

Land, Culture and Community:

Envisioning Native American Sovereignty and

National Identity in the 21st Century

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ABSTRACT: This article focuses on three important elements of Native American sovereignty and national identity as these concepts relate to tribal lands. First of all, it examines the notion of territorial sovereignty for Indian nations, and how federal policy toward Indian lands has changed the nature and understanding of political sovereignty among Indian nations. Secondly, it examines the notion of "cultural sovereignty" and the land ethics that guide the actions of Indian nations toward their traditional lands. Finally, it examines the idea of "community" broadly construed to encompass the people who reside on the reservation, and more narrowly construed to reflect the tribe's own cultural understanding of its membership. The paper compares federal policy with tribal policy to see where the disjunctions are, and how a more unified understanding of these essential concepts might be used to further the contemporary goals and needs of Indian nations.

As we enter the twenty-first century, Native American people are called upon to undertake a critical analysis of their distinctive political and cultural status. Native American people comprise a diversity of cultures and governments, though they are commonly divided into three separate groups: the American Indian nations, the Alaska Native people, and the Native Hawaiian people. The political status of the American Indian nations is primarily built around a treaty relationship that acknowledges the political status and territorial rights of these nations. All Native groups, however, share a common commitment to maintaining recognition of their

sovereignty. The nature of Native sovereignty is fairly distinctive.¹ The "internal" understanding of Native sovereignty, which has always guided the Native people in their independent group existence, centers around three central features: land, culture, and community. The "external" understanding of Native sovereignty, represented by federal law and policy, centers around concepts of "territory" and "jurisdiction," seeking to reach an accommodation between national sovereignty and tribal sovereignty.

This article will focus on three important aspects of Native American sovereignty and national identity, as these concepts relate to tribal lands. First, the article examines the traditional relationship between Native peoples and the land, and explores the cultural significance of land disputes. Secondly, the article discusses how federal law and policy has changed the nature and understanding of Indian nations' political sovereignty and their relationship to their lands. And finally, the article examines the idea of "community," and its broader significance in the resolution of contemporary land and identity issues.

I. The Relationship Between Native Peoples and the Land:

Native Americans, like indigenous peoples throughout the world, possess an intimate and longstanding connection to their traditional lands and environments. Indeed, the relationship between the people and the land often forms the core of traditional Native epistemologies. Paula Gunn Allen, a Laguna author, describes that relationship as follows:

"We are the land. More than remembered, the Earth is the mind of the people as we are the mind of the earth . . . It is not a means of survival . . . It is rather part of our being, dynamic, significant, real."²

Thus, the essence of the relationship between land and Native people transcends the idea of land as a means of physical survival or "subsistence." Land also ensures the "cultural survival" of Indian people as distinct groups and nations.

For Native American people, land is often constitutive of cultural identity.³ Many Indian tribes identify their origin as distinct people with a particular geographic site, such as a river, mountain, or valley, which becomes a central feature

¹ For a full discussion of Native sovereignty, see Wallace Coffey & Rebecca Tsosie, "Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations," *Stanford Law & Policy Review* 12:2 (2001) 191-221.

² Paula Gunn Allen, *Iyani: It Goes This Way*, in *The Remembered Earth: An Anthology of Contemporary American Literature* 191 (Geary Hobson ed., University of N.M. Press 1990) (1979).

³ Rebecca Tsosie, "Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights," *UCLA Law Review* 47:6 (2001) 1615-72.

of the group's religion and cultural worldview.⁴ The Lakota, for example, speak of the Black Hills as the birthplace of their people. They call the Black Hills "Wamaka Og'naka Icante," or "the heart of everything that is."⁵ The Black Hills, of course, were removed from Sioux ownership in the late 19th century, so, according to the courts, the Lakota people no longer have recognized title to these sacred lands.⁶ However, within the cultural belief systems of the Lakota people, the Black Hills constitute their origin place and were placed under their stewardship responsibility. In a spiritual sense, they have not "lost" the Black Hills, and the Lakota continue to maintain their traditional ties to these lands.

The defining features of the land which exist in mountains, plateaus, valleys, springs, and rivers, orient Native people and place them within the land.⁷ They give Native people a sense of history, rootedness, and belonging. For example, many Tribes in the Southwest understand their world as bounded by sacred mountains.⁸ The Tewa of New Mexico, for example, have named and located each of four sacred mountains within their cosmology, and each mountain is associated with certain bodies of water, spirit entities, shrines, directions, and directional colors, which place the Tewa within a sacred universe.⁹ The Navajo also perceive their world to be bounded by four sacred mountains, although the social and religious connections manifest themselves differently in Navajo cosmology.¹⁰ Different prayers and chants are associated with each of the sacred mountains, as well as the sky, the earth, the day, and the night. By honoring the sacred elements of the Navajo universe and caring for them with the appropriate ceremonies, the people believe that they preserve the balance of the natural world and ensure a good life for themselves.

Because of their strong ties to the land, Native people have suffered from the effect of federal laws and policies which have disrupted these relationships. In

⁴ Ibid.

⁵ This statement is from an interview with Charlotte Black Elk, a Lakota historian and leader. See William Greider, *The Heart of Everything that Is*, Rolling Stone, May 7, 1987, at 38, 62.

⁶ *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

⁷ For a very thoughtful account of the cultural and spiritual connection between Native peoples and the land, see Vine Deloria, Jr., *God is Red: A Native View of Religion* 83 (Golden, CO: Fulcrum Publishing, 1992).

⁸ Tsosie, *Tribal Environmental Policy in an Era of Self-Determination*.

⁹ Alfonso Ortiz, *The Tewa World: Space, Time, Being and Becoming in a Pueblo Society* (Chicago: Univ. of Chicago Press 1969). (Copy with author).

¹⁰ Peggy Beck & Anna Walters, *The Sacred: Ways of Knowledge, Sources of Life* (Tsaile: Navajo Community College Press, 1977).

particular, federal laws requiring relocation of Native people have had significant impacts on the sacred relationship between Native people and the land.

Throughout the 18th and 19th centuries, Native people were forcibly removed from their traditional lands.¹¹ In some cases, they were granted title to reservations composed of discrete and fairly small portions of their traditional lands. This, for example, is what occurred for the Lakota Sioux people and the Navajo people. In other cases, the tribes were removed from their traditional homelands altogether, and settled on reservation lands in distant locations. This, for example, occurred when a number of tribes from the Southeastern United States were forcibly settled in the Oklahoma Indian Territory. Forcible relocation onto distant lands has had severe consequences for many groups because they continue to possess a cosmology which relates to their traditional lands, and yet they are not recognized as having any sovereign authority over these lands.

Although there is no longer an official federal policy to relocate Native peoples in the United States, land conflicts related to the earlier relocations continue.¹² In some cases, such as the Black Hills case, the Native people continue to fight for legal recognition of their title to the lands which were wrongfully appropriated from them. In a 1980 case, United States v. Sioux Nation, the United States Supreme Court agreed that the Sioux people were unlawfully dispossessed from their sacred Black Hills.¹³ However, the Court awarded the Sioux people only monetary damages, finding that the title to the land resided in the United States and its subsequent grantees, including the state of South Dakota. The case was decided under American law as a case of property rights. However, the case is fundamentally about cultural and religious rights, and is not amenable to a property solution, e.g. monetary compensation for the land. The Sioux people have refused to accept the monetary compensation and they continue to press for their rights to the

¹¹ For a historical account of the removal policy and its impact on Indian nations, see Vine Deloria, Jr. and Clifford M. Lytle, *American Indians, American Justice* (Austin: Univ. of Texas Press, 1983).

¹² The fact that the official policy of the United States is no longer one of "removal," does not mean, however, that Native people are no longer subject to forcible relocation, as the legendary Navajo-Hopi land dispute demonstrates. See Jerry Kammer, *The Second Long Walk: The Navajo Hopi Land Dispute* (Albuquerque: Univ. of New Mexico Press, 1980). Native people have also been forcibly relocated to facilitate dam projects and strip-mining projects on several reservations. A notorious example of this occurred in the 1950s, when the Allegheny Reservoir Project in New York state flooded a large portion of the Seneca Nation's reservation in violation of the Seneca Nation's Treaty with the United States, which guaranteed the Nation undisturbed possession of their reservation in perpetuity. See *Seneca Nation of Indians v. Brucker*, 262 F.2d 27 (D.C. Cir.1958), cert. denied 360 U.S. 909 (1959).

¹³ 448 U.S. 371 (1980).

Black Hills through a variety of claims, some related to freedom of religion.¹⁴ All of these claims have been unsuccessful to date.

One of the most devastating legacies of relocation is that Native people are no longer able to protect their sacred sites on lands that have been alienated from their ownership. The sacred sites cases that have been litigated under the First Amendment free exercise clause have not been successful for the tribal litigants.¹⁵ In several early cases, the federal courts held that the tribes could not prove that these sites were "central" to their religions, in the sense that the religion could not be effectively practiced without access to the site. In the *Lyng* case, the Supreme Court ultimately rejected use of the free exercise balancing test (which weighs the government's interests against the burden to the practitioners) altogether, holding that, with respect to sacred sites on federal land, the federal government is the ultimate land manager and may condition entry and use of the lands without regard to the impact on Native peoples' religious use of those lands.¹⁶ Currently, the federal government has a series of policies in place which are designed to factor tribal religious use into its decision-making authority.¹⁷ The ultimate authority, however, resides in the federal agency. Moreover, Indian nations are continually frustrated in their efforts to protect burial sites and cultural sites that are located within their traditional territories, but on lands that have fallen into state or private ownership.

Native American people view their ability to exercise control over their remaining lands and resources as essential to their future survival as distinct communities. Thus, it is important to examine how federal law and policy promotes or undermines Native peoples' ability to protect and preserve their lands and resources.

¹⁴ For example, in *Crow v. Gullet*, the Lakota and Cheyenne Nations brought a free exercise claim to secure their right to practice their traditional religions at Bear Butte, a particular sacred site within the Black Hills, which is currently managed by the state of South Dakota. 541 F. Supp. 785 (D. S.D. 1982). The court, however, refused to grant relief.

¹⁵ For a good general discussion of the American Indian Religious Freedom Act and the cases that have been litigated to secure tribal rights under AIRFA and the First Amendment, see the essays in Christopher Vecsey (ed.), *Handbook of American Indian Religious Freedom* (New York: Crossroad Publishing Co. 1991).

¹⁶ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

¹⁷ For example, there is now an executive order directing federal agencies to protect American Indian sacred sites by notifying tribes of potential activities that might be disruptive, by consulting with tribes on ways to mitigate the harm, and by facilitating access to sacred sites by Native practitioners when this is otherwise consistent with federal land management practices. 61 FR 26, 771 (May 24, 1996). The executive order specifically states, however, that it does not create any legal rights or remedies.

II. The Role of Federal Law and Policy:

Federal policy has left a lasting legacy within Indian Country. Under standard principles of Federal Indian law, the federal government is considered the trustee for Indian people. As trustee, the federal government possesses a "plenary power" over Indian issues, which permits it to apply various laws and policies that grant, condition, and limit tribal rights, on the theory that this is in the "best interest" of the tribes.¹⁸ On a more substantive level, Federal policy has been responsible for displacing many traditional tribal economies and social and political institutions; alienating traditional lands and natural resources from indigenous ownership and control; and subjecting the remaining lands and resources to bureaucratic federal control.

A. *The Historical Context of Reservation Land Use:*

The predominant land use ethic in America throughout the last century has been an "ethic of opportunity," premised on notions of private property rights and maximization of economic utility.¹⁹ When the Indian nations were located on the reservations, the federal government assumed legal title to these lands "in trust" for the "beneficial use" of the Indian people. This meant that the federal government exerted management authority of the reservation lands, purportedly for the benefit of the Indian people. In fact, federal management policies for many years treated Indian reservations as "resource colonies" for the corporate and industrial interests of the dominant society. Federal policies throughout the past century assisted these industries by offering below-market prices on lease royalties derived from Indian lands, as well as relative freedom from compliance with state environmental laws or federal environmental oversight.

The legacy of these federal policies is troubling. Today, reservation lands house some of the most severely contaminated areas in the United States. For example, uranium production on Indian reservations throughout the western states has resulted in extensive contamination of tribal lands and water sources.²⁰ The clean up of abandoned mines in many areas has yet to be completed, and in some cases has not been started. Indian Health Service studies suggest a link between

¹⁸ For a thorough discussion of the plenary power doctrine, see Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195 (1984).

¹⁹ See Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, Opportunity*, 24 *Envtl. L.* 1439 (1994).

²⁰ Ward Churchill & Winona LaDuke, (1994) "The Political Economy of Radioactive Colonialism," in Annette Jaimes (ed.) *The State of Native America*; Collins & Hall, "Nuclear Waste in Indian Country: A Paradoxical Trade," 12 *Law & Inequality* 267 (1994).

radioactive contamination and the high rates of cancer, emphysema, leukemia and birth defects found on many of these reservations.²¹ Native people have also suffered from the effects of coal strip-mining and hydroelectric dam projects, which have resulted in a permanent loss of tribal lands, water supplies and fish resources.

This dismal history of colonialism on Indian lands led to a concerted movement among Indian nations in the 1960s and 1970s to gain recognition for tribal sovereignty and political identity. This movement, which was affirmed through the federal government's "self-determination" policy for Indian tribes, was fundamentally linked to tribal land and resource claims. In a number of important cases, Indian nations pressed for recognition of their legal rights to lands and resources which had been appropriated from them. For example, in *County of Oneida v. Oneida Indian Nation*, the Court invalidated a 1795 agreement between the Oneida Tribe and the state of New York as violative of the Trade and Intercourse Act, affirming the tribe's legal claim to these lands, at least in principle.²² This case, which deals with a substantial portion of the state of New York, subsequently settled by thousands of non-Indians, is still unresolved. The policy of the United States courts has been to not disrupt the expectation interests of non-Indians who have acted in reliance by settling the lands for a significant length of time. This policy is also apparent in the many western water adjudication cases which have recognized the substantial legal rights of Indian nations to limited water resources, but which try to reach some negotiated agreement that can honor the expectation of interests of non-Indians who have come to rely on the use of the water resource.²³

In other cases, tribes struggled to define their rights to regulate their reservation lands and resources without interference from outside interests. The modern "land disputes" between Indian people and non-Indians are, in fact, largely jurisdictional. Exploring the nature of tribal sovereignty over reservation lands under domestic federal law illustrates how disputes over land use are currently adjudicated.

²¹ See Louis G. Leonard III, "Sovereignty, Self-Determination, and Environmental Justice in the Mescalero Apache's Decision to Store Nuclear Waste," 24 *Environmental Affairs* 651 (1997). Mr. Leonard discusses the health effects of uranium mines in tribal communities and notes that the Navajo Nation alone has 1000 old mines and waste piles, but has received only about 1% of the cost of cleaning them up from the federal government.

²² 470 U.S. 226 (1985).

²³ See generally John A. Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 *Natural Resources Journal* 63 (1988).

B. *The Jurisdictional Context of Reservation Land Use:*

Indian nations today possess a significant measure of jurisdictional authority over reservation lands still held in trust status.²⁴ Under the "territorial model" of tribal sovereignty that emerges from federal Indian law jurisprudence, an Indian nation's regulatory authority over trust lands is perceived to stem from three separate sources: (1) the Indian nation's inherent sovereignty; (2) the Indian nation's power to "exclude" persons from tribal territory set apart for its exclusive use; and (3) delegated federal power in the exercise of the trusteeship.²⁵ Due to the Indian nations' legal status as "domestic, dependent nations," however, the federal government continues to maintain significant management authority over reservation lands as the tribes' trustee.²⁶ States are generally considered not to possess regulatory authority over reservation lands, although the courts have created certain judicial exceptions to this principle, and Congress has the power to delegate limited measures of federal authority to the states.²⁷ Today, however, a major impetus for land disputes in Indian Country results from state attempts to exercise jurisdictional authority over reservation lands. The most pernicious of these attempts are based on state claims to complete jurisdiction on the theory that the lands in question are no longer "Indian Country" because the reservation has been diminished by allotment to non-Indians.²⁸

²⁴ The most recent decision of the Supreme Court in the *Nevada v. Hicks* case is the only one which blurs the line between trust land and fee land in its analysis of tribal jurisdiction; however, since that case is limited to its relatively rare facts (a tort lawsuit in tribal court against state officials), I do not consider it antagonistic to the general analysis that I propose in this article.

²⁵ See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (discussing tribe's taxation authority over mineral lessees as part of the tribe's retained sovereignty, and also discussing the tribe's authority under its right to exclude); *United States v. Mazurie*, 419 U.S. 544 (1975) (discussing tribe's ability to regulate liquor on the reservation, which had been delegated by federal statute).

²⁶ The term "domestic dependent nation" was coined by Chief Justice John Marshall in his famous opinion in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Marshall held that the Cherokee Nation could not sue the state of Georgia under the Constitutional provision authorizing the Supreme Court to hear disputes brought by a foreign nation against a state because the Cherokee Nation had placed itself under the exclusive protection of the United States and, thus, had accepted a "domestic, dependent" status vis a vis the federal government.

²⁷ Congress has, for example, allowed states to voluntarily assume jurisdiction over civil and criminal actions arising on the reservation, with the consent of the affected tribes, under Public Law 280. See Carole E. Goldberg, "Public Law 280: The Limits of State Jurisdiction over Reservation Indians," 22 *UCLA Law Review* 535 (1975).

²⁸ See, for example, *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998). In this case, the Supreme Court held that the Yankton Sioux reservation had been diminished by an 1894 allotment

In other cases, although the trust status of the reservation is not contested, tribal decisions to locate "noxious" uses on reservation lands have led state municipalities to attempt to curtail tribal jurisdiction on the basis that such activities will have dangerous spillover effects on adjacent non-Indian communities. For example, in Southern California, the Campo Indian tribe entered a partnership with a non-Indian company to build a solid waste facility on reservation land.²⁹ In response to pressure from adjacent residents, state lawmakers introduced a bill which purported to make the reservation land subject to California's environmental regulatory system. The bill did not pass, but ultimately the Campo Tribe and the State entered a cooperative agreement that ensured that California's standards would serve as the minimal standards for the facility.

In other cases, states have protested tribal regulatory programs that are more protective of the environment and would therefore have detrimental effects on corporations doing business on state land. For example, the Pueblo of Isleta, which is located downstream from the large urban community of Albuquerque, New Mexico, enacted water quality standards that were much more stringent than those of the state, and would have required the City of Albuquerque to expend millions of dollars upgrading its wastewater treatment plant.³⁰ The Pueblo's water quality standards, which were approved by the EPA, were created to serve the tribe's use of the water resource, which was partially ceremonial and required human ingestion of the water. In the ensuing litigation, the state argued that the economic consequences of complying with these standards were too severe, and that tribal jurisdiction should be constrained by the state standards. The federal district court, however, found in favor of the EPA's decision to approve the water quality standards, a determination which was later upheld on appeal.³¹ The dispute between the Pueblo of Isleta and Albuquerque is generally characterized as a political conflict between a tribal government and a state government. However, the political conflict is rooted in a value conflict, and the case is particularly illustrative of the value conflicts that continue to arise over land and resource use by tribal communities and non-Indian communities.

act, and therefore a landfill constructed on non-Indian fee land within the exterior boundaries of the original Yankton reservation fell under state jurisdiction.

²⁹ Tsosie, *Tribal Environmental Policy in an Era of Self-Determination*.

³⁰ Mark A. Bilut, "Albuquerque v. Browner, Native American Tribal Authority Under the Clean Water Act: Raging Like a River Out of Control," 45 *Syracuse Law Review* 887 (1994) (arguing that tribes should not be allowed to adopt more stringent standards than the state when this would result in "unreasonable consequences").

³¹ *City of Albuquerque v. Browner*, 865 F. Supp. 733 (D.N.M. 1993), *aff'd* 97 F.3d 415 (10th Cir. 1996), *cert. denied* 118 S.Ct. 410 (1997).

C. *Political Conflicts as Value Conflicts:*

Tribal environmental policy must respond to existing economic and environmental problems on the reservation, as well as traditional normative frameworks for determining appropriate human conduct toward the environment. Tribal land use authority implicates the Indian nations' interest in protecting their political autonomy, and also their interest in preserving their cultural autonomy, as this is represented by traditional norms about environmental use.

Indian nations place a premium value upon maintaining recognition for their sovereign status. The treaties that Indian nations signed with the United States government exemplify the government-to-government relationship that now forms the core of federal Indian policy under the self-determination policy.³² Tribal land use authority is a key component of tribal sovereignty. This is what allows tribes to secure the economic maintenance of the community, and to remediate the environmental degradation that resulted from the federal government's mismanagement of reservation lands. Many Indian nations today have comprehensive land use plans that apply throughout the reservation, and they have also enacted environmental laws and ordinances to protect the integrity of their lands and resources.³³

Significantly, tribal environmental policy must be responsive to contemporary needs as well as traditional norms about environmental use. Native people's systems of environmental ethics are premised upon the idea that the relationship between the people and the land is permanent, enduring and stable.³⁴ Many groups, such as the nations of the Iroquois Confederacy, speak of the need to ensure the survival of the people, the land and the resources for seven generations. This concept is somewhat related to the concept of "sustainability" that has emerged under modern international policy related to the environment. However, for Native peoples this concept comprises a number of central principles: the belief that the earth is an animate being that must be treated with respect, the belief that humans are in a kinship system with other living beings, the perception that land is essential to the identity of the people, and a concept of reciprocity and balance that extends to relationships among humans, including future generations, and between humans and

³² Tsosie, "Sacred Obligations."

³³ See, e.g., *Brendale v. Confederated Tribes & Bands of Yakima*, 492 U.S. 408 (1989) (case involving the Yakima Nation's authority to enforce its zoning ordinance throughout the reservation; in a split opinion, the Court upheld the Tribe's zoning authority in the "closed" portion of the reservation, but found that the tribe could not enforce the zoning ordinance on non-Indian fee land in the open area of the reservation).

³⁴ Tsosie, "Tribal Environmental Policy in an Era of Self-Determination." (Copy with author).

the natural world.³⁵ This concept of relatedness is fundamentally tied to the notion of "community" that guides so much of Native peoples' internal conception of sovereignty.

III. Resolving Land Disputes: The Role of Culture, Community, and National Identity

Indigenous groups in the United States and Canada have begun to use their treaties in international forums as a means to call attention to the human rights abuses they have suffered and also to define their political rights vis a vis the nation-states that colonized their lands.³⁶ The discourse of treaty rights is important for at least two reasons. First, it triggers inquiry into the relationship of cultural identity to ideals of "citizenship" and group status as "peoples," probing the contours of "political community" for Native peoples. Secondly, the discourse of treaty rights appears significant in establishing the necessary conditions to achieve intercultural justice between these groups and the dominant society, possibly serving as a means to effect reconciliation.³⁷

A. *The Relationship of Cultural Identity to Political Status:*

The political identity of an indigenous group as a culturally and ethnically distinct "people" permits that group to have a separate claim to self-determination, which is strongly tied to its landbase. Thus, as the Black Hills case demonstrates, when Indian people use the discourse of treaty rights to gain recognition for their land claims, they are also attempting to gain recognition for their rights to sovereignty and self-determination. In fact, land was the central dynamic around with the treaty-making tradition with Indian nations revolved. For Native peoples, however, the treaties represent far more than a means of ensuring physical or even political survival: they are perceived as fundamental to the cultural survival of the people because they represent the linkage between land and cultural survival.³⁸

The commitment to cultural survival underlies the insistence of the Navajo people in their 1868 Treaty negotiation that the negotiation be held within the sacred boundaries of Dinétah, and their unwillingness to cede lands within those four sacred mountains. This perspective also undergirds the Lakota peoples' refusal to accept compensation for the illegal taking of their sacred Black Hills, which had

³⁵ Ibid.

³⁶ Tsosie, "Sacred Obligations."

³⁷ Ibid.

³⁸ Ibid. at pages 1640-45.

been reserved to them in perpetuity by the 1868 Ft. Laramie Treaty. Indeed, the Lakota people have always asserted that the 1868 Treaty represents a legal and moral commitment on the part of the U.S. government to protect the Lakota people in their political and spiritual claim to land and political identity. They currently point to the 1868 Treaty in defense of their position that Congress has acted unlawfully in a recent bill disposing of lands taken by the U.S. government from the Lakota for use in a federal Dam Project.³⁹ The Bill purports to grant these lands, located along the Missouri River, to the State of South Dakota, rather than returning them to the tribes. The consequences of this bill are devastating to the tribes, in part because there are a number of cultural and burial sites located on these lands, which will now arguably be under state jurisdiction.

Thus, Native peoples' land claims under the treaties are premised upon their separate political and cultural identity, and they are not asserting the rights of "citizens" to property. The discourse of treaty rights as it relates to Native peoples' claims for land and cultural identity reflects the struggle to assert a distinctive national identity. Mohawk scholar Gerald Alfred has written extensively on the utility of understanding Native politics in terms of "community level assertions of nationalism."⁴⁰ According to Alfred, the movement toward "pan-Indianism" that was representative of tribal politics during the 1960s and 1970s has largely failed as Native communities have focused on reasserting their "nationhood." By stressing the need to preserve cultural values and traditional forms of social organization, Native groups have been able to organize a significant resistance against assimilation and incorporation into the institutions of the nation-state, which routinely deny indigenous self-determination.

It is unclear how the United States will ultimately respond to Native American nationalism. Currently, the United States is committed to the domestic model of "quasi-sovereign" status for Indian nations that is embodied within the core of its federal Indian law jurisprudence. Recent developments within international human rights law, which seek to recognize indigenous groups as "peoples" with a right to "self-determination" have proven very controversial among the nation-states.⁴¹ Many Native groups are arguing for strong rights to self-determination as politically distinct groups that possess the same autonomy over their territories and collective destinies as nations which have been involuntarily annexed by other

³⁹ Coffey & Tsosie, "Rethinking the Tribal Sovereignty Doctrine."

⁴⁰ Gerald R. Alfred, *Heeding the Voices of Our Ancestors* (Toronto: Oxford Univ. Press, 1995).

⁴¹ S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford Univ. Press, 1996).

nations. The United States and other colonial powers, on the other hand, continue to resist the notion that indigenous peoples share the same attributes of political sovereignty as the Western nations that have been conquered and involuntarily annexed by other Western nations. These nations appear to agree that indigenous peoples should receive some protection for their unique relationship to the land via international human rights norms, but reject the ideals of political self-determination that would guarantee strong territorial rights.

The debate over national identity and group rights for Native people is manifested in the appraisal of indigenous peoples' land and resource rights under international law. Within international law relating to environmental issues, indigenous peoples have been portrayed as perhaps the last cultures to live in "harmony" with the local environment, as land-based peoples threatened by rapid global industrialization. The very real images of devastation to indigenous peoples caused by mining and deforestation have triggered protective efforts within international law, such as the International Labour Organization Convention on Indigenous and Tribal Peoples, Convention No. 169, which was adopted in 1989.⁴² ILO Convention No. 169 recognizes indigenous peoples' collective rights to social, cultural and economic development, territory, and their rights to control their own institutions and ways of life. Indigenous rights to land and resources include rights of ownership and possession, rights of access for subsistence and traditional activities, and rights to participate in the use, management and conservation of natural resources.

Documents such as ILO 169 recognize the distinctive relationship of indigenous people to the environment, and instruct the national governments to respect this relationship and protect the rights of indigenous peoples. Significantly, however, indigenous peoples are not placed on a par with nations in terms of political sovereignty over lands. In fact, the Convention specifically states that its use of the term "peoples" is not intended to carry the same meaning (or rights) as its use under international law.

Other instruments of international law, such as the Rio Declaration, recognize the vital role of indigenous communities in environmental management and development "because of their knowledge and traditional practices," and declare that states should recognize and support indigenous groups' "identity, culture and interests and enable their effective participation in the achievement of sustainable

⁴² This Convention is contained in the Appendix of Professor Anaya's book, and is discussed extensively in text of the book. Anaya, *Indigenous People in International Law*.

development."⁴³ In terms of implementation, the Agenda for Sustainable Development adopted at the Rio Convention, advocates a "full partnership" with indigenous communities and empowerment of indigenous peoples by several means, including recognizing their traditional resource management practices, settling their land claims, and protecting them from activities that would degrade their environments or that would be considered inappropriate under indigenous cultural norms.

International treaties, such as the Convention on Biodiversity, are beginning to recognize the unique role of indigenous peoples in environmental management and conservation.⁴⁴ The Convention on Biological Diversity discusses not only the duties and responsibilities of States, but also the role of indigenous and local communities in environmental decision-making that impacts biological resources. However, in keeping with the general failure of international law to recognize indigenous peoples' political sovereignty as equivalent to that of the States, the Convention accords the paramount role in constructing environmental policy to the State. Indigenous and "local" communities are recognized as having separate interests that stem from their traditional relationship to the environment, and the Convention requires States to integrate indigenous interests into environmental decision-making to the extent that this actually promotes the goals of the Convention, such as conservation and sustainable use.

These instruments of international law support indigenous environmental rights on the theory that they promote overall social goods such as conservation and respect for basic human rights.⁴⁵ Other international law documents, such as the Draft Declaration on Indigenous Rights, support a more inclusive concept of indigenous self-determination and a seemingly stronger conception of environmental rights.⁴⁶ For example, Article 26 of the Draft Declaration discusses the rights of indigenous peoples to "own, develop, control and use lands and territories," including a right to "full recognition of their laws, traditions, and customs, land-tenure systems" and institutions for managing natural resources. The Draft Declaration, however, remains somewhat controversial, and the overall picture of

⁴³ See I Report of the United Nations Conference on Environment and Development, U.N. Doc. A/Conf. 151/26/Rev. 1 (1992).

⁴⁴ See generally Lyle Glowka, Francoise Burhenne-Guilmin & Hugh Synge in collaboration with Jeffrey A. McNeely & Lothar Gundling, *A Guide to the Convention on Biological Diversity: Environmental Policy and Law Paper No. 30* (IUCN-The World Conservation Union 1994).

⁴⁵ See Russell Lawrence Burkh, *The Challenge of Indigenous Self-Determination*, University of Michigan Journal of Law Reform 26 2 (1993): 277-312.

⁴⁶ Anaya, *Indigenous Peoples in International Law*.

international law still appears to be one concerned with the role of indigenous peoples as stewards of the land and unique, land-based cultures that should be preserved because they counter the dominant norms about environmental use and management that have largely worked to destroy vast bioregions and ecosystems.

B. *Toward a Vision of Intercultural Justice:*

The effort of Indian nations to define their political identity in the modern era corresponds to the international debates over tribalism, sovereignty, decolonization, and democratization. Globally, ethnic groups are mobilizing to define their own identity in the modern era and challenging the structures and institutions that have become the foundation of the international order.⁴⁷ Thus, within the United States, efforts to define the place of Indian nations within American federal system are affected by global debates over tribalism and recognition of group identity within pluralistic societies. The normative foundations of constitutionalism are often perceived to be in tension with those of tribalism, and the central focus of the debate appears to be over which system is best suited to achieve our "common" goals.

The emphasis within American constitutionalism is on the unity of the political community which we understand as the civil society.⁴⁸ Citizens are the constituent members of this political community, and they unite around common ideals, such as virtue, reason, justice, liberty, property, equality, and order. American constitutionalism is essential to the national identity of the United States, and it is unabashedly assimilationist in character, stressing the value of cultural uniformity at the "governmental" or "public" level, and relegating cultural differences to the "private" sphere. Proponents argue that any claims of injustice that particular groups have can be adjudicated within the constitutional structure, which protects "basic rights" fundamental to the orderly and fair operation of a pluralistic society.⁴⁹ Under this theory, presumably, Native peoples have an equal right to the same liberties enjoyed by other citizens, and there is no need to recognize "special" group rights.

⁴⁷ See generally Christine Sistare, Larry May, & Leslie Francis, *Groups and Group Rights* (Lawrence: Univ. of Kansas Press, 2001).

⁴⁸ Herman Belz, "Affirmative Action and American Equality: A Constitutionalist Perspective," in Kenneth L. Grasso and Cecilia Rodriguez Castillo, *Liberty Under Law: American Constitutionalism, Yesterday, Today and Tomorrow* (1997).

⁴⁹ There are many versions of this argument among contemporary theorists, including John Rawls's work in *Political Liberalism* (New York: Columbia University Press, 1993).

Not surprisingly, in the United States, as in pluralistic societies across the globe, ethnic groups are striving to assert their own identities as distinct from the homogenizing influence of the national identity. The assimilationist focus of nationalism is increasingly attacked as a movement that is biased against groups whose cultures differ from that of the majority group. Members of minority groups argue that the constitutional structure has failed to protect their rights to equal concern and respect by failing to recognize their distinctive group status or acknowledge the historical context of conquest, colonialism, and racism that continues to leave a legacy of dispossession and inequality.

In particular, Native American groups have increasingly asserted their own national identities as "tribal" sovereigns with a political status independent from that of the nation-state.⁵⁰ In response, members of the dominant society have attacked movements for indigenous self-determination as a form of "tribalism" that contravenes fundamental liberal norms of political organization and threatens to destabilize the order of civil society. Opponents of indigenous self-determination argue that the premise of group or collective rights that underlies this movement is inconsistent with Anglo-American norms of individual liberty and equality. At a more fundamental level, however, the fear seems to be that "tribalism" represents an alternative structure that enables its members to realize their own political identities as different from that of the nation states.

What does the future hold with respect to our need to achieve intercultural justice? In particular, how can we overcome the legacy of colonialism and begin to recognize the moral and legal rights of Native peoples to cultural integrity, political autonomy, and territorial self-determination?

Indigenous peoples today confront the legacy of colonialism at several different levels. First, colonialism has diluted the "voice" of indigenous peoples in global decision-making because they are not recognized as having rights of consent and control equivalent to the nation-states. Secondly, colonialism continues to manifest itself in the environmental and economic choices that Indian nations are "permitted" to make under domestic law and policy. And finally, the most insidious type of colonialism has been to distort indigenous value systems by imposing Western norms and values through federal law and policy. Thus, in concrete terms, it is not only necessary to regain control over indigenous lands and resources, but to allow indigenous peoples to reclaim their own ideals of self-determination and self-governance.

First of all, it seems apparent that indigenous peoples must continue to resist incorporation into domestic institutional structures. In part, the broad appeal of

⁵⁰ See Rebecca Tsosic, "Indigenous Groups and American Democracy: Substantive Approaches to Cultural Pluralism," in Sinture et al., *Groups and Group Rights*, 215-34.

international human rights law is that it offers a body of conventional and customary norms that augment and even resist contrary applications under domestic law.⁵¹ Thus, to the extent that domestic law holds indigenous peoples to dominant policies based on their "dependent" status, international legal structures offer a way to overcome the constraints of domestic law. However, in many ways a legal structure is only as valid as the tools to enforce it. Thus, a major project for the future will be to develop institutional structures that are inclusive of indigenous participation on an equal basis to nation-states, and thus provide a counter-structure to domestic institutions.

Secondly, there is a need to unite international entities around the realization that indigenous peoples retain rights of self-determination as "peoples." As Professor Anaya points out, "to the extent that indigenous peoples have been denied self-determination by virtue of historical and continuing wrongs, they are entitled to remedial measures."⁵² As Anaya notes, however, the remedial measures may vary depending upon the group and its present needs. In some cases, an indigenous group may believe that it is desirable to maintain a close connection with the domestic government. Thus, it may be entirely consistent with an indigenous view of self-determination to accept political incorporation into a federalist system, while still preserving essential aspects of governmental autonomy and control.

Professor Anaya calls for strategies of negotiation to develop remedial measures and implementation of corresponding norms.⁵³ This strategy is consistent with the treaty relationship of American Indian tribes to the federal government, and thus has a powerful historical basis under domestic law. Moreover, such strategies are consistent with ideals of "multicultural constitutionalism," intended to resolve differences within a pluralistic society. Philosopher James Tully, for example, asserts that "multicultural constitutionalism" demands an "intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity."⁵⁴

The fundamental goal of multicultural constitutionalism is a "critical pluralism" that recognizes cultural groups as equal partners in a dialogue, and enables them to participate in society on their own terms instead of being forced to articulate their claims under dominant society's institutions and conceptual

⁵¹ Anaya, *Indigenous Peoples in International Law*.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

framework.⁵⁵ The principles and relationships that will enable indigenous peoples to achieve equality as participants must be articulated anew in order to overcome the constraints of colonialism. Moreover, it is likely that new institutions and conceptual frameworks will need to be developed in order to realize these principles and relationships, possibly requiring restructuring at both the domestic and international levels.

Finally, indigenous leaders must work to counter the perceptions and stereotypes about them that may work against innovative solutions to long-standing problems. Indigenous peoples require institutions that reflect modernization as well as tradition. To be held to the mythical past as a way of justifying rights in the present is an unfortunate situation and one that is inconsistent with a strong concept of self-determination.

Contemporary Native American people represent a diversity of cultures, governments, religions, and traditions. However, we all face a central challenge: to return to an understanding of sovereignty that integrates our most precious resources--our lands, cultures and communities. This vision is one of "cultural sovereignty." As Wallace Coffey, an educator and former chairman the Comanche Nation, explains: "The most significant challenge of our generation is to safeguard what little remains. The answer to the question of what sovereignty means is deeply rooted in our cultural identity and our traditional spiritual values. Indian men and women are continuing to learn the lessons of our culture. Cultural sovereignty is a renaissance for Indian nations: the flowering of life, the beginnings of wisdom, and, in turn, reverence for spiritual strength."⁵⁶

⁵⁵ Here, I am drawing on Adeno Addis's conception of "critical pluralism." See Adeno Addis, "Individualism, Communitarianism, and the Rights of Ethnic Minorities," *Notre Dame L. Rev.* 67 (1992): 615.

⁵⁶ Coffey & Tsosie, *Rethinking the Tribal Sovereignty Doctrine*.