties established the canon requiring that an Indian treaty be interpreted as the ratifying Indians would have understood it.[171] Second, his handling of the provisions that might have indicated a relinquishment of the Cherokees' sovereignty gave rise to the canon requiring that any ambiguities in a treaty's language be resolved in favor of the Indians.[172] Finally, Marshall's invocation of a treaty's underlying "spirit" as controlling the

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170. *Id.* at 554. As Marshall put it:

> This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them; but its essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war; and ascertain the boundaries between them and the United States.

Id.

171. For example, Marshall stated that to interpret the phrase "managing all their affairs" as a "surrender of self-government" would constitute "a perversion of [its] necessary meaning, and a departure from the construction which has been uniformly put on [it]." *Id.* at 553-54. *See also* Jones v. Meehan, 175 U.S. 1, 4-5 (1899) (explaining that the canon is necessitated by the ratifying Indians' unfamiliarity with English legal terms and their reliance on interpreters in treaty negotiation); Choctaw Nation v. United States, 119 U.S. 1, 28 (1886) (explaining that the canon of interpreting a treaty as the Indians understood it is justified by the greater bargaining power of the U.S. government). In 1977 the Supreme Court explained the canon as requiring that a treaty be construed, "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1979).

172. *See supra* notes 164-67 and accompanying text. In one treaty, for example, the term "allotted" was used in a provision that drew "the boundary between the Indians and the citizens of the United States." *Worcester*, 31 U.S. at 552. While the word "allotted" supported the interpretation that the United States was granting land to the Cherokees, Marshall rejected that construction and insisted instead that, to the contrary, the Cherokees "were ceding lands to the United States . . . ." *Id.* at 553. He added that, because it was not the case that "the term would admit of no other signification," and because its having been misunderstood was so apparent in light of the whole transaction, it was necessary to read the term "in the sense in which it was most obviously used." *Id.* A later Supreme Court reiterated Marshall's reasoning as follows:

> [I]t cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the Government, even if . . . they [could] foresee the "double sense" [of a provision] which might some time be urged against them.

Winters v. United States, 207 U.S. 564, 576-77 (1907).

interpretation of its language, and his insistence that any intention contrary to that "spirit" must be "openly avowed," led to the canon instructing that a diminishment of an Indian people's sovereignty could only be found in a clear expression of that intent.[173] While Marshall searched for clear expressions of intent within the treaty itself, later Supreme Court cases broadened his reasoning into a clear statement canon protecting Indian treaty rights, as well as sovereignty, from being diminished by subsequent federal legislation.[174]

Even more important than the canons themselves was the overarching paradigm within which Marshall worked. Marshall's inquiry proceeded from the premise that, by virtue of being the original possessors of Europe's "discovered" lands, Native peoples were sovereign entities who lost nothing through their relationship with a discovering power save their ability to choose among other European powers in the negotiation of future transactions.[175] Following from this premise, Marshall approached the Indian treaty as a grant of powers and rights *from* an Indian people *to* the United States government, and saw the Indians' own rights as "reserved" by them rather than "received" from some external power.[176] Consequently, the interpretive scheme that gave rise to the canons was part of a broader methodology that sought to secure the Native party's political survival in its ongoing relationship with the federal government.

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173. *See supra* note 166 and accompanying text.

174. *See, e.g.*, United States v. Dion, 476 U.S. 734, 738 (1986); Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903).

175. *See supra* note 133-36 and accompanying text.

176. As Frickey observes, the "reserved rights doctrine" is generally attributed to later Supreme Court cases, *see, e.g.*, United States v. Winans, 198 U.S. 371, 381-82 (1904); *Winters*, 207 U.S. at 576-77, yet it is nevertheless "rooted in a subtle Marshallian move in *Worcester*." Frickey, *supra* note 46, at 402. The subtle move Frickey is referring to is Marshall's discussion of the problematic provision which used the term "allotted" in reference to the boundaries of the Cherokee Nation's territory. *See supra* note 169. Because the subject of the provision "was the dividing line between the two nations," *Worcester*, 31 U.S. at 552, Marshall found it likely that the Cherokees' "attention" would "have been confined to that subject" and would not have been alert to other possible meanings in the English words used. He explained his point as follows:

> When, in fact, *they were ceding lands to the United States* . . . it may very well be supposed that they might not understand the term employed, as indicating that, instead of granting, they were receiving lands.

Id. at 553 (emphasis added).

2. The Canons Today: *Mille Lacs Band of Chippewa v. Minnesota*

Five years after *Worcester*, the United States began negotiating a treaty with the Chippewa to acquire a large tract of land in what was then the Wisconsin Territory.[177] From July 20-29, 1837, over 1,000 Chippewas gathered to meet with Wisconsin Territorial Governor Henry Dodge who had been chosen to conduct the negotiations.[178] The general atmosphere of the daily meetings was one of amicability and mutual good will; Dodge described the President's relationship to the Chippewa as that of a "good father" who would treat them justly, and the Chippewa reciprocated the analogy, addressing Dodge as "my father" and referring to themselves as his "children."[179] Through their conduct and the concerns they raised, the Chippewa evidenced an understanding that the relationship they were establishing with the United States would be ongoing and that, like a "good father," the President invited their trust and offered them protection.[180]

Throughout the meetings the Chippewa emphasized their desire "to continue hunting, fishing, and gathering on the lands" the United States wished to acquire. Dodge responded that he would make that request known to the "Great Father," and assured the Indians that they would "be allowed, during his pleasure," to hunt and fish on those lands.[181] Dodge did not, however, "explain the meaning of the phrase 'during his pleasure.' "[182] On July 29, 1837, Dodge and the representatives of twelve bands of Chippewa ratified the treaty (1837 Treaty) that reserved, in Article 5, the Chippewa bands' right to continued use of the ceded lands. It stated: "The privilege of hunting and fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is

177. The area of the 1837 treaty now straddles the border between Wisconsin and Minnesota. *Mille Lacs Band of Chippewa*, 861 F.Supp. at 793-94.

178. *Id.* at 794-95.

179. *Id.* at 796. To the Chippewa, a treaty represented not merely an agreement between their people and the United States; it symbolized a "personal commitment between their chiefs and the President." *Id.*

180. *Id.* When Dodge asked a Chippewa spokesperson the price of their land, for example, the latter suggested a 60-year annuity, after which time "our grand children who will have grown up, can speak to you for themselves." *Id.* at 795-96.

181. *Id.* at 796. The land in question was, at the time, "a wilderness with only a few hundred non-Indian residents." *Id.* at 794. Dodge added that it would "probably be many years" before the "Great Father [would] want all these lands for the use of his white Children." *Id.* at 796.

182. *Id.* at 796.

guaranteed to the Indians, during the pleasure of the President of the United States. . . ."[183]

As early as 1849 there were rumblings among politicians in the territory about the Chippewas' 1837 rights.[184] In December of that year the Governor of the Minnesota Territory and a private businessman went to Washington, D.C., to urge the President to remove the Chippewa to the west side of the Mississippi and revoke the rights of the 1837 Treaty.[185] President Taylor responded by issuing a removal order on February 6, 1850 (1850 Executive Order), which stated, in part: "The privileges granted temporarily to the Chippewa Indians . . . by the fifth article of the [1837] treaty . . . are hereby revoked; and all of the said Indians remaining on the land ceded aforesaid are required to remove to their unceded lands."[186] The Mille Lacs Band received no notification of the order, however,[187] and the Commissioner of Indian Affairs argued that the order was unnecessary and would have "disastrous" consequences for the Indians.[188] Less than a year later, the federal government suspended efforts to carry out the order and, by 1853, they abandoned the policy of removing Indians westward in favor of a policy of creating reservations.[189]

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183. Treaty with the Chippewa of 1837, 7 Stat. 536, art. 5 [hereinafter 1837 Treaty].

184. In the fall of 1849, Alexander Ramsey, Governor of the Minnesota Territory, complained that the Chippewas' exercise of their 1837 rights had "demoralizing effects" on the settlers in the area and argued for the Indians' removal from ceded lands. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 802.

185. The motivation for the request was primarily economic. As the court found:

> [The politicians and business interests in the Minnesota territory] wanted to obtain more of the economic benefits generated by having a large number of Indians residing in their territory. If the Wisconsin Chippewa were removed to Minnesota, then Minnesota traders would be more likely to benefit from the annuity payments made to the Indians, Minnesota business would be able to compete for the lucrative business of supplying and transporting annuity goods, and Minnesota would receive money from Indian agencies for their operations and for schools, farms, and blacksmith establishments.

Id. at 803.

186. *Id.* at 803-04.

187. *Id.* at 805. The removal order did not address Chippewa bands living along Mille Lacs Lake but rather targeted bands living in the Wisconsin portion of the 1837 ceded area. *Id.* at 809.

188. After reviewing the order, the Commissioner concluded that removal was "not required by the interest of the citizens or Government of the United State[s]; and would in its consequences be disastrous to the Indians." *Id.* at 806. The Commissioner wrote to the Secretary of the Interior and recommended the order be "modified as to permit such portions of these bands as may desire it to remain for the present in the Country they now occupy." *Id.*

189. *Id.* at 806-08. The new Commissioner of Indian Affairs "believed that the use of reservations would allow Indians to learn the necessary skills to assimilate into Euro-American society while protecting them from the bad influences of traders and liquor dealers." *Id.* at 808.

In January, 1855, an Indian agent informed the bands of the Mississippi Chippewa, the Mille Lacs Band among them, that the United States wished to make a new treaty regarding "their claim to lands in Minnesota."[190] A month later a delegation of Chippewas traveled to Washington, D.C., to hold talks with federal officials for the purpose of, as they understood, negotiating the sale of yet unceded lands in northern Minnesota.[191] In Article 7 of the treaty that followed from the negotiations (1855 Treaty), the Chippewa agreed to "fully and entirely relinquish and convey to the United States any and all right, title or interest, of whatsoever nature the same may be, which they may now have in, and to, any other lands in the Territory of Minnesota or elsewhere."[192] Article 7 went on to describe "a 10 million acre tract of land located north and northwest of the 1837 ceded territory." The 1837 Treaty, the land it ceded, and the rights it reserved, were neither discussed in the 1855 negotiations nor mentioned in the 1855 Treaty.[193] In fact, the 1855 Treaty did not address hunting, fishing, or gathering rights at all.[194]

Minnesota became a state three years later and immediately enacted regulations for the hunting of deer, elk, and game birds.[195] For the first twenty-four years, the state did not systematically enforce its game laws. In the 1890s, however, a series of letters between state and federal officials expressed the view that the state's game laws applied to Indians hunting off their reservations.[196] For

190. *Id.* at 812. Federal officials discovered rather late in their relations with the Chippewas that all of the bands did not consider themselves part of a single people but rather claimed exclusive ownership of different areas in the region. *Id.* at 802. The general division appeared to federal officials to be between bands clustered in the north around Lake Superior and those further to the south near the Mississippi; consequently, the United States designated the groups as the "Lake Superior Chippewa" and the "Mississippi Chippewa," with the Mille Lacs Band classified within the latter group. *Id.* The United States' separate dealings with the two groups generated antagonism between them which, at one point, became so intense it required an agent to settle the matter once and for all by drawing a boundary line to establish their respective territories. *Id.* at 801.

191. *Id.* at 813. Negotiations took place from February 12 to 22, 1855. *Id.*

192. *Id.* at 815 (quoting Treaty with the Chippewa of 1855, 10 Stat. 1165, art. 7 [hereinafter 1855 Treaty]).

193. *Id.* at 815.

194. *Id.*

195. Minnesota "enacted statutes relating to seasons for hunting deer, elk, and game birds from the time of statehood in 1858." *Id.* at 820-21 (citing 1858 Minn. Laws 40, Ch. XIX; 1858 Minn. Laws 103 (setting hunting seasons for deer, elk, and several game birds); 1858 Minn. Laws 103, Ch. XLIV (extending Minnesota laws to Indians leaving their reservations and requiring passes to do so); 1858 Minn. Laws 105, Ch. XLV (illegalizing the use of various fishing technologies)).

196. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 821. In 1898, a Minnesota Congressman complained to the commisioner of federal Indian Affairs about local Indians hunting off their reservations in violation of game laws, to which the com-

the next century, members of the Mille Lacs Band exercised their 1837 off-reservation rights under the encumbrance of state laws or at the risk of penalties.[197]

In *Mille Lacs Band of Chippewa*, the Mille Lacs Band challenged Minnesota's authority to regulate tribal members' hunting and fishing practices in the area ceded in the 1837 Treaty.[198] The state defended its authority on the grounds that the 1837 rights were meant to be temporary and were revoked by the President in 1850, or, alternatively, that the Mille Lacs Band had relinquished those rights in the 1855 Treaty.[199] The questions before the court thus boiled down to: (1) whether the phrase "during the pleasure of the President" in article 5 of the 1837 Treaty indicated that the President could revoke the rights at his discretion;[200] (2) whether the 1850 Executive Order revoked them;[201] and (3) whether the Mille Lacs Band surrendered its 1837 rights in the 1855 Treaty.[202]

Resolution of these questions, the court explained, would require the interpretation of Indian treaties, an examination which could properly include the "history of the treaty, the negotiations, and the practical construction of it by the parties."[203] Accordingly, the court began its inquiry by considering the "historical background" of "Chippewa culture and their early interactions with Europeans."[204] From evidence provided by the testimony of historians and anthropologists, the court summarized Chippewa culture at the time of their first contacts with Euro-Americans. The court noted in particular the Chippewas' extensive use of natural resources for subsistence and trade and their seasonal migrations that took them from lakeshore fishing villages in the summer, to

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missioner replied that he had instructed the federal Indian agents in the state to educate the Indians about Minnesota's game laws. A 1926 letter from the commissioner of Indian Affairs in response to an inquiry from three Chippewa individuals instructed the latter to "comply with state law in view of the modified provisions of the [1855] treaty." Moreover, in 1934, a member of the Mille Lacs Band learned from the commissioner of Indian Affairs that his arrest for hunting deer off his reservation was valid. *Id.* at 821.

197. Not all federal officials at the turn of the century subscribed to the idea that Minnesota could impose its game laws on the Chippewa. In 1897, the U.S. Attorney General argued that two Chippewa were wrongfully imprisoned for violating state game laws because the Chippewa had reserved off-reservation hunting and fishing rights in the 1837 treaty. *Id.* at 832.

198. *See supra* notes 1-13 and accompanying text.

199. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 789-90.

200. *See supra* note 183 and accompanying text.

201. *See supra* note 186 and accompanying text.

202. *See supra* note 192 and accompanying text.

203. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 791 (citing *Lac Courte Oreilles Band*, 700 F.2d at 351).

204. *Id.* at 791.

wooded hunting grounds in the winter, to maple sugar groves in the spring.[205]

The United States' earliest relations with the Chippewa were governed by the Northwest Ordinance which provided that: "[t]he utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they never shall be invaded or disturbed."[206] In the 1830s the United States began actively purchasing lands from Indians east of the Mississippi river and "removing" the Indians westward.[207] Pursuant to this policy, Congress passed the 1830 Removal Act which authorized the President to negotiate with "such tribes or nations of Indians as may choose to exchange the lands where they now reside" for other lands west of the Mississippi, with the stipulation that: "nothing in this act . . . shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes."[208]

Having examined the historical backdrop and relevant federal enactments, the court considered whether the 1837 Treaty authorized the President to terminate the Chippewas' rights in the ceded lands at his discretion. For this purpose the court invoked two canons of treaty construction: first, that a treaty is to be interpreted as the Indians would have understood it; and, second, that any ambiguous provisions are to be resolved in favor of the Indians.[209] Based on extensive testimony from a linguist who specialized in the Chippewa language, the court found that the Band would not have understood the phrase "during the pleasure of the President" to place a temporal limitation on the rights. Rather, a more literal translation would have been "as long as the President is happy,"[210] which the Indians would likely have understood to mean that the rights would only be revoked if they "misbehaved" and made the President unhappy with them.[211] Although other interpretations of the phrase were possible, the court resolved the ambiguity in

205. *Id.* at 791-93.

206. *Id.* at 793. The Northwest Ordinance was originally enacted in 1787 by the Continental Congress and was later reenacted by the first U.S. Congress at 1 Stat. 51.

207. *See supra* note 51 and accompanying text.

208. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 793 (quoting 4 Stat. 411 (1830)).

209. *Id.* at 822. Interestingly enough, the court had already discussed the 1837 Treaty, the 1850 Executive Order, and the 1855 Treaty at some length well before it explicitly discussed the canons of treaty construction.

210. *Id.* at 797.

211. *Id.* at 804.

favor of the Band and concluded that the 1837 Treaty did not grant the President unfettered discretion but rather bound him to act in good faith.[212]

The court next turned to the 1850 Executive Order and invoked the clear statement canon to determine whether Congress had granted the President the power to issue it.[213] The court examined two congressional enactments relevant to the President's removal order and found that, not only had Congress not clearly granted the President authority to abrogate the treaty rights, the 1830 Removal Act expressly forbade such actions.[214] In addition, the Chippewa grant did not grant the President the power to revoke their rights or remove them from their land. The 1837 Treaty did not address removal and neither side had discussed the subject at the 1837 negotiations.[215] Moreover, even if the revocation of the 1837 rights had been within the scope of the President's removal power, the President did not issue the removal order in good faith, but rather at the behest of non-Indian interests in the territory.[216] Consequently, the removal order violated the "good faith" required by both the Indians' understanding of the 1837 Treaty and by the congressional enactments regarding Indians.[217]

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212. Here again, by the time the court applied the "ambiguities" canon, *id.* at 822, it had already resolved the "President's pleasure" clause in the Band's favor. *Id.* at 797. What the court seemed to find most compelling in its reasoning were the provisions of other federal enactments, such as the Northwest Ordinance, *see supra* text accompanying note 206, and the 1830 Removal Act, *see supra* text accompanying note 208, both of which bound the President to act in "good faith" toward the Indians. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 826-27. It is thus uncertain whether it was the treaty canons or the authority of federal legislation that controlled the court's interpretation.

213. *Id.* at 823. The court followed the test of "congressional authorization" established in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), which held that the "President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself." *Id.* at 585. When the President's action is clearly within the scope of authority delegated by the Constitution or Congress, it is to be given "the widest latitude of judicial interpretation"; outside of congressional authorization, however, the President enters "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637 (Jackson, J., concurring). In the latter case, the court is to "consider any information that might illuminate congressional views on the subject" and limit the President's power accordingly. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 823. The court noted that the Constitution does not grant the President power to abrogate Indian treaties. Consequently, such power could only derive from Congress or, in this case, the consent of the Chippewa. *Id.* at 823-24.

214. *See supra* note 208 and accompanying text. The other statute the court considered was the 1837 General Appropriations Act which provided money for "holding treaties with the various tribes of Indians east of the Mississippi river." *Mille Lacs Band of Chippewa*, 861 F. Supp. at 793-94.

215. *Id.* at 824.

216. *Id.* at 827. *See supra* notes 184-86 and accompanying text.

217. *Id.* at 827-28.

Finally, the court considered whether the Mille Lacs Band had surrendered its 1837 rights in the treaty of 1855. Here the court utilized all three canons. First, the 1855 Treaty itself contained no clear statement that the government intended to abrogate the rights reserved in 1837, and neither the legislative history nor the 1855 negotiations addressed the subject of hunting and fishing rights.[218] Second, linguistic, anthropological, and historical evidence revealed that the Chippewa bands did not anticipate that the 1855 Treaty would relinquish their 1837 rights. Moreover, the Chippewas continued to exercise their off-reservation rights after 1855, providing further evidence that they did not understand those rights to have changed.[219] The court concluded that, although the phrase "right, title, and interest" may have a different interpretation, any ambiguity was to be resolved in favor of the Mille Lacs Band.[220]

In the end, the court held that the 1837 hunting, fishing and gathering rights had never been extinguished and therefore remained valid.[221] The decision, although a victory for the Mille Lacs Band, reveals the demise of the treaty canons, and of federal Indian jurisprudence generally, since *Worcester*. Like much of federal Indian law since the end of treaty making, the written opinion is all but void of living Indians. Although three members of the Band appeared as witnesses in the trial, their testimony appears in a mere handful of sentences in the lengthy opinion.[222] The bulk of the discussion focuses on history—the history of governmental poli-

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218. *Id.* at 830-31.

219. As the linguist explained at trial, the phrase "relinquishing . . . all right, title, and interest" in land had no direct translation in the Chippewa language and would not have connoted the activities of hunting and fishing on the land without further explanation. *Id.* at 831. In addition, testimony from anthropologists about Chippewa seasonal subsistence patterns emphasized the importance of hunting, fishing, and gathering over a large area and indicated that the Mille Lacs Band would have starved if its subsistence activities were confined to its small reservation. *Id.*

220. *Id.* at 833.

221. *Id.* at 840-41.

222. In the court's exhaustive examination of all the "relevant evidence," the members of the Mille Lacs Band who testified at trial are mentioned exactly twice. After introducing the names and credentials of the eleven expert witnesses, the court noted:

> Three members of the Mille Lacs Band testified about the special importance of hunting, fishing, and gathering to their way of life. They told about the traditions learned from their parents and grandparents who taught them to hunt, fish, and gather. They also discussed the relationship of these activities to their traditional ceremonies and religion. . . . [A]ll three talked about the importance of these activities in supplementing their livelihood.

Mille Lacs Band of Chippewa, 861 F. Supp. at 791. The court addressed the Band members later in the opinion only to reiterate the basic message in the above statement. *Id.* at 831.

cies and enactments and the history of the Mille Lacs Band—all of it told through the documents and testimony of non-Indian "experts." The image of Chippewa culture that emerges is that of a semi-nomadic primitive people whose way of life centers around hunting, fishing, making maple syrup, and harvesting wild rice.[223] There is only the most fleeting glimpse of Chippewa life today, and that glimpse does little more than demonstrate that at least a few Chippewa Indians carry on the traditions of their ancestors and frequently suffer punishment under Minnesota state law for doing so.[224]

C. Rusting Canons in a Changing World

1. Construing Treaties as the Ratifying Indians Understood Them

The canon of construing a treaty as the Indians understood it requires "reconstruction" of an increasingly distant past and, because the last treaties were made well over a century ago,[225] there are no living participants or witnesses who can be called to testify. Courts must instead rely on evidence presented by historians and other scholars,[226] a situation which is problematic for several reasons. First, history itself is an interpretive science that changes over time as new generations of scholars re-interpret the past. Consequently, history, as a body of evidence, does not provide a single set of facts at any given moment, but is a struggle between competing theories.[227] Indeed, historians themselves admit "that their own views influence their construction of history,"[228] with the result that identical evidence may support entirely different constructions of the same events.[229] In such cases, it falls upon judges to

223. *See supra* text accompanying notes 204-05.

224. *See supra* note 213. Near the end of the opinion the court again noted that hunting, fishing and gathering continue to be "an important part of the culture, lifestyle, and economy of Band members" and noted also that two of the three members who testified had received citations for violating state game laws, one of whom spent two months in jail as a consequence. *Mille Lacs Band*, 861 F. Supp. at 831.

225. *See supra* note 45 and accompanying text.

226. The Mille Lacs Band's trial is a case in point. In the court's own words, the "largest part of the evidence was presented by eleven expert witnesses." *Mille Lacs Band of Chippewa*, 861 F. Supp. at 790. Among them were 5 historians, 4 anthropologists, a linguist, and a geographer. *Id.* at 790-91. In contrast, only three Indians appeared as witnesses. *Id.*

227. In closing arguments at the Mille Lacs Band's trial, for example, both parties accused the other of engaging in revisionist history. Pat Doyle, *A Clash of Culture, History, Law: When the Dust Settled, It was Still Two Arguments*, STAR TRIB. (Minneapolis), July 7, 1994, at A1.

228. Frickey, *supra* note 27, at 1211 n.365.

229. *See, e.g.*, CLIFFORD, *supra* note 138, at 294-310.

choose among the possible scenarios with the likelihood that their own experiences and values will in turn influence the interpretive process.[230]

A second problem with judicial reliance on scholarly experts is that history, as with all academia, is an institution of the dominant, non-native culture. As such, it presumes values and assumptions that may leave little or no room for other perspectives.[231] For example, Western culture gives greater credibility to the written than the spoken word.[232] Because Indian cultures originally preserved knowledge through a complex oral tradition,[233] the "Indian" side of early United States history is more often than not recorded and told by non-Indians.[234]

Third, even assuming the accurate portrayal of nineteenth century Indians' state of mind, the Indians' understanding of a treaty may complicate rather than clarify its interpretation.[235] As

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230. As Frickey observes, the act of interpretation "has a situated nature" and is shaped by the interpreter's own place in history. Frickey, *supra* note 27, at 1217.

231. *See supra* notes 141-50 and accompanying text.

232. *See* CLIFFORD, *supra* note 138, at 39-41.

233. In fact, some Indians today still resist "writing" as symbolic of European hegemony:

> I detest writing. The process itself epitomizes the European concept of 'legitimate' thinking; what is written has an importance that is denied the spoken. My culture, the Lakota culture, has been an oral tradition, so I ordinarily reject writing. It is one of the white world's ways of destroying the cultures of non-European peoples, the imposing of an abstraction over the spoken relationship of a people.

Malloy, *supra* note 125, at 1587 (quoting Russell Means, *Fighting Words on the Future of the Earth*, MOTHER JONES 22, 25 (Dec. 1980)).

234. *See* CLIFFORD, *supra* note 138, at 342. In *Mille Lacs Band of Chippewa*, the court's finding of the Band's understanding of the 1837 Treaty is predominantly based on testimony from the "expert" linguist who explained how the phrase "during the pleasure of the president" would likely have been translated into the Chippewa language. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 795, 827. Additional support for the court's finding came from the official treaty journal, *id.* at 795 (containing an official's comment that the interpreters were "unfit to act in that capacity"), and a comment made by a missionary who attended the treaty negotiations. *Id.* (stating that the government's interpreter was "a thick-mouthed, stammering Irishman not being able to speak intelligibly in either language"). Similarly, the court's determination of the Indians' understanding of the 1855 Treaty was based on the expert testimony of the linguist, *id.* at 831 (stating that there was no Chippewa equivalent to the legal phrase "right, title and interest") and an ethnohistorian, *id.* (explaining that conditions were such that the Indians would have starved if the 1837 rights were terminated). No testimony from any of the three Indian witnesses was cited as relevant evidence of the Indians' understanding of the treaty.

235. During the treaty negotiations of 1855, for example, Chief Hole-in-the-Day (from another band—Mille Lacs representatives did not participate at these particular negotiations) spoke at length about the superior ways of the whites and how his people desired to settle down and leave their old ways. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 813-14. While non-Indians might easily construe such talk as indicating that the Indians understood that a treaty's provisions would amount to an abandoning of Indian traditions, the understanding shared among the Indians them-

numerous modern historians have pointed out, many treaties were not entered into freely by tribes but were the product of coercion, deliberate miscommunication, or military threat.[236] Interpreting such treaties as the Indians understood them poses a problem, since they may very well have understood a treaty to be fraudulent or coercive and may have ratified it only to save their people from starvation or military annihilation.

Finally, relying on history at the expense of the present reinforces cultural stereotypes by freezing Indians in the past and ignoring the reality of who they are today.[237] Because "modern" often connotes full assimilation into the "melting pot," non-natives tend to perceive Indians who appear "modern" as having no valid interest in rights established over a century ago, particularly if those rights appear to non-natives as special privileges unavailable to other citizens.[238] Thus Indian litigants must often play up to historical stereotypes or risk losing their treaty rights.[239] In short, *contemporary Indian views, unless they demonstrate the persistence* of historical conditions or practices, may often have no place in court.[240]

2. Resolving Ambiguous Provisions in Favor of Indians

The canon of resolving ambiguities in favor of the tribe likewise fails to protect the interests of contemporary Indian communities. Most importantly, the canon does not specify who is authorized to determine what is in an Indian community's "favor," and since the decline of tribal sovereignty, the federal government received that responsibility under the doctrine of plenary power.[241]

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selves may have been quite different. As one historian testified at trial, many Indians during that period had adopted a strategy of playing up to federal officials as a means of leveraging their bargaining position while at the same time struggling to preserve their way of life. *Id.* at 814. Chiefs often "reassured their agents that they were now wearing white mans [sic] clothes, living in cabins, sending their children to school and working hard tending their gardens. They knew this was exactly what *the government wanted to hear.* Hole-in-the-Day was particularly accomplished at this strategy." *Id.*

236. While many early treaties were made when Native peoples still retained a great deal of bargaining power, *see e.g., supra* notes 35, 37 (showing Marshall's discussion of the "fierce and warlike" character of Native peoples), many if not most later treaties "were imposed on tribes unilaterally, often when their members were essentially prisoners of war, and their terms were often unilaterally changed anyway before ratification by the Senate." Frickey, *supra* note 27, at 1156 n.112.

237. *See supra notes 137-40 and accompanying text.*

238. *See supra* note 141 and accompanying text.

239. *See supra* notes 149-51 and accompanying text.

240. *See supra* notes 222, 224 and accompanying text.

241. Clinton, *supra* note 48, at 132. *See also supra* notes 47-50 and accompanying text.

As the repeated failure of federal policies demonstrate, the imposition of non-Indian answers has resulted in substantial cultural loss as well as a severe erosion of Indian autonomy. More often than not, federal solutions have consisted of " 'answers' to the wrong questions, for the questions were framed by the wants and desires of a western, expansionary society, not by the needs and values of tribal communities."[242]

The persistent disparities in cross-cultural understanding preclude the adequate protection of treaty rights when they are interpreted by dominant culture. In treaty litigation, the use of nonnative criteria in determining a tribe's best interests may expose treaty rights to abrogation. Under the western economic paradigm,[243] for example, the economic development occurring on many reservations may justify finding abrogation on the grounds that, because the activity is no longer economically expedient, abrogation of the right will not be contrary to the tribe's best interests. Indeed, at least one Supreme Court case indicates a move in that direction,[244] and much of the publicity surrounding the Mille Lacs Band's settlement proposal with Minnesota reflected similar sentiments.[245] As one onlooker put it, Band members "don't really need the resources any more. They have the casino and they have a lot of income."[246]

3. The Clear Statement Canon

In treaty litigation no less than in other areas of statutory interpretation, the clear statement canon is arguably a misnomer. First, it suggests that congressional enactments provide clear answers to all possible contingencies when, in fact, the precise ques-

242. Pommersheim, *supra* note 126, at 248. Far from being unique to the United States, the imposition of solutions by a dominant culture has been the typical experience of indigenous peoples throughout the world. In a 1989 U.N. seminar on the effects of racism on social and economic relations between governments and indigenous peoples, participants agreed that "top-down" planning by nonindigenous interests compounded the victimization and exclusion of indigenous peoples. Barsh, *supra* note 85, at 601. Central to the problem was the emergence of a new form of racism based on cultural and political, rather than biological, characteristics. *Id.* The seminar's final report emphasized that "racism in the guise of state theories of cultural, rather than biological, superiority results in rejecting the legitimacy or viability of indigenous peoples' own values and institutions." *Id.* at 602.

243. *See supra* notes 130-32 and accompanying text.

244. In *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 686, the Court seemed to suggest that off-reservation fishing and hunting rights guaranteed by treaty might be limited to that which is necessary "to provide the Indians with a livelihood—that is to say, a moderate [standard of] living." *See also* supra note 23 (discussing the degrees to which state governments may regulate and limit Indians' off-reservation hunting and fishing rights).

245. *See supra* notes 133-34 and accompanying text.

246. Welsh, *supra* note 134, at 1C.

tions that arise in litigation are unlikely to have been considered by the enacting Congress, much less addressed explicitly in a statute's language.[247] As a practical matter, then, what the canon really requires is not a literal "clear statement" of congressional intent, but rather evidence that Congress at least considered the statute's possible ramifications and chose to pass it anyway.[248] Second, even where Congress clearly states its intentions, the canon suggests that such intentions never change. On the contrary, public needs and political approaches to them do change over time, and Congress' intentions change accordingly.[249] Consequently, courts frequently must examine subsequent legislation, and the respective legislative history, and attempt to bring issues that emerged under prior congressional goals into harmony with subsequent "clearly stated" goals.[250] Finally, the clear statement canon does not account for the frequent failure of an enactment's measures to bring about its clearly stated goals. In such cases, courts may exercise broad interpretive latitude on the grounds that they are effectively "implementing rather than frustrating the legislators' design."[251] In the end, many of the congressional intentions "found" by courts are less "clear statements" than judicial interpretations, arrived at with very few hard-and-fast rules as to how far the courts should go in the quest for an elusive congressional will.

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247. Frickey, *supra* note 27, at 1211.

248. Yet sometimes even this kind of evidence is lacking, in which event the courts may have to resort to "an imaginative reconstruction of what the enacting Congress would probably have said about the issue had it been forced to address it." Frickey, *supra* note 27, at 1212. *See also Dion*, 476 U.S. at 739-40 (explaining that congressional intent to abrogate a treaty right " 'can also be found . . . from clear and reliable evidence in the legislative history of a statute.' . . . What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogation of the treaty." (citation omitted)).

249. The history of federal policy toward Indians is rife with examples of changing intentions. *See, e.g., supra* note 57 (discussing land allotment); *supra* notes 58-59 (discussing forced assimilation); *supra* note 60 (discussing termination of tribal status).

250. The historical vacillation of federal Indian policy has given the courts ample opportunities to address ongoing problems which arose under a federal policy which had long since become defunct. Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), for example, presented the Court with the question of whether the Menominee Indians still retained their treaty rights after their reservation status was terminated by the Termination Act and then later reinstated when the termination policy itself was terminated. Numerous other cases have posed the problem of whether reservations, or portions of reservations, retain their distinct character as "Indian country" after having largely fallen out of Indian ownership under the Allotment Act. *See, e.g.,* Solem v. Bartlett, 465 U.S. 463 (1984).

251. Frickey, *supra* note 27, at 1214 n.376 (quoting Daniel Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 310-11 (1989)).

These problems are especially acute when a court must look for a clear statement of congressional intent to abrogate a treaty right. A historical federal enactment will unlikely address all possible future contingencies, and congressional intent has certainly been historically fickle regarding Indian issues.[252] In the face of statutory ambiguity and a mounting body of evidence of federal purposes gone awry, treaty litigation provides a fertile field for interpretive license in the courts. Indeed, congressional intent, though routinely alluded to in Supreme Court cases, fails to explain many of the Supreme Court's decisions. The Court frequently goes to great lengths to fabricate a congressional intent not evidenced in any legislative history,[253] and has even controverted an enactment's clearly stated purpose where it appeared inconsistent with an unclear subsequent federal policy.[254]

Plenary power notwithstanding, one may wonder precisely which branch of the federal government is ultimately responsible for articulating the "intent" purported to require the outcome in any given case. What does seem clear is that the whole exercise largely eclipses the intent of the Indians. The clear statement canon essentially cancels out the canon of interpreting a treaty as the ratifying Indians understood it. The search for congressional intent essentially calls for interpreting a treaty and subsequent legislation as *Congress* understood it.[255] Moreover, the doctrine of plenary power, far from providing judicially cognizable standards for interpretation, offers instead the escape hatch of judicial deference to congressional will, however tenuously demonstrated.[256] Given non-native culture's preference for the written word and its government's proclivity for keeping records, some evidence of congressional intent, however sketchy, may turn up that, when buttressed

252. *See supra* part I.A.2.

253. *See, e.g.*, Frickey, *supra* note 27, at 1149-50 (discussing *Solem v. Bartlett* and observing that the Court admitted "the nonexistence of congressional intent" but pushed ahead "to find it anyhow").

254. *Id.* at 1146-48 (discussing *Menominee Tribe of Indians v. United States* and observing that the Court's decision conflicted with all "the available evidence of congressional intent").

255. *See, e.g.*, South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit . . . disregard of the clearly expressed intent of Congress.").

256. *See, e.g.*, Duro v. Reina, 110 S.Ct. 2053, 2066 (1990) (asserting that if "the present jurisdictional scheme proves insufficient to meet the practical needs [of the situation], then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs"). In several cases addressing an Indian people's inherent sovereignty, Frickey notes that "the Court has made no sustained attempt to justify the outcomes on the basis of congressional expectations"; rather, "the most meaningful role Congress has played . . . has been to give the Court a way to deflect responsibility." Frickey, *supra* note 27, at 1164.

by plenary power, could easily override the undocumented perceptions of Indians long since dead.[257]

4. An Uncertain Arsenal

In addition to falling out of touch with contemporary Native life, the canons of treaty construction have also lost much of their functional importance. This is partly due to the increasingly complicated legal context within which they operate. Indian case law has come to involve a panoply of considerations ranging from conventional statutory interpretation to particular fact patterns.[258] While individual cases may appear internally coherent, in the aggregate they seem little more than ad hoc judgments with no underlying method. A line of reasoning which prevails in one instance may fail in another, and determining precisely the most pertinent factors in any given precedent has become a formidable task.[259]

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257. The power of a clear, or not so clear, statement trumping Indians' understanding of a treaty is apparent in the *Mille Lacs Band* court's consideration of whether the 1855 Treaty ended the 1837 rights. The bulk of the evidence relied on by the court deals with *Congress'* understanding of the treaty. First, the court looked at the congressional act authorizing new treaties with the Chippewa and its failure to address hunting, fishing and gathering rights reserved in prior treaties, as well as a treaty made with several other Chippewa bands a year earlier that expressly left the 1837 rights intact. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 811-12. Second, the court noted that the Indian Commissioner's instructions to the agent appointed to negotiate the 1855 Treaty did not mention the 1837 rights, *id.* at 812, and the subject was not brought up in the negotiations. *Id.* at 815. Third, the 1855 Treaty itself made no mention of hunting, fishing and gathering rights at all, *id.*, and in fact contained provisions which suggested that the government expected the 1837 rights to remain in force. *Id.* at 817. Finally, the court examined correspondence between officials after 1855 that revealed that the Indians continued to exercise their 1837 rights in the ceded area without interference from the government. *Id.* at 818

Evidence of the Indians' understanding of the 1855 Treaty is scant in comparison and is derived mostly from governmental and historical documents. The official journal of the negotiations contained statements made by Indians indicating their assumption that they would continue to hunt and gather in the 1837 ceded lands. *Id.* at 814. Official correspondence verified that the Indians did in fact continue to use the ceded lands after 1855, *id.* at 818, and newspapers from the 1890s reported that they continued to do so even when the state began enforcing its game laws upon them. *Id.* at 821. In the end, the analysis is as much about the government's understanding of the treaty as it is about the Indians': "Based on a careful examination of the historical record established at trial, the court finds that the practical construction of the 1855 treaty by *the parties to it* indicated that *the parties* intended that the 1837 privilege continue to exist." *Id.* at 821 (emphasis added). While in this case the historical record was favorable to the Indians, it remains uncertain what the outcome might have been had some obscure governmental document turned up a contrary intention susceptible of interpretation as a "clear statement."

258. *See, e.g.*, discussion *supra* note 46.

259. Frickey, *supra* note 27, at 1174.

Not surprisingly then, the canons of treaty construction have become "notoriously unreliable predictors of judicial behavior."[260]

Here, too, *Mille Lacs Band of Chippewa* is illustrative. By the time the court rolled out the canons, most of its findings and interpretations had already been arrived at through other lines of reasoning.[261] The resulting decision rests, not on a concise canonical methodology, but on a multiplicity of factual findings that the court, through inclusive language, brought within the sweep of its holding.[262] In the end, the sounding of the canons appears less a matter of functional methodology than of symbolic decorum, a kind of three-gun salute to the Marshall legacy and the history of federal Indian law.

III. Returning to Roots: Toward a Self-Determination Approach to Treaties

This article began with the proposition that the foundations of federal Indian law as established by Chief Justice Marshall are more consonant with the paradigm of self-determination than with the colonial paradigm to which they eventually fell victim.[263] Con-

260. *Id.* at 1175.

261. The court did not introduce or specifically apply the canons until part VII in the opinion. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 822. In parts IV, V and VI the court had already found that the executive order did not alter the 1837 rights, *id.* at 810-11, and that the 1855 Treaty left the 1837 rights intact. *Id.* at 817-18. *See also supra* notes 209, 212.

262. In part IV of the opinion, for instance, the court examined the historical events surrounding the 1850 Executive Order. *Id.* at 801-11. Based on correspondence between government officials, the court found that no measures had been ordered or taken to implement the order's revocation of the 1837 rights. *Id.* at 801-11. Based on population statistics and correspondence between white clergy, the court found that the order's purported purpose of opening land for settlement was unnecessary. *Id.* A circular prepared to notify Chippewa communities of the removal order did not mention revocation of the 1837 rights, *id.* at 805, and there was no evidence that it had been distributed to the Mille Lacs Band. *Id.* at 809. Moreover, the agent responsible for the Mille Lacs Band had never received instructions about the order. *Id.* Subsequent governmental actions revealed that the removal plan was suspended less than a year later, *id.* at 806, and that the whole removal policy was abandoned in 1853. *Id.* at 808. Additional correspondence and "behavior" of officials in the territory indicated that they did not believe the order applied to the Mille Lacs Band. *Id.* at 809.

The court concluded part IV by stating, "Based on *all of this evidence*, the court finds that the 1850 executive order was suspended and that it never applied to the Mille Lacs band." *Id.* at 810-11 (emphasis added). While some clever interpretive gymnastics might somehow relate this line of reasoning back to the Indians' understanding of the 1837 treaty, "all of this evidence" seems to be more a matter of governmental red tape than of canonical construction. Not until part VII did the court revisit the 1850 Executive Order and base the order's invalidity on an application of the canons. *See supra* notes 212-13 and accompanying text.

263. Although his works have already been liberally cited throughout this article, it is appropriate here to express my indebtedness to Professor Philip Frickey, whose

sequently, it locates the shortcomings of the treaty canons not so much in the canons themselves, but in the broader conceptual framework within which they came to be utilized. In a certain sense, turn-of-the-century legal thinking was the embodiment of colonialism in its most mature form, animated by an unquestioned confidence in the superiority of Western civilization. For many in power, it was a foregone conclusion that Native peoples must either "blend into the American 'melting pot' and perish as a distinctive people" or gradually die off due to their inability to adapt to changes brought about by the advance of a superior civilization.[264] Ideological ethnocentrism quickly gave rise to political domination and an all-out assault on native social institutions. The well-being of Indian peoples came to be handled for them, rather than by them, until such time as the government thought they "could be trusted to take over their own affairs."[265] Political domination, in turn, led to the gradual exclusion of Indian nations and persons from the rest of American society.[266]

Colonialism as a distinct political activity may have ended, but its vestiges remain in the ethnocentrism, political domination, and exclusion which continue to mold relations between the peoples it brought together.[267] Although overt ethnocentrism has been largely whitewashed out of official American discourse, subtle versions of it remain. Political domination persists in legal doctrines which perpetuate the fallacy that non-natives, using Western val-

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analysis of Marshall's cases forms the backbone of my argument. Where I depart from Frickey's reasoning is primarily in my greater emphasis on international law and my broader exercise of imaginative license. Frickey proceeds from the practical stance of "taking the law as [he] finds it," Frickey, *supra* note 27, at 1155 n.111, a position which necessarily privileges domestic positive law over international and extra-legal considerations. At the same time, however, Frickey asserts that Marshall's methodology was influenced by an overall sensitivity to the colonial context of Native/non-native relations and urges that contemporary judges would do well to follow that example. *Id.* at 1219-22. This is essentially what I have attempted to do in the present article, except that I have ranged further afield in my exploration of what a more contextualized approach to treaty litigation might look like. Consequently, I have taken greater liberties with the law as I found it in order to imagine how else it might be. For example, whereas Frickey tends to conceptualize the canons of treaty construction as a "cushion" *against* plenary power, *id.* at 1215, my analysis situates the canons within a broader framework of sovereignty which, as I suggest, *predated* the doctrine of congressional plenary power. In addition, rather than attempting to work around plenary power as an immutable "given," I argue that absolute congressional power over Indians is not only contrary to Marshall's doctrine of sovereignty and the principles of self-determination, it also lacks any solid basis in domestic positive law and is even precluded by the United States Constitution. *See infra* part III.A.1.

264. Clinton, *supra* note 48, at 79.

265. *Id.* at 86.

266. *See id.* at 98.

267. *See supra* part II.A.

ues and modes of thought, are capable of determining what is in an Indian community's best interests. Indians continue to be excluded from public law and policy, as they have been for most of the United States' history.[268] It should come as no surprise, then, that federal Indian law itself contributes to this exclusion, given that the bulk of its development took place with no participation from Indians themselves.

One bitter result of this history is that the canons still used to protect treaty rights from federal or state encroachment bear the imprint of values and assumptions which run contrary to that end. At its heart, the colonial paradigm is premised on the colonizer's superiority over the colonized. Translated into judicial doctrine, the colonial paradigm lends itself to a presumption of Native incompetence and governmental benevolence: Indian peoples are presumed incapable of understanding and adapting to the changes imposed by an advanced civilization, and federal authorities are presumed capable of assessing Indian needs and making decisions in their best interests.[269] The twofold presumption of Native incompetence and governmental benevolence continues to be present in treaty litigation. As illustrated by *Mille Lacs Band of Chippewa*, the canons in their current form perpetuate subtle versions of cultural hegemony, political domination, and exclusion of contemporary Native interests from the process of protecting Native rights.

The international paradigm of indigenous self-determination suggests an inverse set of presumptions: Native peoples must be presumed competent to evaluate their own needs within the context of the larger society, and non-natives must be presumed *in*competent to make decisions regarding Native well-being.[270] At the heart of the international concept of self-determination is the "affirmation of the world's diverse cultures"[271] and the conviction that all human beings, both individually and as groups, "should be

268. Clinton, *supra* note 48, at 88.

269. Robert Clinton refers to this rationale as "the white man's burden," under which the federal government was duty-bound to lead "its indigenous charges into a Western enlightenment." *Id.* at 132. Along with the burden "went the plenary power to destroy Indian political organization, land holdings, culture, and the like, all under the banner of civilizing the savages." *Id.* This view was not unique to the United States. Edward Said, writing of Britain's colonization of Egypt, summed up the British administrators' perspective as follows: "[The native peoples] are a subject race, dominated by a race that knows them and what is good for them better than they could possibly know themselves." SAID, *supra* note 70, at 35.

270. The non-native legal community is not necessarily immune from the general cultural misunderstanding which pervades non-native culture. Frickey asserts that few lawyers "know anything about federal Indian law, and even fewer know anything about the realities of Indian life and culture." Frickey, *supra* note 27, at 1219.

271. Anaya, *supra* note 14, at 17.

in control of their own destiny."[272] As the United Nations has recognized, self-determination for indigenous peoples is a crucial prerequisite for the adequate protection of other fundamental human rights to which their members are entitled.[273] Accordingly, the United Nations' emerging conception of indigenous self-determination denounces Western ethnocentrism and asserts in its place the norm of cultural integrity. In place of political domination and exclusion it articulates a vision of double citizenship which entails both political autonomy and active participation in the surrounding society. Considering the bitter history of colonialism preceding the present stance of international law, it is perhaps remarkable that its emergent vision of Native peoples was foreshadowed as early as 1832 in Chief Justice Marshall's handling of *Worcester*.

A. The Marshall Legacy Re-envisioned

There is little to be gained in trying to fashion Chief Justice Marshall into a hero of Indian rights. Western civilization has heroes enough, many of them colonial conquerors. Nor would the historical record support such a revision. Marshall was a man of his times and his judicial opinions are replete with expressions of this colonial heritage, not only in his unquestioned faith in the "superior genius" of European civilization,[274] but in his characterization of Native peoples as "fierce savages"[275] whose main occupations were "war, hunting, and fishing."[276] It is also pointless to deny that, by taking colonization and its resultant impact on Native peoples as a given, Marshall's decisions essentially ratified colonial power and gave tacit approval to the "dominion" of one "distinct people" over another.[277]

Yet neither is it particularly useful to spend additional ink castigating Marshall as an imperialist, racist, or worse. What is important here is not the ideological content of Marshall's views, but the institutional structure he devised to order the relationship between Native peoples and colonial power within the U.S. federal system. What is perhaps amazing is that, unlike many jurists since his time, Marshall was especially loath to incorporate his own

272. *Id.* at 30.
273. *See supra* parts I.B.1, 2.
274. *Johnson*, 21 U.S. at 573.
275. *Id.* at 590.
276. *Worcester*, 31 U.S. at 542-43.
277. *Id.*

views, and the normative concerns those views often raised, into the actual fabric of his methodology.[278]

Amazing, too, is that even had he done so, the result would likely have been no less favorable to Indians.[279] However enamored Marshall may have been with the superior achievements of his own civilization, he was far less enthusiastic when it came to colonization. The following passage from *Worcester* is illustrative of his underlying doubts about the whole enterprise of colonialism:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing right of its ancient possessors.[280]

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278. As Frickey observes, Marshall attempted at every opportunity "to deflect the normative questions rather than address them directly." Frickey, *supra* note 46, at 388 n.35.

279. In *Cherokee Nation*, for example, Marshall opened the opinion with the following:

> This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society . . . .
>
> If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, . . . gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties . . . until they retain no more of their formerly exclusive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.

Cherokee Nation, 30 U.S. at 15. Notwithstanding his "sympathies," Marshall held that the Cherokee's claim against Georgia could not be remedied in the Supreme Court on the grounds that Indian peoples were domestic rather than foreign sovereigns. *Id.* at 15-17.

280. *Worcester*, 31 U.S. at 542-43. The rest of the passage continues in this vein:

> After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.
>
> Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturalists and manufacturers?

For Marshall, the very notion of such an exercise of power was "extravagant and absurd,"[281] and the theory of conquest on which it rested was "pompous."[282] Nevertheless, Marshall found it impossible, as the highest-ranking member among the "courts of the conqueror,"[283] to render a judicial decision which denounced the very power from which he derived his authority to render it.[284] Instead, Marshall relegated his personal views to dicta and set to the task of erecting a judicial methodology which might protect Native peoples from some of the worst effects of colonialism.[285]

The vision of Native peoples that emerged from his approach was, for its time, remarkably free from Eurocentrism. Marshall conceptualized an Indian people "as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself."[286] At the same time, Marshall did not lose sight of the special vulnerability of such societies in the face of an expansionary colonial government. His approach thus began with a presumption of Native competence and colonial ruthlessness, necessitating a firm political boundary between the two nations. Taken as a whole, therefore, the Marshall legacy was more than the promulgation of a doctrine. Rather, Indian sovereignty was a starting point, a paradigm within which to structure an ongoing political relationship between separate and distinct peoples.[287]

It is here that Marshall is prescient of the vision of indigenous self-determination that would emerge over a century and a half later. Whatever his thoughts about the eventual civilization of Indians, Marshall's framework stood to protect not only a Native people's exercise of internal self-government, but their cultural integrity. Nor did Marshall see any conflict between assimilation or modernization on the one hand, and Native sovereignty and political separation on the other. In *Worcester*, he interpreted the fol-

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281. *Id.* at 544-45.

282. *Johnson*, 21 U.S. at 590.

283. *Id.* at 588.

284. Marshall explained that "power, war, [and] conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend." *Worcester*, 31 U.S. at 543.

285. Frickey observed of *Worcester* that:

> [Chief Justice Marshall] undertook indirectly what he eschewed directly. As a formal matter, he continued to assume that he could not entertain fundamental challenges to colonization. As a functional matter, he apparently let his normative qualms about colonization to lead him to create a method of interpretation that presumed tribal sovereignty to be substantial as a matter of law even if it was weak as a matter of fact.

Frickey, *supra* note 27, at 1228.

286. *Cherokee Nation*, 30 U.S. at 16.

287. *See supra* notes 34-39, 158-65 and accompanying text.

lowing 1819 federal statute as denoting the government's intention to preserve the political survival of Native peoples:

> for the purpose of providing against the further decline and final extinction of the Indian tribes . . . , and for introducing among them the habits and arts of civilization, the president of the United States . . . is hereby authorized, in every case where . . . the means of instruction can be introduced with [the Indians'] own consent, to employ capable persons . . . to instruct [the Indians] in the mode of agriculture suited to their situation; and for teaching their children in reading, writing and arithmetic . . . .[288]

For Marshall, this statute was evidence, not of the government's desire for the gradual dissolution of Native peoples as distinct cultural and political entities, but rather "a settled purpose to fix the Indians in their country by giving them security at home."[289]

That Marshall's approach remains salient today is perhaps related to the persistence of the problems that had motivated him. The relationship between Native peoples and the larger society continues to operate within a context of cultural misunderstanding and ethnocentrism. As the history of the civil rights movement has shown, it is far "easier to change societal behavior than to eliminate prejudices."[290] In addition, Native peoples continue to be politically disadvantaged in their dealings with both federal and state governments. Although Native individuals now enjoy national citizenship as well as citizenship in their respective states, their ability to promote their interests through the political process remains minimal due to their demographic dispersement and the fact that, as a whole, they constitute 0.76% of the U.S. population.[291]

Marshall's own response to such concerns was to contemplate a particularly aggressive role for the judiciary in maintaining the political boundary between Native peoples and outside governments. As Marshall was well aware, the courts would often be the only forum available to Native peoples as a check on the political branches' exercise of power. Today, no less than in Marshall's time, there is a need for a judicial methodology which can "stand as a bulwark of demarcation" against "the one-way road of penetration and exploitation" inherent in colonial power.[292] Yet while the vestiges of colonialism remain, the courts have all but abandoned their post at the "dividing line" between peoples, taking the canons of treaty construction with them.

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288. *Worcester*, 30 U.S. at 557.
289. *Id.*
290. Clinton, *supra* note 48, at 152.
291. *Id.* at 78.
292. *Id.* at 121.

1. The Demise of the Treaty Canons: Sovereignty and the Plenary Predicament

"Canons of construction" in general have suffered much abuse since Llewellyn's famous demonstration that the right canon artfully deployed could yield nearly any interpretive result.[293] In federal Indian law, the canons of treaty construction still retain some of their original luster, yet even then they are anything but infallible; nor should they be. Canons are merely tools designed to operate within a larger theoretical framework. On their own, no canon or set of canons can be expected to control a court's decision.[294] The demise of the canons coincided with a broader shift in federal law and policy to accommodate the ambitions of colonial expansionism. The paradigm generated by colonialism essentially wrestled the canons from their original framework and remounted them on congressional plenary power.

The doctrine of plenary power stands in blatant opposition to the paradigm of self-determination. Simply stated, it holds that tribal sovereignty "exists only at the sufferance of Congress."[295] Self-determination, in contrast, affirms Native people's cultural integrity and political autonomy as the continued expression of an indigenous "peoplehood," the existence of which predates colonial power and thus cannot be "subject to the political whim or mercy of the nations in which they live."[296]

Plenary power cannot be accurately attributed to Chief Justice Marshall. In *Worcester*, Marshall held that the Cherokee Nation was a sovereign entity over whom the laws of Georgia could have no effect.[297] He underscored the Cherokee Nation's immunity from state law by placing Native peoples in a direct relationship with the U.S. government, a relationship he characterized as one of "trust." Indian peoples, he explained, were domestic sovereigns, under the protection of the United States as they had formerly been under the

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293. KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521 (1960). Llewellyn showed that the canons traditionally found in case law could, when wrenched from their factual context, be paired up to contradict one another. *Id.*

294. Frickey, *supra* note 46, at 428.

295. In 1978, the Supreme Court explained that:

> [The "incorporation" of Indian peoples] 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 . . . The sovereignty that the Indian tribes retain is of a unique and limited character. It *exists only at the sufferance of Congress and is subject to complete defeasance.*

United States v. Wheeler, 435 U.S. 313, 323 (1977) (emphasis added).

296. Clinton, *supra* note 48, at 116.

297. *See supra* notes 38, 159 and accompanying text.

protection of the British Crown.[298] Marshall's articulation of the federal trust responsibility, or as he described it, "protection," hearkened back to his earlier decision in *Cherokee Nation* where he likened the federal duty of care to that owed by a guardian to his ward.[299] It was a later judiciary that hoisted the doctrine of congressional plenary power up onto Marshall's pillar of federal trust. In *United States v. Kagama*,[300] the Supreme Court described congressional power over Indians, not as a constitutional power, but as an extension of the federal duty of trust justified by Native peoples' status as dependents. "These Indian tribes are the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power."[301]

Perhaps by 1886, when *Kagama* was decided, Native peoples were as desolate and helpless as the above passage suggests. Such was not the case of the Cherokee Nation some fifty years earlier. To the contrary, the Cherokees were a burgeoning, industrious community, quite independent in terms of their "daily food" and, until the State of Georgia enacted a statute to dissolve them as a political entity,[302] in no need of federal protection for their political rights. Consequently it is difficult to imagine that Marshall contemplated any need for absolute congressional power deriving from the Cherokee Nation's dependent status, especially given the conduct of the federal government at that time. During the period surrounding his decisions in *Cherokee Nation* and *Worcester*, the political branches of the government were running roughshod over Indians, and sometimes over Supreme Court decisions as well. Before those cases went to court, the federal government had denied the Cherokees' request for help in protecting their treaty rights. Shortly thereafter the federal government ordered and facilitated their removal from the State of Georgia.[303] In response to *Worcester*, Pres-

298. *See supra* notes 34-37 and accompanying text.

299. *See supra* note 33 and accompanying text.

300. 118 U.S. 375 (1886).

301. *Kagama*, 118 U.S. at 383-84 (emphasis added).

302. *See supra* note 162 and accompanying text.

303. *See* Frickey, *supra* note 46, at 405 n.108. Precisely what Marshall intended in his definition of the "protection" relationship is especially clear against this historical backdrop. Marshall's account of the trust relationship was less a description of "the actual state of things" than a prescription to remedy some of the ramifications of the "actual state of things." By emphasizing that the duties which adhered to the United States involved "protection [of the Cherokees] from lawless and injurious intrusions into their country," *Worcester*, 31 U.S. at 555, and by holding that the treaties that secured that protection for the Cherokees were valid, Marshall implicitly demonstrated that the federal government's current actions, and earlier "non-action"

ident Andrew Jackson allegedly declared: "John Marshall has made his decision: *now let him enforce it*!"[304]

In light of the political environment of Marshall's time, the later Court's fashioning of plenary power out of federal trust can only be seen as a gross distortion of Marshall's "guardian-ward" analogy. Marshall's trust responsibility was intended precisely to *prevent*, not *permit*, unfettered congressional power. Moreover, the awkward placement of the plenary doctrine on another doctrine is inconsistent with Marshall's pattern of grounding power, and its limits, in existing positive law. Indian sovereignty itself, while inspired by international doctrines, was ultimately anchored in the laws of the United States. In *Cherokee Nation*, for example, Marshall invoked the Commerce Clause of the Constitution which grants Congress the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[305] That "Indian tribes" were listed separately, he explained, was not to preclude their status as nations, but to distinguish them from nations "foreign" to the United States. Moreover, their inclusion in the Clause placed Indian peoples on a par with (sovereign) foreign nations and the (sovereign) states of the union, thus confirming their own sovereign status.[306] Later, in *Worcester*, Marshall invoked the federal government's treaties with Native peoples as a second source of Indian sovereignty. By the act of entering into a treaty, he surmised, the federal government ratified the sovereignty of the Indian people and brought all its future actions toward that people within the scope of judicial review.[307]

Unlike Indian sovereignty, congressional plenary power has no constitutional basis. The only mention in the Constitution of any congressional power related to Indians is found in the very Commerce Clause from which Marshall derived tribal sovereignty. The Commerce Clause, at most, authorizes Congress to regulate commerce with Indian peoples in the same manner it regulates commerce among the states. Put another way, the only absolute congressional power over Indians anticipated by the Constitution is the management of affairs *with* Indians, not the internal affairs *of* Indians.[308] Nor can plenary power find any genuine support in In-

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when the Cherokee requested protection, were blatantly outside of the law. *See supra* notes 34-39 and accompanying text.

304. Frickey, *supra* note 46, at 405 n.108.

305. U.S. CONST. art. I, § 8, cl. 3.

306. *Cherokee Nation*, 30 U.S. at 19.

307. Frickey, *supra* note 27, at 405. *See supra* notes 39 and 160 and accompanying text.

308. Clinton, *supra* note 48, at 120. Clinton points out other sections of the Constitution which demonstrate that the framers did not consider Indian peoples to be

dian treaties, for it would essentially negate the very purpose of a treaty as a means of spelling out the rights and responsibilities of the respective parties.[309] In the end, plenary power is neither a "well-grounded, historically rooted constitutional doctrine" nor a legitimate offspring of traditional jurisprudence. Rather, congressional plenary power is a relic of colonialism, the only function of which was to assist an expansionary government's exploitation of Native peoples, their lands, and their resources.[310]

2. Sovereignty Full Circle

By the time Indian law began to coalesce as a distinct field of study, plenary power had so contaminated the doctrine of Indian sovereignty that scholars have only recently begun to reexamine it. Since at least 1942 when the first general treatise on federal Indian law was published, most scholars and practitioners have entertained a blind faith in the judiciary's role as "protector" and have seen Congress as "the federal institution most worthy of fear."[311] In the meantime, the judicial branch has "drifted with the congressional tide"[312] and even devised its own means of chipping away at

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under the absolute authority of Congress. For example, references to "Indians not taxed," U.S CONST. Art. I, § 2; amend. XIV, § 2, imply that Indian peoples were considered to be outside the general American polity; similarly, the inclusion of Indian peoples in the Commerce Clause alongside two other political entities over whom congressional power is sharply curtailed is further evidence that Indian peoples were anticipated to be politically autonomous. *Id.* at 116-20.

309. Marshall eviscerated the phrase in the Cherokee's treaty which gave Congress the power of "managing all their affairs" by pointing out that it would make no sense for the phrase to refer to anything beyond Congress' power to regulate trade and other external dealings *with* Indians; to read the phrase otherwise "would convert a treaty of peace" into an annihilation of "the political existence of one of the parties." *Worcester*, 30 U.S. at 554. Marshall again took up the matter of Congress' regulation of trade with Indians and pointed out "that the stipulation [in the treaty] is itself an admission of [the Cherokee nation's] right to make or refuse it." *Id.* at 556.

310. Clinton, *supra* note 48, at 120. As Clinton highlights, Indian sovereignty was not the only casualty of the colonial expansionism of the late nineteenth century. The same period which produced *Kagama* and plenary power also produced the Spanish-American War, the U.S. military takeover of the Republic of Hawaii, and the expropriation of Panama. *Id.* at 98.

311. Frickey, *supra* note 27, at 1204.

312. *Id.* at 1178. Since the 1980s, however, the Supreme Court seems to have lost sight of congressional trends to drift with its own tide. At the same time as federal policy was moving toward restrengthening Native sovereignty and self-government:

> [The court was] mov[ing] away from Chief Justice Marshall's model in dramatic fashion. It has not justified this shift by reference to any long-standing historical, doctrinal, or contextual development. Indeed, the Court has supported this switch more by ipse dixit than explanation. But whatever the motivating rationale, the Court has simultaneously deflated the power of the Indian law canon and privileged other values . . .

Frickey, *supra* note 46, at 422.

Native sovereignty.[313] From a Native point of view, the Supreme Court, not Congress, has proven the most dangerous federal branch in the past two decades.[314] Recent Supreme Court case law is not completely void of examples of a Marshallian approach.[315] The problem is that such cases do not represent a consistent methodology.[316]

A restoration of the Marshall legacy would do more than reinstate the courts as principal players in maintaining the political boundary between the United States and tribal governments. It would provide the judiciary "with a structural lodestar to guide it through the otherwise impenetrable legal and contextual complexities" and set "the foundation for a consistent pattern of precedents."[317] In addition, Marshall exemplified a particular style modern judges would do well to emulate given the ongoing effects of colonialism. Marshall was "a judge whose hands were on the wheel, attempting to mediate clashes of values and perspectives, to evaluate critically [cultural] preunderstandings as best he could from his own situation, rather than simply drifting along with dominant sentiments."[318] The way he managed to do this is illuminated in *Worcester* where, after expressing his misgivings about the colonial enterprise, he wrote: "We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions."[319] The "actual state of things" upon which Marshall fixed his gaze was a combination of existing law and the realities of colonization. The way he mediated between these often contradictory themes was to "hold in his recollection" the global context of their origin. Although the building blocks of his framework were hewn of domestic positive law, his blueprint was informed by a much broader vision. Indeed, Marshall construed domestic law to necessitate that perspective. For Marshall, the "actual state of things at the time, and all history

313. Courts now follow a formula under which a tribe's precolonial sovereignty may be diminished, not only by an act of Congress, but "by a judicial holding that some tribal authority is inconsistent with the tribe's 'dependent status.'" Frickey, *supra* note 27, at 1155.

314. Between 1968, when the Indian Civil Rights Act was passed, and 1990, Congress had passed no legislation over significant Native opposition except a 1988 gambling statute, and that was the result of a compromise between tribal and state interests. Frickey, *supra* note 27, at 1238 (citing C. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 83 (1987)).

315. *See, e.g.*, Frickey, *supra* note 27, at 1232-37 (analyzing Williams v. Lee, 358 U.S. 217 (1959); Frickey, *supra* note 46, at 429-32 (analyzing Bryan v. Itasca, 426 U.S. 373 (1976)).

316. *See supra* part II.C.4.

317. Frickey, *supra* note 46, at 438.

318. Frickey, *supra* note 27, at 1229.

319. *Worcester*, 31 U.S. at 543.

since,"[320] illuminated the meaning of domestic law regarding Native peoples, and what it revealed was the irrefutable right of such peoples to sovereignty and self-government.[321]

B. Reanchoring the Canons

The canons of treaty construction, as currently used, fail to respect the cultural integrity of Indian litigants or ensure their full participation in the process of protecting their rights. The first canon, requiring that treaty provisions be construed as the ratifying Indians would have understood them, freezes the image of Native peoples in the past and privileges the evidence of written records and the testimony of non-native academic experts. The second canon, requiring that ambiguous provisions be resolved in favor of the Indians, reinforces the exclusion of contemporary Native views from the interpretive process. While the canon does not explicitly bar Indian participation, it does not guarantee it and, since the dawn of plenary power, courts have found it far too easy to defer to congressional will. Here, the third canon comes into play, instructing the courts that an Indian people's sovereignty and treaty rights may be diminished by a clear statement—or more accurately, a judicial inference—of congressional intent. In the end, living members of the tribe can do little more than look on as non-natives narrate their history, articulate their understandings, and determine their best interests.

In order for the canons to be brought into harmony with the principles of self-determination, they would have to be accompanied by a paradigmatic shift in the field of vision of federal Indian law. That shift should begin with a sensitivity to the position of Native peoples as culturally and politically distinct bodies whose existence traces back in an unbroken line to a time before European coloniza-

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320. *Id.* at 560.

321. In *Worcester*, Marshall conducted an exhaustive survey of the laws of the United States from the first treaties made by the provisional government during the Revolutionary War, 31 U.S. at 549, to the powers granted Congress under the Articles of Confederation, *id.* at 558-59, to the U.S. Constitution, *id.* at 559-60, as well as various legislative enactments and treaties throughout the United States' history. *Id.* at 559-62. At the end of his opinion, he shifted his gaze once more to the global perspective with which his reasoning had commenced to affirm the sovereign status of the Cherokee nation. He stated:

> [T]he very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weaker 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.

Id. at 561.

tion of their homeland. Emergent principles in international human rights law are instructive here, for they assert the inherent value of all cultures and the right of all peoples to be governed by laws and institutions of their own making. From within this paradigm, a court's approach to issues involving Native peoples would be guided by: first, a presumption of cultural integrity, with its implication of a living culture actively engaged in the world and capable of all manner of change without rendering itself inauthentic or obsolete; second, a presumption of political autonomy, with its implication of a community actively engaged in a sovereign-to-sovereign relationship with the federal government and fully capable of managing its own affairs; and, third, a presumption of the inadequacy of non-native values and institutions to fully appreciate Native concerns or protect their interests. As it did for Chief Justice Marshall, this set of presumptions should activate an aggressive posture on the part of the court in balancing the sovereignty of a Native people against that of the federal government and in mediating the clash of divergent values and perspectives inherent in that relationship. With regard to treaty litigation, it is of no small consequence that Chief Justice Marshall grounded Indian sovereignty in the U.S. Constitution and in the Indian treaty relationship itself. The U.S. Constitution is itself a kind of treaty, a document that binds the states of the union to the larger federal government, providing a structure for their ongoing relationship and placing limits on the power of the latter.[322] For Marshall, the authority of the Constitution was founded on the right of peoples "to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness."[323] The principles so established were to be deemed "fundamental," permanent principles upon which a living people's relationship to a larger government was established.[324]

An Indian treaty, in similar fashion, marks the beginning of an ongoing sovereign-to-sovereign relationship between a Native people and the United States. Like a constitution, an Indian treaty delineates the responsibilities of the two sovereigns and, by articulating certain rights important to the Native people, assures that its future political survival will not be jeopardized by the actions of the federal government.[325] That Marshall was aware of the anal-

322. *See generally* Frickey, *supra* note 46, at 408-10 (arguing that Indian treaties are constitutive in nature and exploring the implications of such an approach to federal Indian law).

323. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

324. *Id.* at 176.

325. *See* Frickey, *supra* note 46, at 409.

ogy between a constitution and an Indian treaty is evident in *Worcester* where, far from handling a treaty as a mere legislative enactment or product of an obsolete federal policy, Marshall invoked the treaty as a living document, no less worthy of judicial respect for its age. Within this framework, the canons were more than interpretive devices: they were decisive weapons in maintaining the spirit of sovereignty that inhabited the treaty and the ongoing relationship it established.[326] In Marshall's deft hands, the canons put teeth into the federal trust responsibility; rather than support a presumption of congressional good faith, they armed the judiciary to ensure forthright negotiations on the part of the federal government and to assure that the values and perspectives of Native peoples were adequately protected in court.

The paradigm of self-determination, modeled after Marshall's "quasi-constitutional" approach to treaties, would loosen the canons from their historical emphases and require the judiciary to "view Indian law afresh in today's context" and interpret positive law "flexibly in order to promote the ongoing sovereign-to-sovereign relationship."[327] In order to respect a Native people's cultural integrity and political competence, judges would need to take into account contemporary tribal values and practices and afford greater credibility to oral histories passed down to living descendants of the Indians who reserved the rights. Within this framework, the first canon would instruct judges to consider not only the likely understanding of the Indians who ratified the treaty, but more importantly, the tribe's continued and current understanding. The second canon would further require that any determination of an Indian community's interests be made with full participation of the Indians themselves. Finally, a complete restoration of the Marshall arsenal would require that even seemingly clear phrases in a treaty's text must ultimately be governed by the "spirit" of sovereignty that lay at the heart of the treaty relationship.[328]

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326. Frickey summarizes Marshall's framework as follows:

> By centralizing the power over Indian affairs in the federal government, by conceptualizing the relationship of tribes with the federal government as a sovereign-to-sovereign one, by envisioning an Indian treaty as the constitutive document of that sovereignty and structure, and by protecting treaty-recognized sovereignty and structure from erosion by all but crystal-clear treaty text, Chief Justice Marshall built a complex, institutionally sensitive interpretive scheme.

Id. at 417.

327. *Id.* at 428. In addition, Frickey urges that "the spirit of the structural, constitutive approach would force judges to do the hard work . . . [of] challeng[ing] rather than . . . accept[ing] blindly assumptions rooted in colonialism" and "keep the judiciary out of the business of imposing new forms of colonialism." *Id.*

328. *See supra* notes 167-70 and accompanying text.

It is impossible, of course, to predict with any precision how *Mille Lacs Band of Chippewa* might have come out had it been decided within a judicial framework like that envisioned. Certainly its holding that the Band's 1837 Treaty rights remained intact would have been the same, but it is likely that the way the court arrived at its decision would have been very different. Because this article has been the exploration of an alternative vision of treaty litigation, it seems fitting to close with one final exercise of re-envisioning.

C. Mille Lacs Band of Chippewa: A Tentative Vision

In light of *Worcester*, it is noteworthy that the party disputing the validity of the Mille Lacs Band's 1837 Treaty rights was the state of Minnesota, a political entity that was not a party to the treaty nor to any other formal aspect of the Band's relationship with the federal government. Noteworthy, too, is that the federal government, the other party to the treaty, was joined as a plaintiff-intervenor on the side of the Mille Lacs Band.[329] The significance of this alliance sharpens when viewed within the broader context of colonial history and the federal government's sovereign-to-sovereign relationship with the Band, a relationship that predated the existence of the State of Minnesota by nearly a quarter of a century. Moreover, since at least the 1840s the sovereignty of the Mille Lacs Band and the security of its treaty rights have been subject to repeated waves of attack from ambitious politicians and economic interests in the state.[330]

It was precisely this kind of situation which Chief Justice Marshall confronted in *Worcester*, with one important distinction: in that case, the federal government was covertly engaged on the side of the State of Georgia.[331] His holding in favor of the Cherokees' sovereignty was thus no trivial matter. In a certain sense, it placed the very institutional survival of the Supreme Court at risk and "produced what was, up to that point, the most serious conflict between the Supreme Court and another federal branch in American constitutional history."[332] Given the current federal government's position with regard to the Mille Lacs Band's treaty rights, the court would have been especially justified in adopting a strong presumption in favor of the Band and mobilizing the full force of the canons accordingly.

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329. *Mille Lacs Band of Chippewa*, 861 F. Supp. at 790.
330. *See supra* notes 184-86, 195-97 and accompanying text.
331. *See supra* notes 303-04 and accompanying text.
332. Frickey, *supra* note 46, at 439-40.

A stringent application of the clear statement canon might have disposed of the case without further ado. In support of its authority to regulate the off-reservation rights of the Mille Lacs Band, the State offered two sources of federal law as proof that those rights were no longer in effect. First, they argued that the 1850 Executive Order had terminated their rights. Second, they argued that in the 1855 Treaty the Chippewa had relinquished the 1837 rights.[333] A simple reading of the relevant treaties and statutes made clear that Congress had expressed no intent to trample the 1837 rights and had expressly denied the executive branch the authority to do so.[334] Consequently, the rights could have been held valid on that basis alone and the court need not have entertained additional arguments about legislative provisions that, because they were susceptible of different interpretations, were anything but clear.

Following from that, all that would have remained would have been to construe precisely what the treaty rights entailed. For this endeavor, the court would have had two other canons to guide its reasoning: first, that the provisions be construed as the ratifying Indians *and* their living descendants understood them; and, second, that any ambiguous passages be resolved in the Band's favor, giving special weight to the Band's own perspective of its interests. Toward this end, evidence regarding historical conditions and events would have been of only secondary importance, if that. The court might have relied instead upon evidence of current values and practices among Band members pertaining to the treaty rights. Such evidence could have come from elected representatives who might have presented the Band's official understanding of the treaty. The court might have afforded greater credibility to oral histories passed down and kept alive in the minds of the ratifying Indians' living descendants than to the testimonies of non-native historians and anthropologists. Evidence that the Band had gone to great lengths to establish its own department of natural resources, promulgate its own hunting and fishing regulations, and provide for their enforcement would certainly have been given greater weight than the letters written by white missionaries and state officials in the nineteenth century.

In short, the court might have provided a forum where the Band could articulate its interests in terms of resource management and economic development, rather than traditional customs or subsistence, without diminishing its claim to rights established

333. *Mille Lacs Band of Chippewa*, 861 F.Supp. at 789-90.
334. *See supra* notes 209-14 and accompanying text.

over a century ago. Far from lending itself to a stereotyped image of impoverished Indians needing to hunt and fish for survival, the written opinion of *Mille Lacs Band of Chippewa* might have advanced an image of a sophisticated and enterprising community, actively engaged in managing its affairs and determining the course of its future, while at the same time being no less authentically Chippewa because of it.

Conclusion

The United States shares with many nations a history stained with brutality, broken promises, flagrant injustice, and genocide. That history lives on in the descendants of the original casualties of colonialism. As one Chippewa put it, "We're still here. We haven't forgotten and, no, it's not okay what's been done to us."[335] It lives on, too, in the lives of those who, born long after their ancestors arrived, cannot help but see this land as home. Whatever else the future brings, it is clear that these culturally and politically separate peoples must build better ways of living together that will honor the diginity and rights of everyone.

The United States continues to pride itself as a leader in promoting cultural pluralism, tolerance for diversity, and respect for human rights. Just two years ago, President Clinton stood before the United Nations General Assembly and said, "As a country that has over 150 different racial, ethnic and religious groups within our borders, our policy is and must be rooted in a profound respect for all the world's religions and cultures."[336] Indeed, the United States has responded to the voices and demands of its Native peoples and taken steps toward valuing their cultural integrity and protecting their political autonomy.[337] Yet while the legislative and executive branches have moved toward restoring sovereignty as a pillar of federal Indian policy, many rights crucial to tribal self-determination continue to be subjected to a judicial methodology tainted with vestiges of colonialism.

It seems clear that an overhaul of the treaty canons, and the context within which they operate, is necessary if they are to play more than a symbolic role in future treaty litigation and bring the judicial branch into harmony with the world around it.[338] As the

335. From a personal conversation on the White Earth Indian reservation, June 1994.

336. *President Bill Clinton Addresses the General Assembly of the United Nations*, Federal News Service, Sept. 27, 1993.

337. *See supra* note 65.

338. A restoration of the treaty canons and Marshall's framework of sovereignty could protect Native autonomy in other areas of the law as well. Frickey points out

Supreme Court itself once stated, courts are not required "to implement policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship."[339] The case law which ensued in the century between Marshall and the present need not preclude such a change given that the most devastating blows to Indian sovereignty have been dealt through dicta.[340] The foundations of Marshall law, although beaten down and sometimes lost beneath the judicial rubble, have not been beaten to death. Their revival awaits only a Supreme Court that might remember the global perspective that once inspired them and be inspired by it once again.[341]

A Closing Vignette

During an afternoon recess in the Mille Lacs Band's treaty trial in June 1994, I talked for awhile with a young Indian man who was observing the trial. I asked where he was from and, instead of naming a city as I anticipated, he proceeded to give me a brief history of his people, the Winnebago. Originally from southern Minnesota, his people had been repeatedly relocated from one place to another through a series of treaties and other federal actions. Currently, he explained, they were from Nebraska. Where did *he* live? "Oh," he grinned, "I live in St. Paul."

He spoke at length about various other treaty trials and expressed concern about how the outcome of this litigation would affect other Indian peoples. "The thing about precedent," he observed, "is that if the Band loses, it will set precedent. But if they win, it will only mean that *this* band won *this* trial, and it won't set any precedent." He turned then to broader issues. "This country is so unique," he said. "People of every color and from every place live

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that, while much federal Indian litigation since the end of treaty-making has dealt, not with treaties, but with executive orders, congressional enactments, and federal regulations, the difference need not "substantially alter judicial methodology." Frickey, *supra* note 46, at 421. Because many non-treaty enactments address issues that "would have been handled by treaty in former eras," and because all federal laws relating to Indians "are constitutive in nature" in that they "adjust a sovereign-to-sovereign, structural relationship," the treaty canons should apply to them with equal force. *Id.* Consistent with this reasoning, the Supreme Court has made no significant "interpretive distinction between reservations established by statute or executive order and those protected by treaty," *id.* at 422, and courts commonly resolve ambiguities in federal regulations in favor of Native interests. *Id.* at 421 n.166 (citing Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1332 (10th Cir. 1982)).

339. Bryan v. Itasca County, 426 U.S. 373, 389 n.14 (1976) (quoting Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975)).

340. Frickey, *supra* note 46, at 439 (discussing Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989)).

341. *See* Anaya, *supra* note 14, at 39.

here. This country has the opportunity to be truly great, if it could just get it together. Or," he paused and shrugged, "it could really blow it."