CHAPTER 1

TRIBAL GOVERNMENT

American Indian tribal government is a bit of a misnomer in significant ways. Indian nations, now commonly referred to as Indian tribes, are much better described as nations, or what Chief Justice Marshall called "distinct, independent political communities." *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). Marshall recognized Indian nations as timeless entities — "undisputed possessors of the soil, from time immemorial." *Id*. American Indian nations predate the United States, having been in existence since what historians call pre-history. American Indian nations as political entities do not necessarily subscribe to the same political philosophy the American people as a whole follow. Indian nations are not bound to the United States Constitution, many federal laws and regulations, and most state and local laws. Indian nations are left to "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). It is the purpose of this chapter to survey the characteristics of these political entities.

We begin this chapter with the origins of modern American Indian tribal government. We will survey American Indian nationhood as it existed prior to European and American interference, move on to the transition period in which Indian people fought for their own and their nations' survival, and finish with the modern period, where American Indian nations have slowly begun to thrive.

A. A BRIEF HISTORY OF CUSTOMARY AND TRADITIONAL AMERICAN INDIAN GOVERNANCE

1. AMERICAN INDIAN "TRIBALISM"

Well into the period of European and American domination, American Indian government was absolutely nothing like the nations that formed in the Western Hemisphere starting in 1492. It is not an overgeneralization to state that most Indian nations did not view government as a process of coercion of the masses by an enlightened few, as is suggested to be the case for early European government and law in works such as Hobbes's *Leviathan*. Indian nations appear to have governed by consent, often unanimous consent.

Many, if not the vast majority of, American Indian nations did not form a "government" as the term is commonly understood by Euro-American political thinkers:

> Given the absence of formally structured institutions within the Indian tribes they encountered, it appeared to the earliest settlers that the tribes existed without any forms of government. The Indians were generally viewed as living almost in a state of anarchy and some early political writers, seeking to conceive a "state of nature" upon which they could build a philosophical framework for their natural law–social contract theories of government, frequently referred to Indians as "children of nature" and applauded their apparent ability to live without the confining and complex rules that had been devised within the European systems of government. Tribal governments of enormous complexity did exist but they differed so radically from the forms used by Europeans that few non-Indian observers could understand them.

VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 81 (1983).

American Indian nations have long been labeled "tribes," and this label is the standard in that the United States Constitution expressly acknowledges the presence and the sovereignty of "Indian tribes." U.S. CONST. art. I, §8, cl. 3. However, this is an inaccurate characterization for many reasons:

> Tribe is most appropriately a cultural concept. Except for some eastern woodland confederacies, few Indians had tribal organizations that governed their activities. Some, like the Comanches, Apaches, and Navajos, were nomadic families with little in the way of larger organization. Similarly, the Pueblos of New Mexico lived in settled villages rarely, if ever, in contact with each other. Even among the more organized nomadic groups of the Northern Plains, such as the Cheyennes, Sioux, and Blackfeet, the tribes assembled only occasionally, while daily affairs were left to smaller bands. Participation in tribal religious ceremonies or annual buffalo hunts reinforced a sense of larger community, but did not alter the fact that an individual's life focused mainly on the family and clan.

GRAHAM D. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-45, at 2 (1980). That said, we must recognize that American Indian "tribalism" is alive and well, and uniquely linked to "sovereignty." Modern American Indian nations view as sacrosanct the legal and political notion, borrowed in large part from Anglo-American political theory, of "sovereignty." Former Principal Chief of the Cherokee Nation of Oklahoma Wilma Mankiller has referred to American Indian sovereignty as a "sacred trust," borrowing the term from her mentors. Wilma Mankiller, *"Tribal Sovereignty is a Sacred Trust": An Open Letter to the Conference*, 23 AM. INDIAN L. REV. 479, 479 (1998-1999). American Indian notions of "sovereignty," however, tend to be completely different from European and American notions.

The key difference is the way American Indian nations are structured. The idea of a formalized, hierarchical government was anathema to many American Indian communities, which typically abhorred government based on coercion rather than consent:

> The primacy of [American Indian] individual conscience dictates a very pure form of democracy characterized by its lack of central authority, and in which

> any collective action requires the consent of everyone affected — or at least the consensus of all their families. . . .
>
> Leaders are inherently powerless to deprive any family of its means of subsistence. As long as each family stays within its ancestral lands and retains its economic autonomy, the right to dissent is a practical reality. The evil of modern states is their power to decide who eats. . . .
>
> Representative, majoritarian democracy was an improvement on European feudal monarchies, but from an indigenous perspective it seems authoritarian. For them, the emergence of coercive power in government signifies the failure of authority. Indeed . . . imposing a "republic" on tribal peoples forces them into a second-best form of democracy based on trade-offs they themselves chose not to make. The powerlessness of Native American governments was considered and deliberate, reflecting a sophisticated awareness that an external authority which creates its own legal authority is a challenge to culture itself. . . .

Russel Lawrence Barsh, *The Nature and Spirit of North American Political Systems*, 10 Am. Indian Q. 181, 186-87 (1986) (quotations and citations omitted). "[F]ew tribes attempted to form a large encompassing form of government. Indeed, tribes in the plains, like New England townspeople of the seventeenth century, would have abhorred the idea of governing more than a few hundred people." Deloria & Lytle, American Indians, American Justice, *supra*, at 97.

Some Indian community governments operated only in terms of what might be called an external and an internal government. Internal government refers to the daily activities of the people, regulated only by the legal structures created locally, while external government deals with the larger political questions that may arise in connection with other communities or nations. The Diné (Navajo people), for example, may have taken up political issues "only when external affairs dictated the need for a political position." Aubrey W. Williams, Jr., Navajo Political Process 5 (Smithsonian Institution Press 1970). Diné government, like so many other Indian governments, was based not on a monopoly of violence but on consent, unanimity, and respect:

> The people of an area assembled to choose a local headman and, while the choice was nearly always unanimous, a close vote would prompt the people to request speeches from the various candidates. In addition, men and women were allowed to speak in favor of a candidate. The speechmaking and voting frequently took several days; a unanimous vote for one candidate was the objective, as great value was placed on community solidarity and harmony. . . .
>
> The local political leaders, the *natani*, operated within a social control system that respected the individual, and uniform collective behavior was achieved not by authoritarian directive imposed from above, but rather by creating a favorable public opinion within the local group. Speeches, debate, and discussion, sometimes all but endless, were consequently the normal means used to create unanimity. . . . The reputation of a local headman depended upon his good judgment and his rhetorical ability to persuade members of his group to lead peaceful, useful, and harmonious lives.

Id. at 6-7.

Similarly, the Lakota people of the northern plains followed a government more akin to a pure democratic model of government decision making:

> In this type of government, there is majority rule by chosen leaders but there is also the opportunity for any member of the tribe to be heard on any particular issue. It has always been considered ill mannered and not in accordance with the Lakota ideal of good citizenship to be unwilling to listen to the opinion of a fellow tribal member regardless of the issue being discussed or the opinion held. . . .
>
> This form of tribal government — democratic as it was — was not always easy for non-Indians to understand. Given the problems of language and the fact that it was so difficult for non-Indians to identify the different *Wicasa Itancan* [chiefs or true leaders] and who they had authority over, there were many misunderstandings about who spoke for whom and how binding their words or actions could or would be on others. Also, the fact that there might be different leaders at different times for different purposes further complicated relations with non-Indians.

Frank Pommersheim, Broken Ground and Flowing Waters: An Introductory Text with Materials on Rosebud Sioux Tribal Government 11-12 (1977).

The Cherokee Nation, prior to its establishment of the first American Indian constitutional government since the Haudenosaunee Confederacy, had a national government structure in place, but that structure rarely operated with "a strong sense of centralized political nationalism." Duane Champagne, American Indian Societies: Strategies and Conditions of Political and Cultural Survival 39 (1989).

The paradigmatic differences between European and later American political theory and most American Indian nations' political theories contributed to the sort of confusion Professor Pommersheim mentioned in relation to the Lakota communities. In the eighteenth century, prior to the establishment of the United States, colonial leaders sought to reorganize the Delaware Indians' governance structure, with almost amusing results:

> Between 1718 and 1748 Sassoonan, a leader of a major band, was regarded by colonial officials as "King of the Delaware." Although the officials transacted business through Sassoonan and supported him by giving him authority to distribute material resources, he received only nominal recognition from the Delaware.

Champagne, American Indian Societies, *supra*, at 17. The same was true with the Carolina colonists and the Cherokees: "Between 1718 and 1752 Carolina officials proclaimed various Cherokee leaders as 'emperor' and declined to recognize the authority of any other leaders who would not work through their designated intermediary." *Id*. at 41. Accounts of European colonists identifying a "king" or "emperor" and calling the female children of these leaders "princesses" are pervasive — and very frequently inaccurate.

American Indian nations developed legal structures, though many of them could be construed as a form of libertarian socialism, to borrow an idea from Bertrand Russell. Bertrand Russell, Proposed Roads to Freedom 111-38 (1919). These American Indian governments, numbering in the hundreds over the entire continent, incorporated many similar elements, but were characterized by incredible variety and complexity.

In contrast, other communities adopted a rigid political structure based on war and peace, as in the case of the Creek Confederacy. The main political unit of the Creek Confederacy, like so many other Indian communities, was the village. The Creeks would dedicate whole villages to a particular task:

> It is estimated that the Creek Confederacy had between fifty and eighty separate towns in the century before white contact. . . . They divided the towns into red and white towns, red for war and white for peace. The white towns had all the councils, performed the adoption ceremonies, enacted the laws and regulations of the nation, and regulated the internal affairs of the confederation, including intertown relationships. No blood was supposed to be shed in the white towns and it was regarded as a serious offense to do so.
>
> The red towns declared and conducted wars on behalf of the confederacy. They planned the military expeditions and conducted foreign relations on behalf of the nation. To prevent intraconfederacy disputes from fragmenting the tenuous alliance, ball games of some degree of ferocity were initiated matching towns against each other. Traditionally, red towns competed against white towns.

Deloria & Lytle, American Indians, American Justice, *supra*, at 85.

During the transition from American Indian treaty-making to the time of tribal reorganization in 1934, Indian communities engaged in a wide variety of experimentation in regards to governance. Some communities, feeling the threat and the effects of American encroachment on their lands and resources, "tightened their traditional forms of government considerably. . . ." Deloria & Lytle, American Indians, American Justice, *supra*, at 90.

2. QUASI-JUDICIAL CHARACTER OF TRADITIONAL AMERICAN INDIAN GOVERNANCE

Case 4. Cries Yia Eya Banished for the Murder of Chief Eagle

Karl N. Llewellyn and E. Adamson Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence 12-13 (1941)

Cries Yia Eya had been gone from the camp for three years because he had killed Chief Eagle in a whiskey brawl. The chiefs had ordered him away for his murder, so we did not see anything of him for that time. Then one day he came back, leading a horse packed with bundles of old-time tobacco. He stopped outside the camp and sent a messenger in with the horse and tobacco who was to say to the chiefs for him, "I am begging to come home."

The chiefs all got together for a meeting, and the soldier societies were told to convene, for there was an important matter to be considered. The tobacco was divided up and chiefs' messengers were sent out to invite the soldier chiefs to come to the lodge of the tribal council, for the big chiefs wanted to talk to them. "Here is the tobacco that that man sent in," they told the soldier chiefs. "Now we want you soldiers to decide if you think we should accept his request. If you decide that we should let him return, then it is up to you to convince his family that it is all right." (The relatives of Chief Eagle had told everybody that they would kill Cries Yia Eya on sight if they ever found him. "If we set eyes on him, he'll never make another track," they had vowed.) The soldier chiefs took

the tobacco and went out to gather their troops. Each society met in its own separate lodge to talk amongst themselves, but the society servants kept passing back and forth between their different lodges to report on the trend of the discussion in the different companies.

At last one man said, "I think it is all right. I believe the stink has blown from him. Let him return!" This view was passed around, and this is the view that won out among the soldiers. Then the father of Chief Eagle was sent for and asked whether he would accept the decision. "Soldiers," he replied, "I shall listen to you. Let him return! But if that man comes back, I want never to hear his voice raised against another person. If he does, we come together. As far as that stuff of his is concerned, I want nothing that belonged to him. Take this share you have set aside for me and give it to someone else."

Cries Yia Eya had always been a mean man, disliked by everyone, but he had been a fierce fighter against the enemies. After he came back to the camp, however, he was always good to the people.

Case 96. Refusal of Divorce by Court Order

Watson Smith and John M. Roberts, Zuni Law: A Field of Values 98 (1954)

(ca. 1949) A husband wanted to marry another woman. So the wife brought suit before the Council, told them that she could not support her children and did not want a divorce. The husband said at the hearing that he wanted the children and would support them.

The Council decided, however, that the husband should return to his wife and keep the home for the children. There was no fine or penalty imposed.

The husband accepted this decision and returned to his wife.

Case 31. Slander

Watson Smith and John M. Roberts, Zuni Law: A Field of Values 56 (1954)

(Date unknown) The owner of a horse accused another of killing it and demanded payment. The accused denied the charge, and the owner asked the Council for a trial.

After the complainant had stated his case in court, the defendant demanded that if he had any evidence from witnesses or footprints, he should produce it. The parties argued nearly all night, and the Council could not determine which one was telling the truth. Finally, around dawn the plaintiff demanded payment of a similar horse. The judge asked the parties four times if they wanted the Council to decide the matter, each answered affirmatively four times. The judge then decided in favor of the defendant, because the plaintiff had not sufficient evidence to warrant a suit. He added that since the plaintiff had embarrassed the defendant by accusing him falsely, he must pay $30 in damages. Because the suit had caused unnecessary trouble to the councilmen, a fine of $25 was also assessed, payable to the councilmen personally.

The plaintiff attempted to argue further, but the judge "shut him up" and he paid.

A year later the plaintiff brought suit again, and presented the same story without additional evidence. Since the case had already been decided and no new evidence was adduced, the judge found for the defendant again. The plaintiff was fined $80, which was paid the councilmen for their trouble. But no additional damages were ordered because the defendant asked none.

Case 92. Hωnimiidω v. Dohωωtwe

Jane Richardson, Law and Status among the Kiowa Indians 129 (1966)

(Date unknown) Hωnimiidω and Dohωωtwe, brothers of very high rank, had accumulated a large herd of horses through lucrative raiding. They had always presented their spoils to their mother. Thus the mother owned the whole herd of horses. When she died Hωnimiidω came and took the whole herd of horses without consulting his brother. Dohωωtwe did not object. They didn't have "close relations" after that. But they didn't have an open quarrel "because they were brothers. It would have been a disgrace if such a thing got out. High status especially keeps differences quiet."

Case 21. Mωkin v. Toyop

Jane Richardson, Law and Status among the Kiowa Indians 54-55 (1966)

(1888)

H — Mωkin, a Mexican captive and the Taime-keeper's assistant; he had an extraordinarily responsible position for a captive: having learned the ritual, he was for years in charge of the sundance for three owners who did not know it as well as he; also had owl power.
W — wife of Mωkin.
C — Toyop, a captive's son, apparently fairly well off kindred.
HBs — Mωkin's foster brothers, very good family.

. . . After the Oak Tree sundance the tribe moved up to Eagle Heart Spring and camped there. The weather was fine. During the warm evenings C made himself conspicuous by mounting his horse and prancing around the camp very enthusiastically. He was happy because he had W as sweetheart. He was planning to abscond with her. While the people were camped here, C decided to go up to the mountains and fast for four days. C returned in two days but in the meantime H had taken his wife and daughter to informant's father's camp to build a sweathouse for his own medicine. While H was occupied with his sweatlodge, W would leave her tipi every night and go to C. A short time later when they were in Anadarko, C tried to elope with W but failed somehow. Later when H went away to fulfill some religious duty, C, W and W's little daughter ran off. C's mother cried when she heard the news because she was afraid of H's power. H sent for his three foster brothers and they all went to C's place to take horses from C or his brothers. Each of the HBs took a horse, including C's best one. H went along but took no horses. Then the HBs and H went into the Cheyenne country to look for C and W, but they

couldn't find a trace of them. H went up into the mountains to fast and to use his Taime sorcery.

Later the couple returned with H's daughter. The little girl had become blind. It was said that H's sorcery was being paid for. The couple took sick and had to be cured by Quanah Parker, a Comanche Chief. H's daughter died. Then H dropped the whole affair. No one gave him a peace pipe because HBs had gotten horses and the matter was considered settled. Informant was especially struck by H's despair and suffering. He "had never seen anything like it. It made an old man of H."

Jacob Williams and Tuscarora Nation v. Six Nations Iroquois Council

John A. Noon, Law and Government of the Grand River Iroquois 163 (1949)

(May 11, 1886)

Facts of the Case. The plaintiffs' petition Council to ratify the decision of the Wolf clan and the Tuscarora nation to grant retirement to Chief Jacob Williams.

Chief Williams, due to advanced age and being hard of hearing, has sought and been granted the right to retire by the women of the Wolf clan. The women have already nominated Joseph Green to succeed him. The chiefs of the Tuscarora nation, having ratified the action taken by the women of the Wolf clan, bring the matter to Council for final decision.

Point of Law Involved. The question of law raised by this case is the power of Council over the retirement of chiefs.

Decision. "With reference to Jacob Williams who wishes to resign his chieftainship . . . the Council declines to accept his proposal of resignation but hope that he may continue to act with his brother chiefs as long as he lives."

Catharine Hill v. Alex R. Jamieson

John A. Noon, Law and Government of the Grand River Iroquois 152 (1949)

(May 6, 1884)

Facts of the Case. The plaintiff seeks to recover possession of the north half of Lot 6, in 5th Concession of the township of Tuscarora. Some years ago the plaintiff and her husband, the late John Hill, planning to leave the reservation and reside in the state of Kansas, sold the property in dispute to two Indians from St. Regis, Messrs. Mitchel Muskatoe (Wi-sh-sa-kon-on-ta) and Angus Garo (Evo-nias-ka-e-un-to-toe). These Indians later conveyed their rights to the property to Alex R. Jamieson, a member of the Six Nations for the sum of $400. The plaintiff, having returned to the reservation to live, brings suit to compel the return of the property, claiming that the transaction between herself and husband and Messrs. Muskatoe and Garo, and subsequent transaction between the latter parties and Jamieson, was illegal and hence null and void.

The plaintiff raises the question of the validity of a sale of land on the reservation to non–Six Nations Indians and the resale of the property by the same Indians to a Six Nations Indian. It would appear that the two transactions are inextricably related and hence both must either be legal or illegal. Neither sale was submitted to the Council for confirmation. If such a course had been

followed, the present situation would not have arisen because the Council would have refused to confirm the sale. Since both parties are here equally reprehensible, the point cannot be used against either.

Point of Law Involved. Is the sale of property located on the reservation legal when both parties are not Six Nations Indians?

Decision. "The Council . . . decided that the sale between John Hill and his wife to Mitchel Muskatoe and Angus Garo and also the sale between Messrs. Muskatoe and Garo and Alex R. Jamieson shall be respected and on no account allow reconsideration."

NOTES

1. One of the key features of traditional American Indian government was their focus: resolve disputes as they arose, rather than to legislate and enforce. "[T]he primary thrust of traditional government was more judicial than legislative in nature." Deloria & Lytle, American Indians, American Justice, *supra*, at 89.

For example, the Zuni dispute resolution system consisted of leaders of the community, including both secular and religious, who would convene as a "court":

> When the Council sits as a court it acts in the capacity of both judge and jury. Since there are no verbalized limits to its judicial authority, its powers in this field have been built up by accretion and precedent to the point where it may consider and determine almost any controversy of daily life among the people.

Watson Smith & John M. Roberts, Zuni Law: A Field of Values 36 (1954). Smith and Watson further reported:

> [M]eetings of the Great Council were formerly held for the purpose of providing a public hearing of cases of extraordinary interest. . . . [S]uch meetings could be convened by the Tribal Council on its own authority or at the request of an individual. They were announced by the crier four days in advance and were held in the plaza. As many as 400 to 500 people might attend.

Smith & Roberts, Zuni Law, *supra*, at 114. But these public hearings ceased sometime in the 1930s. This excerpt demonstrates how a government focused on the reactionary business of resolving disputes as they arise can slowly, over time, become more of a policymaking body, preventing future disputes by establishing the ground rules before arguments arise.

2. The Zuni people of New Mexico constructed a complicated web of secular and religious government structures over centuries. Their particular government structure was not democratic at all. As a nineteenth-century anthropologist observed, perhaps making too broad a generalization,

> We find, then, that the democracy, or republic, of popular tradition, in its reference to the sedentary Indians of New Mexico and Arizona, is, like most other popular traditions regarding these comparatively unknown peoples, erroneous; that in reality their political fabric is set and woven by an elaborate priesthood, the only semblance of democracy reposing in the power of the

> council — itself composed of all adults of good standing in the nation — to reject a political head chief as thus chosen, while the power of choosing a substitute remains in the hands of the martial priests, and that of confirming him in the four priests of the temple.

F. H. Cushing, *The Zuñi Social, Mythic, and Religious Systems*, 21:2 POPULAR SCI. MONTHLY 186, 187-88 (1882), *quoted in* SMITH & ROBERTS, ZUNI LAW, *supra*, at 31.

3. Non-Indian scholars took to examining the "cases" decided by American Indian councils as if they were case law analogous to Anglo-American common law. Most famously, Karl N. Llewellyn and E. Adamson Hoebel published *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* in 1941, a deeply influential work of legal anthropology involving the reduction of Cheyenne dispute resolution outcomes to writing. Other legal anthropologists followed this methodology of reporting "case law."

Professor Llewellyn, a prominent and influential commercial law professor, supposedly applied his experiences studying the Cheyenne Indians as the Reporter of Article 2 (Sales) of the Uniform Commercial Code. David Ray Papke, *How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code*, 47 BUFF. L. REV. 1457 (1999). Papke argues that the Cheyenne Indians' ways of law persuaded Llewellyn to draft Article 2 to remove many of the formalistic aspects of contract, such as sealed instruments, "realiz[ing] that commercial parties formed contracts quickly in various ways. These parties did not want to worry about traditional contracts doctrine, assume they even knew it in the first place." *Id*. at 1472.

Another commentator, drawing heavily on Papke's work, added:

> By incorporating into the Code concepts like usage of trade, Llewellyn also set in motion a particular form of legal evolution. In many contexts, rapid changes in the commercial environment have quickly rendered a body of law inadequate or obsolete. In copyright law, for example, judges and lawyers are now struggling to figure out how to treat computerized databases, which were barely envisioned in 1976 when the current law was drafted. By making commercial law derivative of commercial culture rather than vice-versa, Llewellyn sought to immunize the UCC against such problems. His theory was that as the marketplace evolved, the law would, too, automatically and without the need for formal intervention. This self-amending feature of the UCC is also strongly evocative of Cheyenne law-ways, with their seemingly infinite capacity to adapt informally to changing cultural circumstances.

John M. Conley, *Of Contract, Culture, and the Code: Judge Easterbrook and the Cheyenne Indians*, 16 TOURO L. REV. 1053, 1056 (2000).

B. THE APPLICATION AND UNDERSTANDING OF UNWRITTEN LAW: THE THREE FIRES CONFEDERACY OF ANISHINAABEK

American Indian tribal nations — the Indian nations located within the geographic borders of what is now the United States — have always governed

themselves in accordance with their own ways. They did not always memorialize their laws in writing, but sometimes did so as part of their tradition of stories, ancestry, and lifeways.

The first forms of law and order appeared long before the arrival of the Europeans, and usually involved the resolution of disputes involving hunting, fishing, and gathering rights, privileges, and territories. There also was a sophisticated system for dealing with criminal acts, as well as negligent acts.

The unwritten laws of the Anishinaabek — the people of the Three Fires Confederacy of Odawa, Bodewadomi, and Ojibwe — offer a reasonable cross-section of American Indian unwritten law.

The Anishinaabek often taught each other general rules of behavior for all people by relating stories linked to the landscape. The story of the Pukwudjinni, or little people, at the Picture Rocks in the Upper Peninsula of Michigan is a good example. Gregory E. Dowd, *The Meaning of Article 13 of the Treaty of Washington, March 28, 1836*, Expert Report prepared for the Chippewa Ottawa Resource Authority, at 113-14; *United States v. Michigan*, No. 2:73 CV 26 (W.D. Mich., Oct. 11, 2004) (quoting and citing Ojibwa Narratives of Charles and Charlotte Kawbawgam and Jaques LePique, 1893-1895, at 71-72, 168 (Arthur P. Bourgeois ed., 1994), and Basil Johnston, Ojibway Heritage (1976)).

It is the stories, which are easily remembered and can be told again and again down through generations, that created the structure of American Indian traditional and customary law. Unlike so many tribes that had been removed by the federal government in the west, Great Lakes Indian nations retain many of the stories that provide the backdrop for law and justice in Indian country. These stories are based on the Anishinaabemowin language and upon the geographic characteristics of the Anishinaabek.

Disputes involving hunting and fishing territories often were disputes between families. Given the seasonal character of Anishinaabek existence — shifting from small inland winter hunting camps to larger spring sugar camps, and to still larger summer villages along the coast — different disputes would be resolved by different individuals depending upon where the dispute originated. For example, a conflict — say, over trespassing — concerning the winter hunting and trapping territory of a family would be resolved through discussion between the heads of households of the two families, with threats of violence perhaps, but rarely any physical conflict. A dispute over sugaring grounds, with larger groups of extended family units coming together, would be resolved by the heads of household meeting and talking together. A dispute between villages would have to be resolved by the *ogemuk* (leaders or headmen) of each village. A dispute between regional confederacies would be resolved by the *ogemuk* of each band. But a dispute between tribes (for example, the Odawa and the Ojibwe, or the Seneca and the Huron) would have to be resolved by treaty — or warfare.

On the most fundamental level, family property rights were the basic form of property rights. *See generally* Charles A. Bishop, *The Emergence of Hunting Territories among the Northern Ojibwa*, 9 Ethnology 1 (1971); John M. Cooper, *Is the Algonquian Family Hunting Ground System Pre-Columbian?*, 41 Am. Anthropologist 66 (1939); Frank G. Speck, *The Family Hunting Band as the Basis of Algonkian Social Organization*, 17 Am. Anthropologist 289 (1915). Individuals

had little import in the property rights algebra, except for *ogemuk*, who represented a family unit, a village, or a band, and were described as "owning" the property right. These family property rights made little sense to the individualistic Europeans, who often chided Odawa hunters for giving away all the meat they harvested. Alexander Henry, a British fur trader who participated in the 1763 battle at Fort Michilimackinac, described Ottawa hunting rights as follows:

> Arrived here [at a sugar grove near Lake Michigan], we turned our attention to sugar-making, the management of which . . . belongs to the women, the men cutting wood for the fires, and hunting and fishing. In this midst of this, we were joined by several lodges of Indians, most of whom were of the family to which I belonged, and had wintered near us. The lands belonged to this family, and it had therefore the exclusive right to hunt on them. This is according to the custom of the people; for each family has its own lands.

Alexander Henry, Travels and Adventures 149 (University of Michigan Press 1968). Johann Kohl, another of the Europeans who interacted with the Great Lakes Anishinaabek, wrote:

> The beaver dams — so persons conversant with the subject assured me — all have owners among the Indians, and are handed down from father to son. The sugar camps . . . have all an owner, and no Indian family would think of making sugar at a place where it had no right. Even the cranberry patches, or places in the swamp and bush where that berry is plucked, are family property; and the same with many other things.

Johann Kohl, Kitchi Gami: Life Among the Lake Superior Ojibway 421 (Minnesota Historical Society Press 1985).

Ruth Landes argued that territorial disputes — or even territories themselves — did not arise unless there was a shortage of some resource, or if there was an outside actor creating a large market for the resource. *See* Ruth Landes, *Ojibwa of Canada*, *in* Cooperation and Competition among Primitive Peoples, at 87 (Margaret Mead ed., 1937). It is possible that there was no need to delineate hunting and fishing territories prior to the arrival of the Europeans, but there is no way to determine this from the printed record. Moreover, trade routes "could be used only by the family who pioneered them and who maintained a gift-exchange and kinship ties which assured safe passage for traders and a supply of goods when they reached their destination." James M. McClurken, *The Ottawa*, *in* People of the Three Fires: The Ottawa, Potawatomi, and Ojibway of Michigan 1, 11 (1986). Even family members used a trade route only with the permission of the *ogema*. Trespassers could be fined, charged some sort of toll, or even executed.

This treatment of property rights was a form of survival. Resources in the region were sufficient for the Michigan Anishinaabek, but the fabric of property rights ensured that the Anishinaabek utilized the correct amount of resources, and at the proper time of the year, so as to preserve the resources for the future. The Anishinaabe calendar system of marking the months by describing the actions to be taken during that time, such as harvesting berries or fishing for sucker, demonstrates how this operated.

As for individual rights, James McClurken wrote that "[t]he first rule in Ottawa society was respect for the individual. No one person could determine the fate of another." McClurken, *The Ottawa*, *supra*, at 5. But all members of the community shared their wealth, labor, and food. A person acquired prestige, respect, and even wealth by the act of gifting:

> The value of trading and gift giving was not only in acquiring goods for oneself, but in the social act of giving. By giving, individuals and families gained prestige and respect. A rich person did not have any more goods than his kinsmen; he simply gave more of what he had. The exchange of gifts was governed by a set of rules which bound giver and receiver. Each gift required some form of return and extended obligations of reciprocity across family lines to other tribes as well. The emphasis on sharing was so strong in Ottawa society that almost no interaction could be carried on without it.

Id.

An act of violence by one person against another, as well as an act of stealing or even hoarding important resources, posed an enormous danger to the small Ottawa communities. Every person had an important role to play in the day-to-day activities of the community, such as producing food or shelter, and the loss of one person or one person's production capacity could be devastating. Ottawa communities would exile, or even execute, a person who violated the trust of the people through the act of murder or another crime. Attempting to acquire too much personal or family power could also result in exile, which often was voluntary.

Anishinaabe people dealt with acts of violence, especially if they were accidental, not through retaliation but through remediation. One incident involving the accidental death of a small child through the misuse of a firearm by another child in 1846 is instructive. Peter Dougherty, an early nineteenth-century missionary who was instrumental in providing the history of the Grand Traverse Band of Ottawa and Chippewa Indians in Michigan, wrote that the family of the deceased child received a large gift of "guns and traps and blankets" from the other family. Dowd, Expert Report, *supra*, at 359-60 (quoting Peter Dougherty to William A. Richmond (Sept. 26, 1846)). This also demonstrates the importance of hunting and trapping to the Anishinaabek.

Anishinaabe customs and traditions involving domestic rules of marriage and divorce in some ways differ from the norms of today. One Anishinaabek practice exemplifies the relative autonomy that Anishinaabekwewag (Anishinaabe women) enjoyed during this period. About 70 percent of all the food consumed in Anishinaabe villages was produced by women, a fact that gave women individual authority. According to James McClurken, "Because of the work that Odawa women did in their traditional society was so important, they were afforded a great deal of personal freedom. . . . A woman could divorce a man simply by placing his belongings outside the door of the house." James M. McClurken, Gah-Baeh-Jhagwah-Buk: The Way It Happened, a Visual Culture History of the Little Traverse Bay Bands of Odawa Indians 46 (1991). The ease of ending intimate relationships may have led outsiders to infer that the Anishinaabek practiced polygamy. In fact, polygamy was not typical for the Michigan Anishinaabek. Certain respected and wealthy *ogemuk* acquired political power

within a local tribal community by taking additional wives. *See* McClurken, Gah-Baeh-Jhagwah-Buk, *supra*, at 73 (citing Paul Radin, *Ottawa-Ojibwe No. 5b*, notebook at 105 (American Philosophical Society) (noting information obtained from Joe Shomin of Cross Village, Michigan, in 1926 or 1927)). These *ogemuk* could do so only if they had the economic power to take care of all of these families, and it was this economic power that demonstrated the political power of the *ogemuk*, not to mention the sheer number of supporters one could acquire by taking care of additional families.

Tribal leadership in a particular village involved four different individuals (*ogemuk*), according to James McClurken:

> In the traditional Odawa village, there were four *Ogemuk*, each with a special job to fulfill. *Meaosad*, or head chief, was the most respected man in the village. *Meaosad* was traditionally a middle-aged man with two or three wives and many children and grandchildren. As the head of a prominent family, he could call on his kinspeople to provide food and gifts for feasts as well as to support his opinions in council. Sometimes, *Meaosad* had distinguished himself in war and could call on his fellow warriors to support him.
>
> The *Wendikawad Ogema*, or deputy chief, was a younger man than *Meaosad* who showed promise as a leader. Often, the *Wendikawad Ogema* was a son or son-in-law of *Meaosad*. When *Meaosad* could no longer lead, the *Wendikawad Ogema* filled his position. Then there was *Dewewege*, the leader who beat the drum, who was responsible for opening ceremonies, and *Mejinowe*, the official voice of the village, who was so skilled in oration that when a formal council was held, either between Odawa villages or with non-Anishinaabe people, *Mejinowe* spoke the words of the *Ogemuk* and thus represented the people.

McClurken, Gah-Baeh-Jhagwah-Buk, *supra*, at 73 (citing Radin, *Ottawa-Ojibwe No. 5b*, *supra*, at 105 (noting information obtained from Joe Shomin of Cross Village, Michigan in 1926 or 1927)). Others besides the *ogemuk* had important roles within the Anishinaabe communities: "[T]he *mishinaway* (data collector), the *kekedowenine* (mediator and conflict resolver), and the *oskabewis* (speaker and messenger) were almost as important to group decision making as the *ogima* (head chief) and the *anikeogima* (second or subchief)." Janet E. Chute, *Shingwaukonse: A Nineteenth-Century Innovative Ojibwa Leader*, 45 Ethnohistory 65, 68 (1998).

Leadership in Anishinaabe communities was similar in some respects to non-Indian leadership, in that most of the leaders were male. But as Anton Treuer notes, "[a]lthough the authority to become a civil chief was considered hereditary, influence was not." Anton Steven Treuer, The Assassination of Hole in the Day at 34 (Sept. 1997) (unpublished Ph.D. dissertation, University of Minnesota). Possessing leadership lineage made it easier and more likely for an Anishinaabe-inini (male) to rise to a leadership position, but "clan, military prowess, religious knowledge, political savvy and personal charisma all played a part in determining who had political power in the nineteenth century." *Id*. at 34-35. Moreover, collecting or hoarding or even possessing wealth was mutually exclusive to serving as a leader: "As long as a man has anything, according to the moral law of the [Anishinaabek], he must share it with those who want; and no one can attain any degree of respect among them who does not do so most liberally." *Id*. at 36 (quoting Kohl, Kitchi Gami, *supra*, at 66).

And while men served as leaders, some women ascended to leadership roles, and generally women played a terrifically important behind-the-scenes role in major decision making. *See id*. at 37-38.

The authority and responsibility of the family *ogema* is captured in the story of how one Grand Traverse region family's traps intruded on the trapping territories of another family, recounted by Henry Schoolcraft, former federal Indian Agent for the Great Lakes region:

> Some years ago, a Chippewa hunter of Grand Traverse Bay, Lake Michigan, found that an Indian of a separate band had been found trespassing on his hunting grounds by trapping furred animals. He determined to visit him, but found on reaching his lodge the family absent, and the lodge door carefully closed and tied. In one corner of the lodge he found two small packs of furs, these he seized. He then took his hatchet and blazed a large tree. With a pencil made of a burned end of a stick, he then drew on this surface the figure of a man holding a gun, pointing at another man having traps in his hands. The two packs of furs were placed between them. By these figures he told the tale of the trespass, the seizure of the furs, and the threat of shooting him if he persevered in his trespass.

Dowd, Expert Report, *supra*, at 92 (quoting Henry Rowe Schoolcraft, Personal Memoirs of a Residence of Thirty Years with the Indian Tribes of the American Frontiers 695 (1851) (AMS 1978)). This ended the dispute.

Ogemuk had a variety of tools at their disposal to enforce territorial rights and obligations. Penalties could range from confiscation to violence. For example, Peter Dougherty stated that the penalty for trespassing on another band's hunting territories could be severe:

> Each family has a certain hunting ground and trespass was in former times considered to be a sufficient cause for retaliation on the life of the trespasser. Now the one against whom the trespass is committed has the right to go to the lodge of the offender and take from him property to satisfy himself. In case of trespass by one tribe on the hunting ground of another tribe, the injured party sends a message to the other, and if satisfaction is not rendered it becomes a just cause of war.

Dowd, Expert Report, *supra*, at 90 (quoting Peter Dougherty to War Department, Office of Indian Affairs, Grand Traverse Bay (Jan. 21, 1848)). *Ogemuk* even enforced Anishinaabe community rights against non-Indians: "When the American, Samual Ashman, started fishing commercially in Goulais Bay, Shingwaukonse [a Sault Ste. Marie *ogema*] had Ashman's property seized and the fish distributed to the Indians to whom they of right belonged." Robert Doherty, *Old-Time Origins of Modern Sovereignty: State-Building among the Keweenaw Bay Ojibway, 1832-1854*, 31 Am. Indian Q. 165, 170 (2007) (quotation and citation omitted).

Francis Assikinack, an Odawa Indian from Drummond Island and who lived at L'Arbre Croche at a young age, asserted that tribal sovereignty originates in these territorial boundary questions:

> Each of these tribes had to maintain a small sovereignty of its own and for its own use. The members of the neighboring tribes had no right to go beyond the

> limits of their respective districts on their hunting excursions, and encroach upon that belonging to others. Any hunter that was caught trespassing upon the rights of other tribes, or taking beaver in the rivers running through their lands, was in danger of forfeiting his life on the spot for his rashness.

Francis Assikinack, *Legends and Traditions of the Odawah Indians*, 3 CAN. J. INDUSTRY, SCI. & ARTS 115, 117 (1858).

NOTES

1. The traditional form of governance of the Anishinaabek of Michigan demonstrates a few key principles, some of which apply in general terms to nearly all Indian nations.

First, American Indian *nationhood* developed as a response to changing geopolitical circumstances caused by the arrival and interference of European and American nations. Primary Anishinaabe governance centered on villages, and even to some extent on regions, but not on nations. Related to this, the notion of an Indian "tribe" is not an Indian construction, but a label attached to Indian nations by non-Indian governments as a means of denigrating them.

Second, Indian governance largely involved what Deloria and Lytle called "quasi-judicial" functions, and also the maintenance of family-based territorial property structures.

Third, Indian governance was unlike the modern conception of government theorized to involve coercion, or a monopoly of violence.

2. Anishinaabe scholar Benjamin Ramirez-shkwegnaabi analyzed the leadership patterns of Anishinaabe treaty negotiators, concluding:

> Anishinaabeg ogimaag (leaders) were men and women who excelled in areas such as warfare, medicine, hunting, or singing. They did not lead by force or authority (in the European sense), but rather secured their power through service to their communities. There were two main categories of ogimaag: war chiefs and civil leaders. War chiefs were typically young warriors, of lower rank than civil chiefs, who had proved their leadership in war. Ideally they supported the civil ogimaag and asserted their authority only in times of conflict. Civil leaders (by the nineteenth century this was often a hereditary rank) had a responsibility to provide for the welfare of their people, much as parents had responsibility for their children. "He was a father to his people; they looked on him as children do to a parent; and his lightest wish was immediately performed," said a principal warrior of Curly Head, a Mississippi Ojibwe civil chief whose relationship with his people was based on ensuring their well-being: "His lodge was ever full of meat, to which the hungry and destitute were ever welcome. The traders vied with one another [over] who should treat him best, and the presents which he received at their hands he always distributed to his people without reserve. When he had plenty, his people wanted not."

Benjamin Ramirez-shkwegnaabi, *The Dynamics of American Indian Diplomacy in the Great Lakes Region*, 27(4) AM. INDIAN CULTURE & RES. J. 53, 56 (2003) (quoting WILLIAM W. WARREN, THE HISTORY OF THE OJIBWAY 348 (1984)).

C. THE ORIGINS AND DEVELOPMENT OF MODERN AMERICAN INDIAN TRIBAL GOVERNMENTS

The federal government forced the establishment and the development of many western American Indian nations' tribal governments. From the point of view of the Indian people, such artificial tribal governments did not necessarily take the place of what we could call a more localized, indigenous government.

1. EARLY TRIBAL CONSTITUTIONS

The earliest significant known writing establishing a formal government structure among Indian nations is the *Gayanashagowa*, or the Great Law of Peace, established by the five Haudenosaunee nations' confederacy sometime between 1000 and 1525 A.D. *See* DAVID E. WILKINS, DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT 14-15 (2009); *see also* ARTHUR C. PARKER, THE CONSTITUTION OF THE FIVE NATIONS OR THE IROQUOIS BOOK OF THE GREAT LAW (1916) (Iroquois Reprints 1984); ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997). The Great Law of Peace includes a "detailed description of the political and moral principles of the confederacy's structural arrangement." WILKINS, DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT, *supra*, at 14.

GAYANASHAGOWA OR THE GREAT LAW OF PEACE

1. I am Dekanawidah and with the Five Nations' Confederate Lords I plant the Tree of Great Peace. I plant it in your territory, Adodarhoh, and the Onondaga Nation, in the territory of you who are Firekeepers. . . .

We place you upon those seats, spread soft with the feathery down of the globe thistle, there beneath the shade of the spreading branches of the Tree of Peace. There shall you sit and watch the Council Fire of the Confederacy of the Five Nations, and all the affairs of the Five Nations shall be transacted at this place before you, Adodarhoh, and your cousin Lords, by the Confederate Lords of the Five Nations. . . .

3. To you Adodarhoh, the Onondaga cousin Lords, I and the other Confederate Lords have entrusted the caretaking and the watching of the Five Nations Council Fire.

When there is any business to be transacted and the Confederate Council is not in session, a messenger shall be dispatched either to Adodarhoh, Hononwirehtonh or Skanawatih, Fire Keepers, or to their War Chiefs with a full statement of the case desired to be considered. Then shall Adodarhoh call his cousin (associate) Lords together and consider whether or not the case is of sufficient importance to demand the attention of the Confederate Council. If so, Adodarhoh shall dispatch messengers to summon all the Confederate Lords to assemble beneath the Tree of the Long Leaves. . . .

5. The Council of the Mohawk shall be divided into three parties as follows: Tekarihoken, Ayonhwhathah and Shadekariwade are the first party;

Sharenhowaneh, Deyoenhegwenh and Oghrenghrehgowah are the second party, and Dehennakrineh, Aghstawenserenthah and Shoskoharowaneh are the third party. The third party is to listen only to the discussion of the first and second parties and if an error is made or the proceeding is irregular they are to call attention to it, and when the case is right and properly decided by the two parties they shall confirm the decision of the two parties and refer the case to the Seneca Lords for their decision. When the Seneca Lords have decided in accord with the Mohawk Lords, the case or question shall be referred to the Cayuga and Oneida Lords on the opposite side of the house.

6. I, Dekanawidah, appoint the Mohawk Lords the heads and the leaders of the Five Nations Confederacy. The Mohawk Lords are the foundation of the Great Peace and it shall, therefore, be against the Great Binding Law to pass measures in the Confederate Council after the Mohawk Lords have protested against them.

No council of the Confederate Lords shall be legal unless all the Mohawk Lords are present. . . .

8. The Firekeepers shall formally open and close all councils of the Confederate Lords, and they shall pass upon all matters deliberated upon by the two sides and render their decision.

Every Onondaga Lord (or his deputy) must be present at every Confederate Council and must agree with the majority without unwarrantable dissent, so that a unanimous decision may be rendered. . . .

9. All the business of the Five Nations Confederate Council shall be conducted by the two combined bodies of Confederate Lords. First the question shall be passed upon by the Mohawk and Seneca Lords, then it shall be discussed and passed by the Oneida and Cayuga Lords. Their decisions shall then be referred to the Onondaga Lords, (Fire Keepers) for final judgment.

The same process shall obtain when a question is brought before the council by an individual or a War Chief.

10. In all cases the procedure must be as follows: when the Mohawk and Seneca Lords have unanimously agreed upon a question, they shall report their decision to the Cayuga and Oneida Lords, who shall deliberate upon the question and report a unanimous decision to the Mohawk Lords. The Mohawk Lords will then report the standing of the case to the Fire Keepers, who shall render a decision as they see fit in case of a disagreement by the two bodies, or confirm the decisions of the two bodies if they are identical. The Fire Keepers shall then report their decision to the Mohawk Lords who shall announce it to the open council.

11. If through any misunderstanding or obstinacy on the part of the Fire Keepers, they render a decision at variance with that of the Two Sides, the Two Sides shall reconsider the matter and if their decisions are jointly the same as before they shall report to the Fire Keepers who are then compelled to confirm their joint decision.

12. When a case comes before the Onondaga Lords (Fire Keepers) for discussion and decision, Adodarho shall introduce the matter to his comrade Lords, who shall then discuss it in their two bodies. Every Onondaga Lord except Hononwiretonh shall deliberate and he shall listen only. When a unanimous decision shall have been reached by the two bodies of Fire Keepers,

Adodarho shall notify Hononwiretonh of the fact when he shall confirm it. He shall refuse to confirm a decision if it is not unanimously agreed upon by both sides of the Fire Keepers. . . .

16. If the conditions which shall arise at any future time call for an addition to or change of this law, the case shall be carefully considered and if a new beam seems necessary or beneficial, the proposed change shall be voted upon and if adopted it shall be called, "Added to the Rafters."

Rights, Duties and Qualifications of Lords

17. A bunch of a certain number of shell (wampum) strings each two spans in length shall be given to each of the female families in which the Lordship titles are vested. The right of bestowing the title shall be hereditary in the family of the females legally possessing the bunch of shell strings and the strings shall be the token that the females of the family have the proprietary right to the Lordship title for all time to come, subject to certain restrictions hereinafter mentioned.

18. If any Confederate Lord neglects or refuses to attend the Confederate Council, the other Lords of the Nation of which he is a member shall require their War Chief to request the female sponsors of the Lord so guilty of defection to demand his attendance of the Council. If he refuses, the women holding the title shall immediately select another candidate for the title. . . .

19. If at any time it shall be manifest that a Confederate Lord has not in mind the welfare of the people or disobeys the rules of this Great Law, the men or women of the Confederacy, or both jointly, shall come to the Council and upbraid the erring Lord through his War Chief. If the complaint of the people through the War Chief is not heeded the first time it shall be uttered again and then if no attention is given a third complaint and warning shall be given. If the Lord is contumacious the matter shall go to the council of War Chiefs.

The War Chiefs shall then divest the erring Lord of his title by order of the women in whom the titleship is vested. When the Lord is deposed the women shall notify the Confederate Lords through their War Chief, and the Confederate Lords shall sanction the act. The women will then select another of their sons as a candidate and the Lords shall elect him. Then shall the chosen one be installed by the Installation Ceremony.

When a Lord is to be deposed, his War Chief shall address him as follows:

"So you, _____, disregard and set at naught the warnings of your women relatives. So you fling the warnings over your shoulder to cast them behind you.

"Behold the brightness of the Sun and in the brightness of the Sun's light I depose you of your title and remove the sacred emblem of your Lordship title. I remove from your brow the deer's antlers, which was the emblem of your position and token of your nobility. I now depose you and return the antlers to the women whose heritage they are."

The War Chief shall now address the women of the deposed Lord and say:

"Mothers, as I have now deposed your Lord, I now return to you the emblem and the title of Lordship, therefore repossess them." . . .

20. If a Lord of the Confederacy of the Five Nations should commit murder the other Lords of the Nation shall assemble at the place where the corpse lies

and prepare to depose the criminal Lord. If it is impossible to meet at the scene of the crime the Lords shall discuss the matter at the next Council of their Nation and request their War Chief to depose the Lord guilty of crime, to "bury" his women relatives and to transfer the Lordship title to a sister family. . . .

23. Any Lord of the Five Nations Confederacy may construct shell strings (or wampum belts) of any size or length as pledges or records of matters of national or international importance. . . .

Any of the people of the Five Nations may use shells (or wampum) as the record of a pledge, contract or an agreement entered into and the same shall be binding as soon as shell strings shall have been exchanged by both parties. . . .

Names, Duties and Rights of War Chiefs

. . .

37. There shall be one War Chief for each Nation and their duties shall be to carry messages for their Lords and to take up the arms of war in case of emergency. They shall not participate in the proceedings of the Confederate Council but shall watch its progress and in case of an erroneous action by a Lord they shall receive the complaints of the people and convey the warnings of the women to him. The people who wish to convey messages to the Lords in the Confederate Council shall do so through the War Chief of their Nation. It shall ever be his duty to lay the cases, questions and propositions of the people before the Confederate Council. . . .

39. If a War Chief acts contrary to instructions or against the provisions of the Laws of the Great Peace, doing so in the capacity of his office, he shall be deposed by his women relatives and by his men relatives. Either the women or the men alone or jointly may act in such a case. The women title holders shall then choose another candidate. . . .

Clans and Consanguinity

42. Among the Five Nations and their posterity there shall be the following original clans: Great Name Bearer, Ancient Name Bearer, Great Bear, Ancient Bear, Turtle, Painted Turtle, Standing Rock, Large Plover, Deer, Pigeon Hawk, Eel, Ball, Opposite-Side-of-the-Hand, and Wild Potatoes. These clans distributed through their respective Nations, shall be the sole owners and holders of the soil of the country and in them is it vested as a birthright.

43. People of the Five Nations members of a certain clan shall recognize every other member of that clan, irrespective of the Nation, as relatives. Men and women, therefore, members of the same clan are forbidden to marry.

44. The lineal descent of the people of the Five Nations shall run in the female line. Women shall be considered the progenitors of the Nation. They shall own the land and the soil. Men and women shall follow the status of the mother.

45. The women heirs of the Confederated Lordship titles shall be called Royaneh (Noble) for all time to come. . . .

52. The Royaneh women, heirs of the Lordship titles, shall, should it be necessary, correct and admonish the holders of their titles. Those only who attend the Council may do this and those who do not shall not object to what has been said nor strive to undo the action.

53. When the Royaneh women, holders of a Lordship title, select one of their sons as a candidate, they shall select one who is trustworthy, of good character, of honest disposition, one who manages his own affairs, supports his own family, if any, and who has proven a faithful man to his Nation.

54. When a Lordship title becomes vacant through death or other cause, the Royaneh women of the clan in which the title is hereditary shall hold a council and shall choose one from among their sons to fill the office made vacant. . . .

Laws of Adoption

. . .

68. Should any member of the Five Nations, a family or person belonging to a foreign nation submit a proposal for adoption into a clan of one of the Five Nations, he or they shall furnish a string of shells, a span in length, as a pledge to the clan into which he or they wish to be adopted. The Lords of the nation shall then consider the proposal and submit a decision.

69. Any member of the Five Nations who through esteem or other feeling wishes to adopt an individual, a family or number of families may offer adoption to him or them and if accepted the matter shall be brought to the attention of the Lords for confirmation and the Lords must confirm adoption.

70. When the adoption of anyone shall have been confirmed by the Lords of the Nation, the Lords shall address the people of their nation and say: "Now you of our nation, be informed that such a person, such a family or such families have ceased forever to bear their birth nation's name and have buried it in the depths of the earth. Henceforth let no one of our nation ever mention the original name or nation of their birth. To do so will be to hasten the end of our peace." . . .

NOTES

1. The Great Law of Peace established a formal government structure for the five (later six) Haudenosaunee nations, guaranteeing an external political alliance for hundreds of years. The structure merged informal diplomatic ceremony and the laws of the nations into a workable document for these very different nations. Despite the creation of this complicated and venerated international political structure, the confederacy did not often inspire cooperation between the five nations when they were engaging outsiders: "Between 1600 and 1692 the Iroquois appear to have rarely acted in political unison." CHAMPAGNE, AMERICAN INDIAN SOCIETIES, *supra*, at 26; *see also id.* ("Although the Iroquois through the confederacy had formed institutions of social and ceremonial integration, Iroquois kinship and political institutions were not differentiated, and religious mythology dictated the structure of the Iroquois polity, including the kin-based political organization. Primary political alliances remained tied to lineage and clan and regional groupings.") In other words, the Great Law of Peace prevented Haudenosaunee-on-Haundenosaunee bloodshed, but did not always lead to a concrete, unified nationality.

2. In 1848 the Seneca Nation of Indians became one the first Indian nations to promulgate an Anglo-American style form of constitutional government. The constitution adopted that year has remained substantially the same to this day. WILKINS, DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT, *supra*, at 75-81.

2. THE IMPACT OF THE TREATY RELATIONSHIP ON AMERICAN INDIAN GOVERNANCE

In contrast to the obvious example of the Haudenosaunee Confederacy, most Indian nations did not appear to have a governmental structure resembling that of the European explorers. However, the European nations still turned to diplomacy and negotiation — and entered into numerous treaties with those apparently anarchic Indian nations. The treaty relationship developed between Indian nations and England, France, Spain, and other nations carried over into relations with the United States, leading in 1777 to the first treaty between the nascent American Republic and an Indian nation.

The establishment of this treaty relationship perfected the recognition by European nations that American Indian nations existed with a legitimacy comparable to their own. These international agreements held the key to power over much of the continent. For example, the series of treaties and agreements between Great Britain and the Haudenosaunee Confederacy, known as the "Covenant Chain," served as an important linchpin between the competing colonial nations of Great Britain and France:

> English colonial officials universally regarded the Iroquois Covenant Chain as the single most important indigenous political, military, and economic institution on the continent. Through it, as the English clearly recognized, the Five Nations of the Iroquois confederacy maintained an effective capability of tipping the balance of power in North America. Only the Iroquois "empire" stood between England's weakly defended colonies on the Atlantic seaboard and France's desires to assert its hegemony over the North American continent.

WILLIAMS, LINKING ARMS TOGETHER, *supra*, at 117.

The treaty relationship allowed American Indian tribal governments some room to prosper — and served the all-important purpose of explicitly designating Indian nations as sovereigns capable of and eligible for engagement in formal international relations with recognized nations such as the United States. In effect, Indian treaties served as formal recognitions of American Indian nation sovereignty.

TREATY WITH THE OTTAWA AND CHIPPEWA

11 Stat. 621

(July 31, 1855)

Article V

The tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this

agreement, is hereby dissolved; and if at any time hereafter, further negotiations with the United States, in reference to any matters contained herein, should become necessary, no general convention of the Indians shall be called; but such as reside in the vicinity of any usual place of payment, or those only who are immediately interested in the questions involved, may arrange all matters between themselves and the United States, without the concurrence of other portions of their people, and as fully and conclusively, and with the same effect in every respect, as if all were represented. . . .

NOTES

1. Treaty making often served to impose an artificial governing authority on an Indian community that otherwise would not have recognized such an entity. One example is the negotiation of the 1836 Treaty of Washington involving the Anishinaabek of Michigan's northern Lower Peninsula and eastern Upper Peninsula. The 1836 treaty, from the point of view of the Lower Peninsula Anishinaabek, was intended to address their interests alone, with land sales to be limited, even minuscule. It was Henry Schoolcraft and Lewis Cass, the United States treaty commissioner and Indian Affairs Commissioner, who envisioned a much larger treaty cession that would involve half of the Upper Peninsula as well. Gregory Dowd reports that the 1836 treaty delegation consisted primarily of Lower Peninsula Ottawas and Chippewas. D The Upper Peninsula Chippewas were only sparsely represented, and by individuals with dubious authority at best. Schoolcraft, as the lead American treaty negotiator, used the very presence of the Upper Peninsula Chippewas as leverage against the Lower Peninsula Ottawas and Chippewas. At any moment, all parties knew, if the Ottawas objected to a large land cession or any other treaty term, Schoolcraft could easily acquire the signatures of the Upper Peninsula Chippewa contingent, regardless of their authority to sign away lands that they did not own.

To enable the federal government to take advantage of this situation, the American treaty commissioners incorporated into the treaty the establishment of an entity called "the Chippewa and Ottawa nations," which existed for the purpose of executing the treaty and binding all the nations assembled. Treaty of Washington, art. I, 6 Stat. 491 (1836). The Anishinaabek did not view themselves as a unified entity. There were two key negotiators, one from the Lower Peninsula and one from the Upper Peninsula. And those speakers had no authority to bind the most important political entities — local villages — without the express consent of those communities. The treaty signature page, divided by region and village, demonstrated this reality more so than the fictional designation "Chippewa and Ottawa nations."

From the U.S. government's point of view, a signature was a signature. No one in Washington, DC, would question the signatories' authority. Once the United States created this legal fiction, Schoolcraft exploited it to incredible advantage:

> When the parties reassembled in the Masonic Hall on March 18, the formalities of the calumet ceremony preceded the discussions. Then the "chief

> speaker" arose to reject Schoolcraft's offer [to extinguish Indian title to the Anishinaabek lands, amounting to one-third of the land base of the current state of Michigan]. It is not clear from the record who this is, and after his objections no individual is referred to in [the treaty journal] as the "chief speaker." Probably it was Aishquagonabee, the first name listed on the treaty, a "Chippewa Chief of Grand Traverse." . . . * It was obvious that the Indians simply did not wish to sell their rights to most of their lands.

Dowd, Expert Report, *supra*, at 204. Schoolcraft, the American treaty commissioner, responded with a play of dirty pool and an effective trump card against the Lower Peninsula Anishinaabek:

> Schoolcraft then threatened to treat separately with the Chippewas of the Upper Peninsula unless the Ottawas and Chippewas of the Lower Peninsula changed their minds before the following Tuesday. Since Upper Peninsular peoples had even less to fear from white settlement than did Ottawas, and since the dubiously representative Chippewa delegation from the Sault Ste. Marie region had been practically handpicked by the agent (and was related by marriage to him), it is not surprising that the Chippewas present were more willing to make a deal.
>
> At that point, Augustin Hamelin [spelled Emlin in the treaty journal], Jr., intervened. He declared in English that the Ottawas had spoken, not from their hearts, but after having been, he claimed, manipulated by "white men who wanted [private] reservations." Hamelin reassured the commissioner that "if the Indians were left alone they would sell, with some Reservations for themselves, he was confident it was their wish to dispose of their lands and derive present benefit." Schoolcraft arranged for a private room in which the Indians could counsel among themselves, and that no one else be allowed to "disturb them." . . .
>
> By the eve of the resumption of formal discussions, it was clear that most of the treating Indians would mark the agreement. Mary Holiday wrote that, while the preceding Friday "most of the Ottawas refused to sell," they had since "called on Mr. Schoolcraft, telling him they would sell, if they would be allowed to make large, permanent reservations for themselves."

Dowd, Expert Report, *supra*, at 205.

The 1836 treaty did not solve the problems of the Michigan Anishinaabek, so the Indian nations and the United States entered into negotiations for another treaty in 1855. Once again, the Anishinaabek came to the table as disparate entities, and the United States worked from the fictional "unified bands" notion. The Anishinaabek objected to this characterization, and so upon the conclusion of the treaty the United States included a section eliminating the "Chippewa and Ottawa nations." Treaty of Detroit, art. V, 11 Stat. 621, 624 (1855). But the federal government used the fictional entity anyway, attempting to bind bands, such as the Burt Lake Band of Ottawa and Chippewa Indians, that refused to execute the treaty.

A second, more insidious outcome arose out of Article V of the 1855 Treaty: administrative termination of Michigan Indian nations:

> Henry Schoolcraft, who negotiated the 1836 Treaty of Washington on behalf of the United States, combined the Ottawa and Chippewa nations into a joint political unit solely for purposes of facilitating the negotiation of that treaty.

> In the years that followed, the Ottawas and Chippewas vociferously complained about being joined together as a single political unit. To address their complaints, the 1855 Treaty of Detroit contained language dissolving the artificial joinder of the two tribes. This language, however, was not intended to terminate federal recognition of either tribe, but to permit the United States to deal with the Ottawas and the Chippewas as separate political entities. Ignoring the historical context of the treaty language, Secretary Delano interpreted the 1855 treaty as providing for the dissolution of the tribes once the annuity payments it called for were completed in the spring of 1872, and hence decreed that upon finalization of those payments "tribal relations will be terminated." *Letter from Secretary of the Interior Delano to Commission of Indian Affairs* at 3 (Mar. 27, 1872). Beginning in that year, the Department of the Interior, believing that the federal government no longer had any trust obligations to the tribes, ceased to recognize the tribes either jointly or separately.

Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the United States Attorney for the Western District of Michigan, 369 F.3d 960, 96162 n. 2 (6th Cir. 2004).

2. One example involves the Indian nations of the Puget Sound area, in which "tribes" and tribal "leaders" came into being when the American treaty commissioner, Issac I. Stevens, named and appointed groupings of Indians as nations and identified leaders among them:

> No formal political structure had been created by the Indians living in the Puget Sound area at the time of initial contact with the United States Government. Governor Stevens, acting upon instructions from his superiors and recommendations of his subordinates, deliberately created political entities for purposes of delegating responsibilities and negotiating treaties. In creating these entities Governor Stevens named many chiefs and sub-chiefs.

United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974).

3. THE BEGINNINGS OF AMERICAN INDIAN CONSTITUTIONAL GOVERNMENT

In the nineteenth century, American Indian policy compelled American Indian nations to retool their traditional governance structures from primarily judicial entities to primarily legislative and executive authorities. Deloria & Lytle, American Indians, American Justice, *supra*, at 96 ("[T]he transition from a wholly traditional tribal government, which basically performed a quasi-judicial function, to the modern tribal council, which performs predominantly executive and legislative functions, varied from tribe to tribe.").

The Cherokee Nation of the southeastern United States was among the very first American Indian nations to take dramatic steps to replicate the structure and philosophy of American governments, largely as an attempt to pre-empt efforts to remove them to the west, and to end blood revenge against Americans and against each other. Champagne, American Indian Societies, *supra*, at 44. In 1809, the Cherokee nation was born when the "Cherokee council announced that the nation had been united. . . ." *Id*. at 45. In 1810, "[t]he clans agreed to delegate their judicial authority to the national council. With the

legitimate use of force now granted solely to the national government, the Cherokee polity became even more centralized. A police force called the lighthouse acted as police, judge, and executioner." *Id*.

After failing to prevent certain village leaders from signing a removal treaty with the United States, the national council signed another significant treaty in 1819 guaranteeing their lands. Then the nation further centralized, utilizing governmental districts controlled by the national government, and adding a national judiciary and regulatory structure. *See* CHAMPAGNE, AMERICAN INDIAN SOCIETIES, *supra*, at 47.

In 1828, the Nation finalized its constitutional system of government, complete with a written constitution, legal code, judiciary, and even a written, dual-language newspaper:

> In late 1826, the Cherokee national council agreed to hold elections for delegates to a constitutional convention, which was held in July 1827. The Cherokee constitution was ratified by the national council in 1828 and the first elections were held in October of that year. The new constitution was modeled after the US Constitution: it provided separation of powers among the executive, judiciary, and legislative branches, and a legal code that regulated criminal and economic concerns.

CHAMPAGNE, AMERICAN INDIAN SOCIETIES, *supra*, at 47. It also incorporated the American constitutional infirmities of "disenfranchisement of African Americans and women." WILKINS, DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT, *supra*, at 57. "Yet it also contains specific provisions (e.g., communal land ownership) that sustained a measure of traditional Cherokee values and property notions." *Id*.

CHEROKEE CONSTITUTION OF 1827

We the Representatives of the people of the Cherokee Nation in Convention assembled in order to establish justice, ensure tranquility, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty; acknowledging with humility and gratitude the goodness of the sovereign Ruler of the Universe in offering us an opportunity so favorable to the design and imploring his aid and direction in its accomplishments do ordain and establish this Constitution for the Government of the Cherokee Nation. . . .

Article II

The powers of this Government shall be divided with three distinct departments, the Legislative, Executive, and Judicial.

Section 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others; except in cases herein after expressly directed or permitted.

Article III

The Legislative power shall be vested in two distinct branches; a Committee, and a Council; each to have a negative on the other, and both to be styled,

[on] the General Council of the Cherokee Nation, and the style of their acts and laws shall be "Resolved by the Committee and Council in General Council convened." . . .

Section 4. No person shall be eligible to a seat in the General Council, but a free Cherokee male citizen, who shall have attained to the age of twenty-five years. The descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife, according to the customs and laws of this Nation, shall be entitled to all the rights and privileges of this Nation, as well as the posterity of Cherokee women by all free men. No person who is of negro or mulatto parentage, either by the father or mother side, shall be eligible to hold any office of profit, honor or trust under this Government. . . .

Section 7. All free Male citizens (excepting negroes and descendants of white and Indian men by Negro women who may have been set free) who shall have attained to the age of 18 years shall be equally entitled to vote at all public elections. . . .

Section 15. The General Council Shall have power to make, all laws and regulations, which they shall deem necessary and proper, for the good of the nation, which shall not be contrary to his Constitution.

Section 16. It shall be the duty of the General Council to pass such laws, as may be necessary and proper, to decide differences, by Arbitrators to be appointed by the parties, who may choose that summary mode of adjustment.

Section 17. No power of suspending the laws of this nation Shall be exercised, unless by the Legislature or its authority.

Section 18. That no retrospective law, nor any law, impairing the obligation of contracts shall be passed.

Section 19. The Legislature shall have power to make laws for laying and collecting taxes for the purpose of raising a revenue. . . .

Article IV

Section 1. The supreme executive power of this nation, shall be vested in a principal chief who shall be chosen by the General Council and shall hold his office four years. . . .

Section 10. He shall take care that the law be faithfully executed. . . .

Section 14. Every bill which shall have passed both Houses of the General Council shall, before it becomes a law, be presented to the Principal Chief of the Cherokee Nation. If he approves it, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journals, and proceed to reconsider it. If after such reconsideration, two thirds of that house shall agree to pass the Bill, it shall be sent together with the objection to the other House by which it shall likewise be reconsidered and, if approved of by two thirds of that house, it shall become a law. . . .

Article V

Section 1. The Judicial powers shall be vested in a Supreme Court, and such Circuit and inferior Courts, as the General Council may, from time to time, ordain and establish. . . .

Section 14. In all continual prosecutions, the accused shall have the right of being heard, of demanding the nature and cause, of the accusation against him, of meeting the witness face to face, of having compulsory process for obtaining witnesses in his favor, and in prosecutions by indictments or information, a speedy public trial by an impartial Jury of the vicinage, nor shall he be compelled to give evidence against himself.

Section 15. That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizures and searches, and that no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without good excuse, supported by Oath or affirmation. — All prisoners shall be bailable, by sufficient securities, unless for capital offences, where the proof is evident or presumption great.

Article VI

. . .

Section 3. The free exercise of religious worship and serving God without distinction, shall forever be allowed within this nation: Provided that this liberty of conscience shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace of safety of this nation. . . .

Section 8. No person shall for the same offence be twice put in jeopardy of life, or limb, nor shall any person's property be taken or applied to public use without his consent; Provided, That nothing shall be so construed in this clause as to impair the right and power of the General Council to lay and collect taxes. That all Courts shall be open, and every person for an injury done him in his property, person, or reputation, shall have remedy by due course of law.

Section 9. The right of trial by Jury shall remain inviolate.

Section 10. Religion, morality, and knowledge being necessary to good government and the preservation of liberty, and the happiness of Mankind, Schools and the means of education, shall forever, be encouraged in this nation.

Section 11. The appointment of all officers not otherwise directed by this constitution, shall be vested in the legislature. . . .

Section 13. The General Council may at any time propose such amendments to this Constitution as two thirds of each House shall deem expedient; and the Principal Chief shall issue a proclamation directing all the Civil officers of the several Districts to promulgate the same as extensively as possible within their respective Districts, at least nine Months previous to the next general election, and if at the first session of the General Council after such general election, two thirds of each House shall by yeas and nays, ratify such proposed amendments they shall be valid to all intents and purposes as parts of this Constitution; Provided, That such proposed amendments shall be read on three several days in each house as will when the same are proposed as when they are finally ratified.

Done in Convention at New Town Echota this 24th day of July 1827.

NOTES

1. The State of Georgia declared a legal and political war on the Cherokee Nation of Oklahoma around this time:

> A crisis came, in 1828, when the Cherokees held a convention and adopted a Constitution for a permanent government, displaying their intention to remain on their lands. The Legislature of Georgia responded by passing, in 1829, a series of laws of the most cruel and stringent nature, invalidating all laws and ordinances adopted by the Indians, and providing for a division of their lands. As these laws were clearly in violation of the treaty with the United States, Congress was forced now to take cognizance of the situation, but its action was feeble; and the new President, Andrew Jackson, was in entire sympathy with the State of Georgia in its claim of right to legislate over all persons within its territory, regardless of the Federal treaty. To an application made by the Cherokees for protection by Federal troops against the efforts made by Georgia to remove the Indians by force, Jackson replied "that the President of the United States has no power to protect them against the laws of Georgia." . . .
>
> The form of action decided upon was an original bill in equity, to be filed in the Supreme Court by the Cherokee Nation as an independent state, against the State of Georgia, seeking an injunction to restrain it from executing the laws claimed to be illegal and unconstitutional. Before this suit was begun, however, another case arose in the State of Georgia which presented the same issues. A Cherokee named Corn Tassel had murdered another Indian within the territory occupied by the tribe. He was arrested by the State authorities under one of the recent State laws, tried and sentenced to be hanged. Application was at once made to the United States Supreme Court for a writ of error to the State trial court, on the ground of the illegality of the State laws. The writ, which was issued on December 22, was treated by the Governor of Georgia, Gilmer, with utter disdain. . . . [O]n December 24, 1830, Tassel was executed.

1 Charles Warren, The Supreme Court in United States History 731-34 (1926).

The Supreme Court dismissed the first Cherokee case, *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), with a strongly divided Court ruling that the Cherokee Nation could not bring a claim against Georgia under the Supreme Court's original jurisdiction.

The next year, however, another test case reached the Court: *Worcester v. Georgia*, 31 U.S. 515 (1832). The Marshall Court voted 5-1 to declare unconstitutional the laws of Georgia purporting to invalidate the entire Cherokee Nation in *Worcester*, "one of the most powerful [Chief Justice John Marshall] ever delivered." Jean Edward Smith, John Marshall: Definer of a Nation 518 (1996).

2. The Cherokee experiment of establishing a constitutional form of government encouraged other American Indian nations to do the same. The Keweenaw Bay Indian Community of Ojibwe in Michigan, fearing removal to the west, exemplifies this trend:

> In October 1842, shortly after they heard about the removal treaty signed earlier that month, the Keweenaw Methodists reorganized their community. They wrote a code of laws by which to govern themselves. Unfortunately, the

> code has been lost. . . . We do, however, have some clues as to its likely contents.
>
> . . . [Peter] Jones wrote a code of laws for the Village of Credit, which may well have provided a model for the one enacted at Keweenaw Bay. Jones's code provided that Credit was to be governed by a head chief, two second chiefs, and a general council. Elected for life, the chiefs had executive and judicial functions. They had wide coercive power, including banishment. The general council, which included all resident householders, acted as a legislature and controlled public property, including all lands, timber, and the fishery.
>
> Peter Jones admired the Cherokees and believed they had set a course for other Indians to follow: Become Christians; develop a modern economy; protect land and resources; restructure tribal government as a sovereign state; defend tribal rights. The actions of Jones at Credit and the Keweenaw leaders at L'Anse parallel these Cherokee initiatives. Jones encouraged his people to hold on to their lands and resources while selectively adapting to "white" culture. He worried about white aggressiveness, especially as he learned of the pressures leading up to Cherokee removal, so he urged Indians of the region to establish an Ojibway state in which they could perpetuate their sovereignty.

Robert Doherty, *Old-Time Origins of Modern Sovereignty: State-Building among the Keweenaw Bay Ojibway, 1832-1854*, 31 Am. Indian Q. 165, 173 (2007) (footnotes omitted).

Seneca Nation of Indians Constitution of 1848

We, the people of the Seneca Nation of Indians, by virtue of the right inherent in every people, trusting in the justice and necessity of our undertaking, and humbly invoking the blessing of the God of Nations upon our efforts to improve our civil condition, and to secure to our nation the administration of equitable and wholesome laws, do hereby abolish, abrogate, and annul our form of Government by chiefs, because it has failed to answer the purposes for which all governments should be created.

It affords no security in the enjoyment of property, — it provides no laws regulating the institution of marriage, but tolerates polygamy.

It makes no provision for the poor, but leaves the destitute to perish.

It leaves the people dependent on foreign aid for the means of education.

It has no judiciary, nor executive departments. It is an irresponsible, self-constituted aristocracy.

Its powers are absolute and unlimited in assigning away the people's rights, but indefinite and not exercised, in making municipal regulations for their benefit or protection.

We cannot enumerate the evils growing out of a system so defective, not calculate its overpowering weight on the progress of improvement.

But to remedy these defects, we proclaim and establish the following Constitution or Charter, and implore the Governments of the United States and the State of New York to aid in providing us with laws under which progress shall be possible.

Section 1. Our Government shall have a legislature, Executive and Judiciary departments.

Section 2. The Legislative power shall be vested in a council of Eighteen members who shall be termed the Councillors of the Seneca Nation, and who shall be elected annually on the first Tuesday of May in each year; and who shall be apportioned to each Reservation according to its population, two-thirds of whom assembled in regular session and duly organized shall constitute a quorum, and be competent for the transaction of business; but to all bills for the appropriation of public moneys the assent of two-thirds of the members elected shall be necessary in order that the bill should become a law.

Section 3. The executive power shall be vested in a President, whose duty it shall be to preside at all meetings of the council, having only a casting vote therein. . . .

Section 4. The judiciary power shall be vested in three Peace Makers on each Reservation: any two of whom shall have power to hold courts, subject to an appeal to the council, and to such courts of the State of New York as the Legislature thereof shall permit. The jurisdiction['s] forms of process and proceeding in the Peace Makers' Courts shall be the same as in courts of the justices of the Peace of the State of New York, except in the proof of wills, and the settlement of deceased person's estates, in which cases the Peace Makers shall have such power as shall be conferred by law. . . .

Section 6. The power of making Treaties shall be vested in the Council, but no treaty shall be binding upon the Nation until the same shall be submitted to the people, and approved by three-fourths of all the legal voters and also by three-fourths of all the mothers in the Nation. . . .

Section 14. The council shall have power to make any laws not inconsistent with the Constitution of the United States or of the State of New York.

Section 15. All offenses which shall not be punishable by the laws of the United States or of the State of New York, shall be tried and punished in the Peace Makers' Court, or before the council as shall be prescribed by law.

Section 16. The rights of any member of the ancient Confederacy of the Iroquois to the occupancy of our lands and other privileges shall be respected as heretofore; and the council shall pass laws regulating for the admission of any Indian of other tribes and nations to citizenship and adoption into the Seneca Nation of Indians by his or her application for his or herself or family.

Section 17. This Charter may be altered or amended by a council of the people convened for that purpose on three months previous notice, by a vote of two-thirds of the legal voters present at such convention. . . .

Done in a general council of the people held at the Council House on the Cattaraugus Reservation on the 4th of December, A.D. 1848.

NOTES

1. Seneca scholar, professor, and attorney Robert Odawi Porter described the circumstances compelling the Seneca people to create a constitutional form of government and annulling the authority of the traditional government:

> The efforts to displace the traditional government of the Seneca Nation were spawned primarily by the perception that the traditional leadership had betrayed the Seneca People. One of the main issues of contention related to whether the treaty annuities received from the federal and state

governments should be distributed to the heads of households or kept by the leadership for governmental purposes. It was widely believed, however, that the chiefs were appropriating the annuities for themselves. The second major issue was the acceptance of bribes by the chiefs and their consequent agreement to sell all remaining Seneca lands and to remove all Senecas in New York to Kansas under the 1838 Treaty of Buffalo Creek.

In 1842, the so-called "Compromise Treaty" restored Seneca ownership to the Allegany and Cattaraugus Reservations by agreeing to relinquish claim to the Tonawanda and Buffalo Creek Reservations. Three years later, however, the state of New York, urged on by those Senecas disgusted with the traditional leadership, passed a law that fundamentally altered the Seneca government. The statute provided for new officers of the Seneca government — a clerk, a treasurer, six peacemakers, and two marshals — to be selected from the traditional chiefs. Furthermore, it defined the duties of the existing chiefs and the new officers. Not surprisingly, two factions of chiefs emerged — those in favor of the "Law" and those who were "Anti-Law" — split along the lines of who had been put in power under the "Law." By 1847, a compromise between the factions had emerged that called for no changes to be made to the 1845 Law. Nonetheless, the State acted unilaterally to amend this law and provide for the popular election of the positions of clerk, treasurer, marshal, and peacemaker that had been earlier provided.

Robert B. Porter, *Decolonizing Indigenous Governance: Observations on Restoring Greater Faith and Legitimacy in the Government of the Seneca Nation*, 8 KAN. J.L. & PUB. POL'Y 97, 108 (Winter 1997).

2. Professor Porter also notes that the 1848 constitution eliminated by implication the important governance authorities provided by the Great Law of Peace, altering gender politics in the Nation for decades:

The 1848 Constitution made no provision for women to vote or hold office. In part, this prohibition was consistent with the Gayanashagowa, in which only men served in the official governing positions. But fundamentally, the elimination of women from the process of selecting the Nation's officials was a radical departure from the practice that had been in place for hundreds of years.

One logical explanation for this transformation was the fact that women were politically non-existent in American society generally. The drafter of the Nation's constitution — a white lawyer named Chester Howe who was the Nation's attorney — undoubtedly introduced contemporary white customs into the text. [Non-Indians] had little sympathy for such Seneca traditions as preserving a strong role for women in the governmental process.

Despite the lack of a formal role, however, it is most likely that women continued to have some kind of influence upon the Nation's political affairs. . . . Nonetheless, women were formally excluded from the Nation's governing process and remained so for over 100 years.

Porter, *Decolonizing Indigenous Governance*, *supra*, at 110-11.

3. Professor Porter also noted how the informal process by which Seneca leaders talked through a problem in private before reaching a public decision survived the adoption of the 1848 constitution for over 100 years:

Under the 1848 Constitution, the structure of the decision-making process changed dramatically in two important ways. First, the traditional

> decision-making model, the "multicameral" structure of disparate political units each having a participatory role in making societal decisions, was replaced with a unicameral decision-making model — the Council. Second, the decision-making principle that unanimity was necessary before formal action could be taken was abandoned.
>
> Despite this change in structure, until recently, there did not appear to be a significant impact on the decision-making process. Through the 1970s, the sixteen members of the Nation Council had an extraordinary record of voting unanimously or near unanimously during roll call votes. The reason for this most likely was due to the continued adherence to the values of consensus politics underlying the Gayanashagowa.
>
> While not required under the Constitution, the Council appears to have conducted almost all of its important work outside of its formal sessions. Pre-meeting caucuses amongst the councillors and discussions between them with political supporters and community members were common for most of the Nation's political history. This suggests that most of the decision-making process occurred outside of Council meetings and inevitably resulted in the actual Council meetings serving as more of a recording process for what had already been decided, rather than as a genuine forum for debate and discussion. In this way, the actual decision-making process within the Nation more closely tracked the procedures under the Gayanashagowa in which various constituencies were consulted with and involved in the process before a decision was rendered.
>
> The fact that the Nation Council voted unanimously or near unanimously for almost 130 years is also evidence that the process established under the Gayanashagowa continued after the adoption of the Constitution.

Porter, *Decolonizing Indigenous Governance*, *supra*, at 114.

4. New York Indian nations also must confront the assertion of political authority over them by the State of New York, under its so-called Indian Law. In the case of the Seneca Nation, the state legislature enacted the following statute in 1847:

> The government of the Seneca nation by chiefs is abolished. Each nation shall have as officers a clerk and a treasurer. The Tonawanda nation shall have a marshal and three peacemakers. The Seneca nation shall have a marshal, three peacemakers, and eight councilors for each of its reservations, and a president. Each officer of each nation now in office shall continue in office until the expiration of the term for which he was chosen and until his successor shall be chosen.

N.Y. INDIAN LAW §41 (1847) (McKinney 2000). Professor Porter asserts, justifiably so, that laws like this statute are "invalid on their face." Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, 63 ALB. L. REV. 125, 167 (1999). He added:

> Not only did State officials in the nineteenth century believe that they had authority to establish Haudenosaunee governments, they also believed that they had the authority to direct Haudenosaunee governments — including those that it didn't "create" — to take action. . . . [State] laws focused more on the States' self-interest, such as those laws "authorizing" tribal governments to lease tribal land to individual Indians and non-Indians and to sell tribal natural resources such as timber, oil, natural gas, and stone. A few of

> these laws "authorize" tribal government to take action to protect tribal interests, such as granting permission to tribal leaders to sue in State court to protect tribal lands, to regulate residency and trespass by Indians of other tribes and non-Indians, and to establish fire corporations. . . .
>
> There is a logical explanation why laws such as these were enacted. The State has had a long history of colonizing the Haudenosaunee. The enactment of laws such as these in the nineteenth century are classic demonstrations of the State's historic efforts to obtain control over the Haudenosaunee. . . . Thus, for example, "helping" to transform Seneca governance upon the request of a few disgruntled Senecas was a rare opportunity for the State to seize greater influence and control over the Seneca Nation that could potentially lead to future land cessions.

Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, *supra*, at 167-69.

5. Early in 1848, before the ratification of the Seneca constitution, a New York court refused to take jurisdiction over private property matters relating to Seneca Indians, and even appeared to adopt a form of comity toward tribal judgments:

> We have never applied our doctrines of descent or distribution to their property, nor subjected them to our laws relating to wills, intestacy or administration; nor are they applicable to their state of society. . . .
>
> If our laws have no jurisdiction over their property, our surrogates have no power to grant letters of administration upon it. . . . I am of the opinion that the private property of the Seneca indians is not within the jurisdiction of our laws respecting administration; and that the letters of administration granted by the surrogate to the plaintiff are void. I am also of the opinion that the distribution of indian property according to their customs passes a good title, which our courts will not disturb; and therefore that the defendant has a good title to the horse in question, and must have judgment on the special verdict.

Dole v. Irish, 2 Barb. 638 (N.Y. Sup. Ct. 1848). *See also* Deborah A. Rosen, *Colonization through Law: The Judicial Defense of State Indian Legislation, 1790-1880*, 36 Am. J. Leg. Hist. 26, 49 n. 42 (2004) (collecting similar cases).

Pima Constitution of 1901

We the Indians of the Santan Reservation, in order to promote the general welfare of our Indians do ordain and establish this Constitution and By-laws for the Government of the Santan Reservation:

1. The executive power of the Reservation shall be vested in a Chief who shall be elected by the People; such election shall be subject to approval by the U.S. Indian Agent at Sacaton, Arizona. . . .

2. The legislative power of the said Reservation shall be vested in the Chief and the Council, the latter to consist of eight Councilmen, two Assistant Chiefs, and the Head Chief. . . .

Head Chief

1. The Head Chief shall have power to enforce the Constitution and By-laws. . . .

Council

1. It shall be the duty of the Council of the Santan Reservation to discuss and decide all general questions relating to the Reservation.

2. They shall try all cases or suits referred to them from the Head Chief.

President of the Canal

1. The President of the Canal of the Santan Reservation shall be elected by the people of the said Reservation for a term of four years.

2. It shall be his duty to have the entire control of the Canal, the same to include Dam water distribution and all general contracts thereof. . . .

Constitution

1. The Head Chief shall be empowered to enforce this Constitution and By-law, and he in turn shall be subject to the Council.

2. It shall be the duty of the Head Chief to take all cases unable to be settled by the Council before the U.S. Indian Agent at Sacaton, Arizona.

3. He shall try all cases with the exception of liquor and murder, said cases to be tried by the U.S. Court.

4. Every bill shall before it becomes a law be presented to the U.S. Indian Agent, who, if approving it, shall attach thereto his signature. If the same does not meet with his approval he shall return it to the Chief stating objections to the same.

NOTES

The Pima Indian community of the Gila and Salt River regions — known as the Akimel O'odham — adopted this written constitution in October 1901 authored by a community member educated at the Carlisle Indian School. The constitution is an excellent example of the transition period that many Indian governments encountered in moving from a quasi-judicial government to a policymaking government complete with checks and balances and separation of powers. *See* Frank Russell, *A Pima Constitution*, 16 J. Am. Folklore 222, 222 (1903); Wilkins, Documents of Native American Political Development, *supra*, at 281.

This constitution had it all, which helped to condemn it to an early political grave. The complicated separation–of-powers structure provided for the "executive power of the Reservation" to be vested with an elected Chief, with the election to be subject to the approval of the United States Indian Agent for Arizona. The constitution vested the "legislative power of the said Reservation" in the Chief *and* the Council, which would consist of eight council members, the head chief, and two assistant chiefs. The Council also served as a court, with the jurisdiction of this "court" subject to the Head Chief's discretion: "[The Council] shall try all cases or suits referred to them by the Head Chief." To confuse the issue further, the constitution provides much later in the document that the Head Chief "shall try all cases with the exception of liquor and murder, said cases to the tried by the U.S. Court." The constitution also provided for what amounts on paper to a completely separate branch of

the government — the "President of the Canal," who would have "the entire control of the Canal, the same to include Dam water distribution and all general contracts thereof." The document proved unworkable, largely as a result of conflict between previous leaders and the newly elected leaders, and the federal Indian agent vetoed the constitution. Russell, *A Pima Constitution*, *supra*, at 226-27.

Ottawa Laws (1850)

Stealing to Kill

1. If any person shall steal and kill an animal, upon conviction thereof the price of said animal shall be by him paid to the owner; and half the price he shall pay into the treasury.

Theft

2.If any person shall steal an article of property, when it is known the stolen article must be taken. If the owner, upon seeing it, shall discover that it has not been injured, he must take it back. If it be injured, the thief shall pay one price and a half of the article. The full price must be paid to the owner, and the half price into the treasury.

Using without Permission

3.If any person shall, without permission, be seen riding another's horse, for every mile he shall pay 25 cents. The price of horse hire shall be paid to the owner, and the balance into the treasury. If oxen shall be thus stolen, twice the price of ox hired shall be paid — one price of the hire shall belong to the owner, and the balance shall be deposited in the treasury.

Indian Horses

4.If an Indian horse shall come into the Ottawa country no attention shall be paid to him. If any person shall, regardlessly, use him, the same that is paid for an Ottawa horse per mile shall be paid for him. All of it shall be deposited in the treasury.

White Person's Beast

5.If a White person's domestic animal shall come into the Ottawa country, he may be caught, to be taken care of. No person shall be permitted to take him far off, nor to work him. The person, on taking up such an animal, shall write descriptions of him, which must be taken to Westport and to Wolftown to be nailed to the doors, in order that the owner may know it, who must bring proof before he can take him, and sign his name to a written receipt. If the owner shall not come, he may be kept for one year, and then sold. For each month three dollars shall be charged for keeping him if in the winter, and in the summer two dollars. For every dollar 25 cents shall go to the treasury. Half a dollar shall be charged for advertising. . . .

Stock Destroying Crops

7.If either pigs, hog, cattle or horses, get through a good fence, and damage the crop, the owner of the said animals shall pay for it. But if the fence be not good, and animals get in, and damage the crop, the owner of the field shall lose [sic] it and shall neither injure nor kill the said animals.

Debts

8.If any person shall owe his fellow Ottawa, having named a time to pay, and does not pay at that time, the creditor may ask him to set another time to pay, who must then name a time, not far off, but within two months. If he shall not then pay, the creditor may do as he shall think best. If he shall wish to take any articles of property; or animals, he may take them.

Revenge

9.If any person, having his property lawfully taken shall become angry, or threaten to take revenge, or shall injure the other's property, he shall see more trouble. Whatever the lawmen shall decide on, so it shall be.

House Breaking

10.If any person sees a house that is locked, he must not open it, unless he has permission from the owner. If he does regardlessly open it, he shall, on conviction, pay two dollars. One half shall belong to the owner of the house, and the other half shall be deposited in the treasury.

Searching

11.If any person shall miss any thing of his property, he may send the lawmen to search in any suspected house — the owner of which shall submit. If he shall refuse he must stand convicted.

Re-Exchanging

12.If any person swops [sic] away his horse, and wishes to re-call his bargain, he can do so by paying $5.00 in cash. All other articles exchanged may be re-exchanged by paying 25 cents on every dollar.

Bad Stud

13.If any person shall own a bad stud which shall a kill a horse or colt, he must pay to the owner the value of that which is killed.

Slander

14.If any person shall injure another by slander, he shall pay to him the amount of injury done to him.

Burning

15.If any person shall set fire to the prairie, and burn another's property, he shall pay for what is burnt.

Whiskey

16.Whiskey on the Ottawa land cannot come. If any person shall send for it, or bring it into the Ottawa country, he who sends, or he who brings shall pay five dollars, and the whiskey shall be destroyed. Any one sending or bringing the second time, shall forfeit all of his annuity money. For the third offence, he shall be delivered over to the United States officers, to try the severity of the White men's laws.

Gambling

17.If any person on the Ottawa land shall be seen at moccasin playing he shall pay two dollars and a half.

Borrowing

18.If any person shall borrow or hire a horse, ox or wagon, the time shall be named for returning them, although he may be done using them the daily price of hire shall continue to be paid. If however sickness, or a severe rain storm should prevent, he may be excused. And also, all other articles borrowed must be returned at the time appointed. If they are not returned at the time, regular pay must then commence. — For every day the borrower must pay 12½ cents.

Residents

19.Whoever shall live on the Ottawa land must be dealt with if he shall violate any of these laws. He shall also be permitted to prosecute others if he shall be in any way wronged.

Law Men

20.When any one shall be elected to be a lawman he must not refuse to serve, unless he shall pay five dollars in order that he may be excused. . . .

Cancelling Debts

22.The Ottawas, known that much evil has hitherto resulted from their running in debt, now resolve to act differently. Those who, from this time forward, shall go in debt, shall be compelled to cancel all such debts at each annuity payment. If any one shall not, at that time, pay his debts in full, any creditor whose claims have not been cancelled, let him come from whereso-ever he may, can then act according to his own wish. He can require the law-men to seize any property whatsoever belonging to the said debtor which he may wish. If he, the creditor, shall not want said property, the lawmen must sell it, and make payment. The debtor must also pay over to the law ten cents for every dollar thus collected, which must be deposited in the treasury. January, 1850.

Taxing

23.For every acre of land cultivated in the Ottawa country ten cents shall be paid. — For older cattle, ten cents per head shall be paid. For horses the same amounts shall be paid which are to be paid for cattle. The above amounts are to

be paid once every year, and to be deposited in the treasury. The time for collecting these payments shall be in the month of September. If any one shall fail to pay at that time, and shall not have paid at the annuity payment, his money shall then be taken. January, 1850.

Poor Tax

24.Every man living on the Ottawa land shall pay annually 12½ cents. This amount is also to be paid in the month called September, and is to be given for the benefit of the poor.—To be deposited in the treasury. January, 1850.

Widows and Orphans

25.On the Ottawa land if a married man shall die, having children, the said children shall own all of his fields, domestic animals, and houses; and the widow shall own every thing else of his personal estate. If the said man shall die without children the woman shall own all. If another person shall take any part of it by force, as a thief is dealt with by the law, so shall that person be dealt with who shall rob the widow and children of what belongs to them. January, 1850.

NOTES

1. The Ottawa Indians of southeastern Michigan and northern Ohio experienced the injustice of removal to Kansas and later to Oklahoma in the mid-nineteenth century. The "Ottawa laws" came in direct response to their changed circumstances:

> The laws appear to be an attempt to create a bridge between the tribal customs and traditions under which the Ottawas lived in their traditional homelands and their new surroundings in the Great Plains. One law, "Burning," provides, "If any person shall set fire to the prairie, and burn another's property, he shall pay for what is burnt." Another is "Revenge," which states, "If any person, having his property lawfully taken, shall become angry, or threaten to take revenge, or shall injure another's property, he shall see more trouble. Whatever the lawmen shall decide on, so it shall be." According to commentary on the Ottawa laws, the laws of the Ottawas in 1850 were "primarily customary law," but were "evolving in the direction of statute law made in the tribal council . . . as distinguished from laws simply passed on in an oral manner from generation to generation."

Matthew L. M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 58-59 (2007).

2. The Ohio Ottawas once exerted a great deal of influence in the major trading and military center of Detroit, and they became known as formidable fighters as well as powerful traders. This was part of Pontiac's legacy as well. But by 1795, after suffering a critical military setback at the Battle of Fallen Timbers (along with several other tribes), the Ohio Ottawas had lost much of this influence and power. They agreed to the Treaty of Greenville that year, which ceded much of Ohio, Indiana, and Illinois to the Americans. For the next several years, the remaining Ohio Ottawas fought against

forced removal, but in 1837, 1838, and 1839 the United States military forced additional removals. In all, about half of the population fled to Canada, to Manitoulin and Walpole, and about half of those attempting the trek to Kansas died along the way. Just a few hundred Ottawas populated the Ottawa reservation in Kansas.

Kansas was an unmitigated disaster for the Ottawas. Prior to removal to Kansas, the economy and lifeways of the Ohio Ottawas revolved around water, fur trade, travel, and sustenance. Kansas had no such abundance of water, forcing the removed Ottawas to adjust to a prairie-based economy. Upon the Ottawas' arrival, unscrupulous whites tricked them into spending their remaining capital on a university for Ottawa Indian children. Sadly, this became known as the Ottawa University fraud. Worse, the reservation lands truly were desolate and virtually useless for purposes of agriculture and livestock. *See* William E. Unrau & H. Craig Miner, Tribal Dispossession and the Ottawa Indian University Fraud (1985).

4. REMOVAL, ALLOTMENT, AND ASSIMILATION: THE DESTABILIZATION OF NASCENT AMERICAN INDIAN GOVERNANCE

The federal government and a host of non-Indians and others influenced the history of most of the Indian nations between the period of time when the Indian nation entered into a treaty relationship and the enactment of the Indian Reorganization Act in 1934, through three main categories of action: (1) removal, (2) allotment, and (3) assimilation. The government did not remove all Indian nations, nor did it allot all Indian nation property, but those pressures existed in every Indian nation at some point. The third category impacted every Indian nation.

In short, prior to 1934 (and generally after), traditional and more modern Indian governments faced enormous pressure to capitulate and cease their functioning. Many Indian nation governments did, for a time, cease to exist in a viable way.

While the following materials demonstrate how Indian governments declined in dramatic ways, Vine Deloria, Jr. reported that the decades leading up the Indian Reorganization Act were the "time of traditional governments":

> Beginning in Oklahoma in the 1890s and then spreading across the country to most of the larger tribes was the movement to get admitted to a federal district court, or even better, the Court of Claims, to press suits for violations of treaties. Traditional councils and chiefs quickly understood the necessity of using the judicial system, and each Congress saw an increasing number of white lawyers lobbying to get bills passed "that would allow the tribes to sue the United States. After 1900 this movement became a deluge as lawyers saw an opportunity to garner large fees for successful prosecution of these cases. Of importance in this movement is that the traditional councils that did not, as a rule, have formal constitutions and by-laws authorized the cases. We can call this period, 1890-1930, the time of traditional governments.

Vine Deloria, Jr., The Indian Reorganization Act: Congresses and Bills ix (2002).

a. Removal

"Removal" involved the physical relocation of Indian nations away from their homelands, usually to an area west of the Mississippi River for eastern nations. The establishment of American Indian tribal governments had begun in order to help Indian nations resist federal government pressure to cede lands via treaty:

> The "civilization" of a portion of these tribes [in the American southeast] embarrassed United States policy in more ways than one. Long-term contact between the southeastern tribes and white traders, missionaries, and government officials created and trained numerous half-breeds. The half-breed men acted as intermediaries between the less sophisticated Indians and the white Americans. Acquiring direct or indirect control of tribal politics, they often determined the outcome of treaty negotiations. . . . Particularly among the Cherokees and Choctaws, they took pride in their achievements and those of their people in assimilating the trappings of civilization. As "founding Fathers," they prized the political and territorial integrity of the newly organized Indian "nations." These interests and convictions gave birth to a fixed determination, embodied in tribal laws and intertribal agreements, that no more cessions of land should be made.

Mary E. Young, *Indian Removal and Land Allotment: The Civilized Tribes and Jacksonian Justice*, 64:1 Am. Hist. Rev. 31, 33-34 (1958). Similar intermarriage — or simply straight-up education of American Indians — generated more bargaining power in treaty negotiations for Indian nations in other regions as well. *E.g.*, James M. McClurken, *Ottawa Adaptive Strategies to Indian Removal*, 12 Mich. Hist. Rev. 29 (1986); James M. McClurken, *Augustin Hamlin, Jr.: Ottawa Identity and the Politics of Persistence*, *in* Being and Becoming Indian: Biographical Studies of North American Frontiers 82 (James A. Clifton ed., 1989).

As a result, President Andrew Jackson pushed through the Indian Removal Act in 1930.

> Congress's enactment of the Indian Removal Act of 1830 was the statutory culmination of a concerted effort by many American politicians, particularly from the South and West, to move the eastern Indian tribes west beyond the Mississippi River. Several factors motivated the federal policy, including an emerging pessimism about the ability of Indians to assimilate into the general population, but the most important factor was the desire for Indian lands. In particular, southerners desired Indian lands to farm cotton.
>
> The removal bill authorized the president to negotiate land cession treaties with Indian tribes in which the United States would offer lands west of the Mississippi River in exchange for all of a tribe's territory in the East. The law also authorized the president to guarantee the Indians' title to their new lands in the West, to protect those lands from trespasses or attacks, to pay for improvements that Natives had built on lands they were surrendering, and to pay for the Indians' costs of relocation. Naively, Congress appropriated only $500,000 for the expected expenses of the removal policy.

Matthew L. M. Fletcher, 1 Encyclopedia of United States Indian Law and Policy 424, 424 (Paul Finkelman & Tim Alan Garrison eds., 2009). Federal removal

of Indian tribes to the west created horrific splits in tribal leadership systems:

> [In 1835 after] the Supreme Court decided *Worcester v. Georgia*, . . . two competing [Cherokee] delegations arrived in Washington, D.C. — one headed by Principal Chief John Ross, who was refusing to accept a removal treaty, and the other by dissident leader John Ridge, who wanted the Cherokees to emigrate. In December the Jackson administration signed the Treaty of New Echota with Ridge's group, which represented a small minority of the overall Cherokee population. Despite a vigorous debate as to the validity of the negotiations, the Senate ratified the treaty by one vote in March 1836. Over sixteen thousand of the remaining Cherokees petitioned Congress to stop the removal, but Congress refused. In 1838 President Martin Van Buren sent the U.S. Army to Cherokee territory and directed it to place the Cherokees into internment camps and prepare them for removal. Over the fall and winter of 1838-1839, the Cherokees marched what became known as the Trail of Tears to the northeastern portion of the Indian Territory. Scholars estimate that at least four thousand Cherokees died as a consequence of their roundup and removal.

Id. at 425. Federal Indian removal policy in the northeast and old northwest followed a different pattern. The tribes in the north were more diffuse and land settlement patterns more haphazard than in the south. Tribes in the Great Lakes region often were able to resist removal to the west for the most part, although the partial success of the federal policy split tribes such as the Oneidas, Ottawas, and Potawatomis and caused many Indians to flee to Canada to avoid removal. In general, the tribes that moved west to Kansas, Oklahoma, and elsewhere often found themselves on land that was ill suited to their way of life. Some tribal communities were able to avoid removal, especially those that lived in areas that were unsuited to American-style farming, such as the Florida, Minnesota, and Wisconsin wetlands and the lands north of the freeze line in Michigan.

b. Allotment

The second federal policy — allotment — involved the transformation of Indian nation property holdings into "allotments," for the express purpose of breaking down tribal governments and assimilating American Indian people into the American nation. Allotment, which has political origins in the seventeenth century, came into prominence in 1853 when Commissioner of Indian Affairs George Manypenny announced that the Department of Interior's policy in relation to further Indian treaties was to negotiate for the allotment of Indian lands. Congress adopted this as express national policy in the 1887 General Allotment Act.

Generally speaking, since there are always exceptions, "allotment" consists first of either a treaty or an act of Congress authorizing the allotment of an Indian nation's land base. Next, the Secretary of Interior promulgates a plan to divide the land base, often a reservation, into "allotted" lands and "surplus" lands. Federal agents identify a chunk of the land base and inform Indian heads of household to select 80, 160, or some other number of acres, depending on the plan. Once the heads of household select their allotment, the land agent

delivers to them a certificate stating that the Indian may possess the land for farming or grazing purposes for a certain period of years, often 25 — a trust period in which the land remains in federal government ownership, may not be taxed by local governments, and may not be sold or alienated by the Indian certificate holder. Once the trust period expires, the land agent issues a fee patent, and the Indian owns the land in fee simple. The Indian may then sell the land, and the state and local governments may tax it.

The land agent labels the remainder of the land base as "surplus," announces a public sale of the land in accordance with federal homesteading or other statutes, and divides the proceeds among the Indians, after assessing a healthy administrative fee.

The experience of the Stockbridge-Munsee Indian community during its debate over allotment in the 1830s demonstrates how American Indian communities could disintegrate over the question, even before the community was allotted:

> During the 1830's the Stockbridge-Munsee were beset by an internal conflict that would in time mirror the national debate over the Indian question; namely, would Indians seek a separate existence from white American society or would they opt for assimilation with the prevailing culture? By and large, federal efforts to promote assimilation involved the Indians' removal from their tribal setting through individual allotments of land to the heads of each Indian family. Supporters of allotment assumed that if Native Americans would accept private ownership of the land as the white man had, and adopt all the attendant legalities and cultural notions it implied (such as title and deed, wealth and status), they would be well on the road to civilization. . . .
>
> The debate within the Stockbridge-Munsee tribe split the tribe into two camps: the Citizen Party, which sought U.S. citizenship and supported individual allotment of lands; and the Indian Party, which desired to retain both communal ownership of land and federal annuities. To openly display their philosophies, Citizen Party members sought to dress like their white neighbors while Indian Party members continued to cloak themselves in the traditional blanket.
>
> This split proved far more damaging than simply a difference over the tribe's style of clothing. Buoyed by the desires of the Citizen Party, Congress in 1843 ordered the allotment of all Stockbridge-Munsee lands and offered citizenship to the entire tribe. The Citizen Party eagerly accepted these terms and was promised individual tracts of Stockbridge-Munsee land. The Indian Party, led by John W. Quinney, rejected the terms, forcing Congress to repeal it and order a new enrollment to partition lands to better represent the two factions. To foster a solution, Congress passed an amendment to the treaty in 1849 that offered the Indian Party lands west of the Mississippi River and a one-time payment of $25,000 for resettlement and improvement of those lands if the tribe would leave the newly created state of Wisconsin. Unfortunately, no land was forthcoming, although some Stockbridge delegates were sent west to scout for it. As the Stockbridge-Munsee Community tells the story: "Thus matters continued, government neglecting to provide us with lands; and the Stockbridge nation having, on the faith of the treaty, surrendered title to some of the most valuable lands in Wisconsin at a moderate compensation, were unable to move away, simply because they knew not whither to go."

John C. Savagian, *The Tribal Reorganization of the Stockbridge-Munsee: Essential Conditions in the Re-Creation of a Native American Community*, 77:1 Wis. Mag. Hist. 39, 42-43 (1993).

Angelique EagleWoman offers more details about the allotment process as envisioned by the 1887 statute:

> Under the Dawes Act, the federal policy focused on breaking up the tribal land base from community property and territories to individual allotments as a means to assimilate tribal members to the lifestyle of Euro-American farmers. Specifically, the Allotment Act provided for 160 acres to be apportioned to each head of household and any other lands after this apportionment within the control of the Tribes was regarded as "surplus" which the federal government sold to homesteaders.
>
> Additionally, the Allotment Act held that the individual allotments were in a federal trust status for twenty-five years preventing the sale of the lands. The stated purpose for the trust period was to familiarize tribal members with the European concept of land ownership. The subsequent amendments by the Burke Act of 1906 allowed for allottees to be declared "competent" by area BIA officials for the alienation of lands formerly held in trust status. A second wave of dispossession occurred as a result of the 1906 Burke Act passed by Congress providing for competency hearings to determine an Indian fit for the purpose of selling lands to an interested buyer.

Angelique A. EagleWoman, *The Philosophy of Colonization Underlying Taxation Imposed upon Tribal Nations within the United States*, 43 Tulsa L. Rev. 43, 51 (2007). "Under the Burke Act of 1906, Indians whom the Secretary of Interior deemed were 'competent' could obtain patents in fee for their allotments. Competency commissions roamed Indian Country between 1909 and 1920, declaring individuals competent and eliminating the trust protections on their allotments." Barbara Leibhardt, *Allotment Policy in an Incongruous Legal System: The Yakima Indian Nation as a Case Study, 1887-1934*, 65:4 Agric. Hist. 78, 99 (1991).

Justice Blackmun noted the most obvious impact of allotment on Indian country:

> The 138 million acres held exclusively by Indians in 1887 when the General Allotment Act was passed had been reduced to 52 million acres by 1934. *See* 2 F. Prucha, The Great Father 896 (1984). John Collier testified before Congress that nearly half of the lands remaining in Indian hands were desert or semidesert, and that 100,000 Indians were "totally landless as a result of allotment." *Hearings on H.R. 7902 before the House Committee on Indian Affairs*, 73d Cong., 2d Sess., 17 (1934); *see also* D. Otis, The Dawes Act and the Allotment of Indian Lands 124-155 (Prucha ed. 1973) (discussing results of the allotments by 1900).

Hagen v. Utah, 510 U.S. 399, 425 n. 5 (1994) (Blackmun, J., dissenting). Quoting Felix S. Cohen's *Handbook of Federal Indian Law* (1942), he added:

> "The theory of assimilation was used to justify the [allotment] legislation as beneficial to Indians. Proponents of assimilation policies maintained that if Indians adopted the habits of civilized life they would need less land, and the surplus would be available for white settlers. The taking of these lands was justified as necessary for the progress of civilization as a whole." Cohen 128.

Id. at 425 n. 4 (Blackmun, J., dissenting). Another commentator noted that the allotment policy worked merely to redistribute wealth from Indian people to non-Indian people:

> Thus the world created by federal allotment laws, beginning with the Dawes Act, was not one peopled by agrarian, or even economically self- sufficient Indian peoples. The Dawes Act and its progeny existed in a legal system that consistently channeled resources toward those who would develop them for individual, and therefore positing the market's benevolent "invisible hand" public good. Here, political power and economic capital were what mattered, and Indian peoples collectively had little of either. To Indians, as the Yakima example shows, the system was doubly unfair because it robbed them of their lands and resources despite the guarantees they believed had been written into their treaties with the United States. "No person should be prohibited from his food by law," Louis Mann wrote in 1916. To Yakima, allotment laws in particular, and U.S. law in general, were white people's laws, not the laws of a civilized people.

Leibhardt, *Allotment Policy in an Incongruous Legal System*, *supra*, at 103.

The impact on American Indian governance was more insidious, but no less destabilizing. Charles Wilkinson wrote:

> Just as the proprietary side of tribes was hamstrung by allotment, so too was the governmental capacity of tribes. Traditional governance came naturally in reasonably tight-knit cohesive societies. Evolution into more elaborate forms of government would have occurred most smoothly on reservations composed solely of tribal Indians and tribal land. When the reservations were opened, true traditional governments were essentially doomed in most tribes, and the authority of any form of tribal rule was undermined.

Charles F. Wilkinson, American Indians, Time, and the Law 20-21 (1987).

The changed demographics of Indian country, as well as the dramatic reduction in American Indian land ownership, created a virtual void in Indian country governance:

> The great influx of non-Indian settlers, coupled with the loss of communal lands and the attendant yoke of federal support of these policies, simply eradicated much of the tribes' ability to govern. In the resulting void, the Bureau of Indian Affairs and Christian missionaries became the true power brokers and the de facto governing forces.

Frank Pommersheim, Braid of Feathers 21 (1995).

American Indian governance suffered further with the dramatic changes to Indian cultures resulting from allotment:

> The blow was less economic than psychological and even spiritual. A way of life had been smashed; a value system destroyed. Indian poverty, ignorance and ill health were the results. The admired order and the sense of community often observed in early Indian communities were replaced by the easily caricatured features of rootless, shiftless, drunken outcasts, so familiar to the reader of early twentieth-century newspapers.

Wilcomb E. Washburn, Red Man's Land—White Man's Law 75-76 (1971).

c. Assimilation

Allotment contributed greatly to a process already in full swing:the policy of assimilation.

Assimilation has taken a multitude of forms in federal and state official policy and law, but its purpose has been virtually singular: in the words of the most (in)famous director of an American Indian boarding school, Capt. Richard Pratt: "To kill the Indians to save the man."

A key component of assimilation policies was the militarization of American Indian boarding schools under the administration of President Grant:

> The first efforts by non-Indians to formally educate American Indians — by the Jesuits in Florida during the 16th century — attempted to " 'Christianize' and 'civilize' the heathen." . . . President Washington articulated a policy favoring the acculturation or assimilation of American Indians, cheaper than declaring war on them. . . . Over 150 Indian treaties included provisions relating to Indian education. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §22.03[1][a], at 1356 (2005 ed.). In 1819, Congress established a fund — later known as the "civilization fund" — usually distributed to missionary societies for the purpose of transforming American Indians from "hunters to agriculturalists." . . .
>
> Tribal treaty negotiators who hoped to provide for their children a means to learn English as a second language or to learn a trade did not realize that they had inadvertently negotiated for the kidnapping of their children by American government and military officials, the abuse of their children by educators and missionaries, and the ruinous undermining of their cultures and religions. Captain Richard H. Pratt, superintendent of the famed Carlisle Indian School from 1879 to 1904, is best known for his infamous statement that embodies American Indian education policy in the late 19th century: "A great general has said that the only good Indian is a dead one. . . . In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. *Kill the Indian in him, to save the man*." Richard H. Pratt, *The Advantages of Mingling Indians with Whites* (1892). . . . Meanwhile, "[i]n 1892 and 1904, federal regulations outlawed the practice of tribal religions entirely, and punished Indian practitioners by either confinement in agency prisons or by withholding rations." . . .
>
> American policymakers harshly criticized the lifestyles of tribal Indians in the late 19th century and sought to eliminate any trace of Indian culture and religion in Indian children. In 1889, General Thomas J. Morgan, Commissioner of Indian Affairs, recommended that Indian children being educated in grammar schools should be structured in such as a way as to eliminate "the irregularities of camp life, which is the type of all tribal life, [to force Indian youth to] give way to the methodical regularity of daily routine." Thomas J. Morgan, *Supplemental Report on Indian Education* (1889). . . . Morgan also recommended that the United States withhold rations, use Indian police, and send United States soldiers to compel Indian children to attend school, . . . a recommendation endorsed by Congress explicitly in 1893 [25 U.S.C. §283].

Brief of *Amicus Curiae* American Indian Studies Professors Dr. Suzanne L. Cross and Dr. K. Tsianina Lomawaima at 1-7, *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir.) (No. 09-20091).*

**Disclosure:* The author of this book participated in this case as the lead author of the brief.

The assimilative programming of American Indian children over generations undermined the retention of tribal culture and traditions, not to mention Indian languages, where so much of the tribal law originated.

Federal statutes dating back to at least 1883 have been directly tied to the assimilation of not just Indian people, but tribal governments themselves, into mainstream American policy:

> The Major Crimes Act was one of the first major intrusions of federal law into Indian country. Passed by Congress in 1885, the Major Crimes Act served as the first suggestions that the federal government would exercise authority over crimes that happened in Indian country. . . . The practical impact of the Major Crimes Act, however, is that fewer tribes pursue prosecution of crimes such as murder and rape. Instead of a rape case being handled within the community using the laws, beliefs, and traditions of indigenous people, rape cases have become the domain of the federal government.
>
> Passed in 1953, P.L. 280 served to transfer criminal jurisdiction in certain states from the federal government to the state government. Neither the states nor the tribes, however, consented to this arrangement and states were not provided with any additional resources with which to enforce crimes in Indian country. Instead, this national legislation resulted in what Carole Goldberg at UCLA has called a sense of "lawlessness" in some local communities. . . . For all practical purposes, though, the tribal governments in P.L. 280 states have historically been at a distinct disadvantage when it comes to crime control.

Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455, 460-61 (2005).

5. THE INDIAN REORGANIZATION ACT AS THE ORGANIC DOCUMENT OF MODERN TRIBAL GOVERNANCE

The experience of other Indian nations did not include indigenous, organic political and legal development, but instead involved federal government intervention, which took various forms. A large number, if not the majority, of modern American Indian tribal governments tie their functional origins to the Indian Reorganization Act (IRA), passed by Congress in 1934. The IRA instructed the Secretary of Interior to hold what would become known as Secretarial elections in which the adult citizenry of a given Indian nation would vote upon whether to "reorganize" under the terms of the act — to create a constitutional form of republican government. For the first time, Congress gave Indian nations a say in whether a federal statute would apply to them, as opposed to dictating federal mandates to Indian nations.

TRIBAL SELF-GOVERNMENT AND THE INDIAN REORGANIZATION ACT OF 1934 (COMMENT)

70 Mich. L. Rev. 955, 960-68, 970-72 (1972)

During the period preceding the enactment of the IRA there was some recognition that Indians were living in grinding poverty, that Indian health and education were in an abominable state, and that government policies were not working. As early as 1881 books like Helen Hunt Jackson's crusading

A Century of Dishonor had exposed these conditions to public view and made people aware of broken treaties and other unfulfilled promises. But it was not until publication of the Meriam Report that a movement toward change began.

The Report is an extremely detailed document, describing and analyzing the entire spectrum of Indian life and the problems of governmental administration of Indian affairs. It brought these problems into sharp focus, and in so doing presaged more than any other work the enactment of the IRA six years later.

The basic position taken by the Meriam staff was that

> [t]he object of work with or for the Indians is to fit them either to merge into the social and economic life of the prevailing civilization as developed by the whites or to live in the presence of that civilization at least in accordance with a minimum standard of health and decency.

If this goal were accomplished, as the staff saw it, there would be no need for further governmental supervision. This position did not imply automatic cultural assimilation, however. The authors of the Report recognized explicitly that many Indians wished to maintain a separate cultural identity, although they also admitted this would be difficult in so far as the economic underpinnings of the old culture had been destroyed. . . .

II. The Indian Reorganization Act of 1934

A. A Brief Legislative History

The Wheeler-Howard Bill, as the originally proposed legislation was known, was entitled an act "[t]o grant to Indians living under Federal tutelage the freedom to organize for purposes of local self-government and economic enterprise." The bill represented a significant change in the approach to Indian legislation. . . .

B. The Act's Objectives: An Analytical Look behind the Scenes

The thrust of the IRA can be gathered from its operative provisions. Every section in some way affects tribal self-government, although obviously not all are equally relevant to this discussion.

Section 1 of the IRA ended the policy of allotment: "No land of any Indian reservation . . . shall be allotted in severalty to any Indian." This provision, while not going directly to self-government, was a key factor in making it possible; it alone assures the Act's historical significance.

Section 4 related to alienation. In general, it prohibited any transfer of Indian land or shares in the assets of tribal corporations otherwise than to the tribe, except that the Secretary could authorize voluntary exchanges of such lands or interests of equal value when it would be "expedient and beneficial for or compatible with the proper consolidation of Indian lands." This provision has had the desirable effect of further strengthening the tribal land base and tribal control over it.

Section 10 set up a revolving fund from which the Secretary of Interior could make loans to chartered corporations for purposes of economic development. This reversed an earlier policy by which loans were made to individual

Indians and under which there had been problems in repayment. Under the IRA, loans are made only to the tribes, with individual loans being arranged between the tribe and the individual. Also, section 11 appropriated a small amount of funds to be used for loans to Indians for tuition payment and other expenses in "recognized vocational and trade schools" and in high schools and colleges.

Section 18 provided that the Act would not apply to any reservation wherein a majority of the adult Indians voted against its application at a special election to be held within one year after the Act's approval. This section marked a significant change in approach to Indian legislation. Formerly, legislation had been either special, applying by its terms to only one tribe or group of tribes, or general, applying to all Indians without consideration of tribal differences.

Through section 18, the IRA became a type of enabling act, giving each tribe the opportunity to determine for itself whether it wanted to come under the Act. There was, however, a major flaw in the approach: a tribe could hold the election only once. If it voted against application, it did not have the option of later reconsideration.

The essence of the IRA lay in those provisions relating directly to tribal organization, viz., sections 16 and 17. The former provided:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws. . . . [Procedure is then established for ratification by members and approval by the Secretary of Interior].
>
> In addition to all powers vested in any tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. . . .

Section 17 first provided for issuance of a charter of incorporation to a tribe and established procedures for petition and ratification. It continued:

> Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

The purpose of adopting a charter is different than that of adopting a constitution, the charter being oriented more toward business than toward governmental organization.

Perhaps the prime objective of the IRA, which was crucial to any effective establishment of self-government, was elimination of the "absolutist"

executive discretion previously exercised by the Interior Department and the Office of Indian Affairs. During the hearings, Commissioner of Indian Affairs John Collier presented to the House Committee examples which revealed the vastness of this discretionary power. Not only had administrative power grown beyond control, but its exercise and the effects of its exercise also changed from year to year, depending on the attitude or whim of a given commissioner. Further, this discretionary power was also exercised by local agency superintendents, a situation that led Senator Wheeler to refer to the local agent as "a czar." So all-encompassing was this power that "the Department [had] absolute discretionary powers over all organized expressions of the Indians. . . . [T]ribal councils exist[ed] by [the Department's] sufferance and [had] no authority except as . . . granted by the Department." Consequently, the IRA sought to eliminate this boundless discretion or at least place a damper on its exercise. "This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians the control of their own affairs. . . ."

It was not entirely clear, however, precisely what changes were to be made. Commissioner Collier was the moving force behind the new administrative approach. Of course, as Commissioner, he already possessed broad powers to move the Indian Office in the desired direction. Apparently, however, he was one of that rare breed of administrators who seek actively to undermine their own powers through legislation. To be sure, the Office would not become powerless under the Act. Subsequent developments have shown that it can and will exercise much power, often to the detriment of its constituency. . . .

It is, of course, not essential that a tribe or any group of people have a written constitution before they can govern themselves. The right to self-government exists as well in tribes whose organizational structure may have been based on ancient custom or tradition. Certainly all the tribes were not politically developed to the same degree, and therefore some were less able than others to put into practice their inherent governmental powers. Nonetheless, these powers existed in all the tribes.

Indian tribes seem also to have been regarded as corporate bodies for some purposes prior to enactment of the IRA. In at least one instance there had been specific incorporation by legislative act. Further, if the term "corporation" is used in the broader sense of designating an identifiable group of people to whom a legal personality is affixed, then it becomes dear that tribes have often been assigned a corporate status. For example, there were federal statutes authorizing suits by injured persons against tribes whose members had committed various depredations. Under these statutes liability was tribal only; no liability was imposed on individual members. The distinction between the tribe and its members had also been emphasized in cases involving property rights and other common-law legal rights.

The question of tribal capacity to sue and be sued, in the absence of statutory authority, also appeared occasionally. Where a tribe was recognized as a distinct political community or even as a political subdivision, it was immune from suit unless it had consented thereto, following the general rule of sovereign immunity. Moreover, when the tribe was immune, it was held that tribal officers could not be sued on tribal obligations.

Whether a tribe could bring suit without statutory authorization was a more difficult question, although probably answered in the affirmative. Cases in which tribes were parties to the suit have been entertained by the courts, apparently without any question of standing or capacity being raised. In any case, the objectives of such a suit could have been obtained through a representative suit brought by individual tribal members.

Thus, the powers and capacities "granted" to Indian tribes by the IRA had, in large part, previously existed. This fact has been recognized by those who have closely examined the Act. Commentators have said, for example, that "the constitutions [adopted pursuant to the IRA] add to, but do not detract, from, the powers of an Indian tribe. . . ." But precisely what was added? The answer is that the IRA apparently added nothing in terms of specific substantive powers. From this, however, it does not follow that the IRA accomplished nothing. As previously noted, the mere fact that Congress was willing, with the blessing of the Interior Department and the Indian Office, to enact such a statute signified an abrupt change in policy. Because of this policy change the tribes were able, at least temporarily, to coordinate effectively their organizational efforts and to use these powers for their benefit.

Furthermore, the IRA can be said to have had a stabilizing effect on tribal powers. This effect is more significant in light of the erosion of these powers that had taken place during the previous century. The IRA reaffirmed the principles of tribal self-government. Better organizational machinery could now be worked out through proper definition or limitation of tribal powers in the constitutions and charters. Finally, the mere act of organizing to write an organic instrument in the form of a constitution may have been a stimulus for more effective government, especially if the tribes could be assured that their efforts would not be undermined by arbitrary administrative action.

NOTES

1. After enactment of the IRA, some senators sought an opinion on the meaning of Section 16's provision that Indian tribal government authority includes whatever is incorporated into a tribal constitution and bylaws, and "all powers vested in any Indian tribes or tribal council by existing law." Nathan Margold, the Solicitor of the Department of Interior, signed the resulting document, "The Powers of Indian Tribes," which likely was written by Felix S. Cohen. Here is the conclusion of the memorandum:

> I conclude that under Section 16 of the Wheeler-Howard Act (48 Stat. 984) the "powers vested in any Indian tribe or tribal council by existing law," are those powers of local self-government which have never been terminated by law or waived by treaty, and that chief among these powers are the following:
>
> 1. The power to adopt a form of government, to create various offices and to prescribe the duties thereof, to provide for the manner of election and removal of tribal officers, to prescribe the procedure of the tribal council and subordinate committees or councils, to provide for the salaries or expenses of tribal officers and other expenses of public business, and, in general, to prescribe the forms through which the will of the tribe is to be executed.

2. To define the conditions of membership within the tribe, to prescribe rules for adoption, to classify the members of the tribe, and to grant or withhold the right of suffrage in all matters save those as to which voting qualifications are specifically defined by the Wheeler-Howard Act (that is, the referendum on the act, and votes on acceptance, modification, or revocation of constitution, bylaws, or charter), and to make all other necessary rules and regulations governing the membership of the tribe so far as may be consistent with existing acts of Congress governing the enrollment and property rights of members.

3. To regulate the domestic relations of its members by prescribing rules and regulations concerning marriage, divorce, legitimacy, adoption, the care of dependents, and the punishment of offenses against the marriage relationship, to appoint guardians for minors and mental incompetents, and to issue marriage licenses and decrees of divorce, adopting such State laws as seem advisable or establishing separate tribal laws.

4. To prescribe rules of inheritance with respect to all personal property and all interests in real property other than regular allotments of land.

5. To levy dues, fees, or taxes upon the members of the tribe and upon nonmembers residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders.

6. To remove or to exclude from the limits of the reservation nonmembers of the tribe, excepting authorized Government officials and other persons now occupying reservation lands under lawful authority, and to prescribe appropriate rules and regulations governing such removal and exclusion, and governing the conditions under which nonmembers of the tribe may come upon tribal land or have dealings with tribal members, providing such acts are consistent with Federal laws governing trade with the Indian tribes.

7. To regulate the use and disposition of all property within the jurisdiction of the tribe and to make public expenditures for the benefit of the tribe out of tribal funds where legal title to such funds lies in the tribe.

8. To administer justice with respect to all disputes and offenses of or among the members of the tribe, other than the ten major crimes reserved to the Federal courts.

9. To prescribe the duties and to regulate the conduct of Federal employees, but only insofar as such powers of supervision may be expressly delegated by the Interior Department.

It must be noted that these conclusions are advanced on the basis of general legislation and judicial decisions of general import and are subject to modification with respect to particular tribes in the light of particular powers granted, or particular restrictions imposed, by special treaties or by special legislation. With this qualification the conclusions advanced are intended to apply to all Indian tribes recognized now or hereafter by the legislative or the executive branch of the Federal Government.

The Powers of Indian Tribes, 1 U.S. Department of the Interior, Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974, at 445, 476-77 (Oct. 25, 1934) (1979).

2. John Collier, the Indian Commissioner who was the primary visionary and promoter of the Wheeler-Howard Act, declared soon after the introduction of the bill in February 1934 that he would host

> congresses in various locations in the West to consult with Indian tribes on his legislative proposals. Beginning in early March in Rapid City, South Dakota, with a large meeting of the Northern Plains tribes, the bureau then moved to Chemawa and then to New Mexico, Arizona, and California conducting Collier's meetings, encountering increasing Indian opposition as the consultations continued. In late March Collier held three meetings in Oklahoma, where opposition was very strong against his ideas because dissident groups of Indians had interpreted his proposals as advocating communism and segregation. . . .
>
> The congresses reveal that most Indians had adjusted to the allotment act, and the selfishness that Senator Henry Dawes believed an essential part of civilized life had taken hold in many tribes so that they were reluctant to pool their resources and lands and try to revive the old tribal ways. Many Indian spokesmen made clear to Collier that while they wanted education for their children and better medical care, they were not prepared to welcome mixed bloods back into the tribal community in those instances in which they had sold their lands and tried to adjust to life away from the reservation.

Deloria, The Indian Reorganization Act, *supra*, at vii-viii.

Deloria's study of the IRA congresses elucidates several key ideas. First, American Indian views are hardly uniform. Some American Indian nations, particularly those that became subject to allotment prior to the 1887 General Allotment Act, had embraced private land ownership in the context of allotment. Second, Indian people generally mistrusted the reform concepts introduced by Collier and the Bureau of Indian Affairs, none of which had any input from Indian people.

6. ADMINISTRATIVE ASSAULTS ON TRIBAL GOVERNANCE DURING THE TERMINATION ERA

The result of the Red Scare politics of the late 1940s and early 1950s in Indian affairs was House Concurrent Resolution 103, which stated that the policy of Congress was to terminate the relationship between Indian nations and the federal government wherever feasible.

"Termination" consisted of congressional identification, with assistance by federal bureaucrats and by constituents with a financial stake in opposing tribal sovereignty, of Indian nations whose fortunes had improved under the IRA sufficiently for Congress to assert that they were no longer in need of federal assistance. The Secretary prepared a plan, most of which involved auctioning off property owned by American Indian nations to the highest bidder, and eliminating the tribal government altogether. The Secretary then would distribute the proceeds, after taking a healthy cut for administrative costs, per capita to the tribal citizenry.

Congress's "termination" of hundreds of Indian nations had a devastating impact on the American Indian nations affected directly by termination:

> Although devastating to the tribes that were actually terminated, the policies of termination affected all Indian tribes in a number of ways. . . . Many educational programs and services were transferred from the federal government to the states. Indian health responsibility was transferred from the BIA to the

> Department of Health, Education and Welfare. The federal government implemented relocation programs to encourage Indian migration from their reservations to the cities, with the hope that Indian people would simply disappear. In fact, many eventually returned to their homeland. Of those that stayed in the cities, many lived in cultural isolation and poverty, their identity taken. . . .
>
> The government's attempts to ostensibly "free" Indian people from the bondage of federal supervision via termination policies did not go unopposed. Indians organized against the legislative termination of tribalism, most visibly in the June 1961 American Indian Chicago Conference. Moreover, state governments realized the difficulty of assuming many of the responsibilities of the federal government in Indian country.
>
> By 1958, termination without tribal consent, as it had been practiced, was viewed unfavorably. Under the Kennedy administration, the termination policy was "abandon[ed] in practice." Even so, many elder tribal leaders today still remember the days of termination, and the policy has left an indelible mark on the psyche of Indian people.

John Fredericks III, *America's First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & Pol'y 347, 377-79 (1999).

Even without express congressional termination, federal bureaucrats tossed out the progressive policies of the 1930s and early 1940s, and instituted oppressive administrative policies toward Indian communities.

The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy

Felix S. Cohen, 62 Yale L.J. 348, 353-56, 360-61, 367-71, 380 (1953)

From 1930 to 1950, the Bureau respected the right of Indians to hold their own elections and to select their own representatives and attorneys. Two or three slips from this standard may be found in this 20 year period, but the whole direction of Indian administration was towards increasing freedom. . . .

Freedom of Elections

. . .

Use of federal funds. A notable instance of the use of federal funds to influence local Indian elections occurred on the Blackfeet Reservation during the June, 1950, tribal election. Thirty-six pages of mimeographed materials attacking certain candidates for local tribal office, charging them with various "criminal" and "illegal" acts (none of which were ever prosecuted and most of which were later shown never to have occurred) were prepared by Government employees at Government expense on Government paper and Government mimeograph machines. Hundreds of copies of this campaign literature were circulated by Government employees on the reservation during the two weeks before the election. . . .

Such use of federal funds to influence local Indian elections quickly became accepted Departmental practice after June, 1950. In the Blackfeet referendum election of May, 1952, and the Choctaw referendum election of July, 1952, letters from Interior officials on the merits of referendum issues (as seen

by the Indian Bureau) were distributed at Government expense with a view to influencing voters. . . .

Direct interference. Similarly, direct interference with local elections for local offices has increased in frequency during the past three years. When the Blackfeet Tribe held a referendum election on May 9, 1952, on a proposed amendment to the tribal constitution, the Interior Department ran a rival election, managed by Indian Bureau employees; called out its special Bureau police force; closed down one or more tribal polling places; seized tribal funds, without tribal consent, to pay some of the expenses of the Bureau election (notwithstanding Secretary Chapman's assurance that no such action was contemplated); and, in order to validate its own election results, tried to strike more than 1,000 Blackfeet names from the list of eligible voters. This last move was eventually held by the Solicitor of the Interior Department to be illegal, and so the Bureau's election results were declared invalid. But the Bureau continues to insist that it has the right to run future tribal elections even where, as in the Blackfeet case, the tribal constitution provides that all local elections are to be supervised by the Indians themselves.

At San Ildefonso Pueblo, in New Mexico, the Indian Bureau seized control of valuable lands and proceeded to dispose of the resources of the Pueblo without statutory authority, on the pretext that the Pueblo had failed to elect a Governor. In fact, the elected Governor of the Pueblo is recognized by all the other Pueblos, by the public, and by all of the members of the Pueblo except for a few beneficiaries of the Bureau's illegal acts. . . .

Freedom of Speech

The right to speak one's mind freely is so widely taken for granted in American life that it is inconceivable to most of us that anybody could have his bank accounts impounded as a penalty for criticizing the operations of a government bureau. Yet when the Oglala Sioux Tribe on September 28, 1950, petitioned Congress to cut wasteful expenditures of the Indian Bureau in its so-called "extension service" in South Dakota, the Indians were advised that $140,000 of credit funds allocated to the tribe several months earlier would be "frozen" until the tribe withdrew its criticisms. Of course, there was no legal authority for any such action, any more than there would be for the freezing of the bank account of a non-Indian. But the Indian funds were in the possession of federal officials, and possession is at least nine points of the law. Even a non-Indian confronted by his banker with a "freeze order" from the Federal Reserve Board based upon a report by the Post Office Department and the Federal Bureau of Investigation that the depositor was engaged in subversive activities might have a hard time fighting his case through the courts with the world's largest law office on the other side of the case. Indians who are unable to employ counsel of their own choosing face even tougher odds in such a situation. . . .

Freedom in Personal Life

The extent to which the Bureau of Indian Affairs now seems prepared to supervise the intimate details of an Indian's personal life is indicated by

an incident reported to the Senate Appropriations Committee on May 7, 1952:

> Last week a tribal policeman on the Blackfeet Reservation reported that the local superintendent had called him in to see that the Indian men and women at Heart Butte stopped playing the stick games (a sort of aboriginal canasta) not later than six o'clock in the evening.
>
> Now of course the Blackfeet Agent and the tribal policeman have no more right to tell adult Indians when to stop playing games and when to go to bed than they have to tell me when I should stop playing poker or chess. Conceding that the Blackfeet Superintendent's intentions are highly moral, is there any reason in the world why the Federal taxpayers should pay for that kind of nonsense?
>
> Back in 1923, the Indian Bureau had a lot of regulations like that, providing that Indian dances could only be held once a month 'in the daylight hours of one day in the midweek' and not in March, April, June, July or August, and 'That none take part in the dances or be present who are under 50 years of age.' Many of us thought that we had outgrown this sort of paternalism when Indians became full-fledged citizens in 1924, but if the Indian Bureau is allowed to proceed unchecked there are no limits to what they will spend Federal funds for.

Telling Indians when to go to bed and when to get up is not just a whimsical bit of paternalism. It has deep roots in a long tradition under which Indians for many decades were subjected to arrest and even death if they did not behave as white officials wanted them to behave. Thus when the Bureau issues an official report telling the Rio Grande Pueblos that their custom of annual elections is causing "much trouble" in the handling of farm machinery; that their communal use of grazing lands is lowering their grazing income; that their individual partitioning of farming lands is lowering their agricultural income; and that their religious customs are causing them to put "too much labor" on their corn fields, these official denunciations have a disastrous effect upon Pueblo life quite similar to the probable effect on a non-Indian of a warning cast in similar terms and bearing the imprint of the F.B.I.

From 1930 to 1950 it looked as though we had definitely put an end to such unauthorized authoritarianism on Indian reservations. It now appears that this view was illusory. . . .

Tribal Income

For many years the Interior Department backed the concept that Indian tribes should be allowed to spend their own earnings without let or hindrance from federal officials. Under Commissioner Myer's administration every bill introduced in Congress for this purpose has been opposed by the Interior Department, on the ground that Indians are "not yet ready" to spend their own money. In some instances, Bureau officials have gone even further. Thus the Blackfeet Tribal Council, which had a limited jurisdiction over some of its own earnings and had done its banking at the First National Bank of Browning, Montana, was peremptorily ordered on June 6, 1950, to deposit all funds in excess of $5,000 with the Agency Superintendent. When the Tribal Council

stood its ground and refused to obey this legally unauthorized order, the Indian Bureau backed down.

Why Bureau employees want to keep a stranglehold on Indian income is not difficult to understand. So long as they retain this control they can insist that such Indian funds be used to pay any Bureau employee removed from the federal payroll. They can prevent the use of such funds for carfare in investigating or protesting government frauds and irregularities. This restriction has been placed on the funds of the Fort Belknap Indians in Montana, the Pyramid Lake Indians in Nevada, the Jicarilla Apache Indians in New Mexico, and many other tribes which have been earning substantial incomes for themselves through the management of tribal cattle herds, tribal stores, or other commercial enterprises. . . .

Tribal Cattle

During the drought years in the 1930's, the Government, as a measure of relief to distressed farmers, purchased drought cattle at an average price of about $12 a head. Most of these cattle were given away free to relief clients. Under Commissioner Myer's administration, Indian tribes which received such drought cattle have been charged up to $140 or more a head for what started out as a gift and was a gift to everybody who wasn't an Indian. The practice of making gifts to Indians and then charging the Indians for the gift was not invented by Commissioner Myer — it runs back many decades in our Indian history — but charging Indians $140 or more for a gift that cost the giver only $12 is a new wrinkle on an old game.

The Blackfeet Indians wouldn't have minded being charged for the wobbly, drought-stricken cows they received as a gift. They had no objection to paying retroactive interest on these gifts. In effect, for many of these cattle, the Indian Bureau charged interest at the rate of 70% per annum. But repaying cattle loans, even at 70% interest, was worthwhile, the Blackfeet felt, since only in this way would they achieve final and complete ownership of their own cattle. What shocked the Blackfeet, however, was that in June, 1950, after they had paid back the Indian Bureau many times over for the last cow they had received, they were suddenly advised by the Indian Bureau that title to the cattle was still vested in the Bureau and that the Bureau would arrange for the disposition of the cattle as it thought best. Bitter protests at this breach of faith were completely futile. The Chairman of the House Interior Appropriations Subcommittee, Representative Michael Kirwan, declared that he "will not believe" that "this Government, your Government, and my Government" would do any such thing. But when the Indian Bureau itself supplied facts and figures confirming the charge, the House Committee quickly dropped the subject. . . .

Tribal Claims

. . . First, a number of Indian tribes found themselves excluded from court because Commissioner Myer would not approve the only lawyers they knew and trusted. Second, Commissioner Myer played a large part in blocking enactment of a bill to give Indians additional time to employ lawyers and file their claims. Third, since May, 1950, the Indian Bureau has steadfastly refused to

give Indian tribes information in Interior Department files which they need in order to present their cases properly, offering the lame excuse that such Indian requests for information amount to asking the Bureau to do research work for Indian tribes, and alleging that it is illegal for Government employees to "aid or assist" (even by telling the truth) "in the prosecution or support of claims against the United States." In the fourth place, the Indian Bureau has apparently been spying on the activities of tribal attorneys as they go through public files in the Interior Department Building and then advising opposing counsel concerning such activities in order that Indian claims may be more easily defeated. Of course, the Commissioner can always reply that disclosing information concerning the research activities of tribal attorneys helps to achieve truth, but he has made no move so far to acquaint Indian tribes, his alleged "wards," with the facts concerning similar research activities of their legal opponents in the Justice Department." . . .

The attitude of the Department's Solicitor to Indian Bureau decisions was fully expressed in his opinion of July 2, 1951, upholding the Indian Bureau's rejection of the Pyramid Lake Paiute Tribe's attorney contract:

> Perhaps I may venture the suggestion that, in passing upon the policy question in connection with each point, it is necessary to act in the light of two important principles. On one hand, there is the principle that the Department should foster local self-government among organized Indian tribes and, in dealing with such tribes in the exercise of the Department's power over them, should impose requirements on a tribe only when it seems necessary to do so in order to protect some important interest of the tribe or of the Government. On the other hand, there is the principle that, from the standpoint of stability of the administrative process, the head of a Department who has delegated authority and responsibility concerning a particular matter to a subordinate official ought not to overrule such official unless the latter has exceeded his authority, or has failed to conform to instructions issued by the head of the Department, or has made a grave error in judgment which is apt to have serious consequences. If the responsibility for deciding the present case rested upon me I believe that I should give the greater weight to the second of the two principles and affirm the Commissioner's action.

D. SELF-DETERMINATION AND THE FUTURE OF AMERICAN INDIAN TRIBAL GOVERNANCE

Strengthening Tribal Sovereignty through Government Reform: What Are the Issues?

Robert B. Porter, 7 Kan. J.L. & Pub. Pol'y 72, 74-76, 93-98 (Winter 1997)

II. What Is the Current State of Tribal Governance?

To start with, it is first necessary to explore the current state of tribal governance. . . .

Given the raw numbers of different indigenous nations, it should not be surprising that there is a tremendous degree of diversity amongst them.

Land, language, culture, and politics are all factors contributing to our differences. Despite this, however, there are common factors associated with all indigenous communities. Specifically for our purposes, each has some form of government in place that purports to manage and address their internal and external affairs. While any complete assessment of the state of tribal governance would analyze the government of each of these Indian nations in detail, for purposes of this essay, I will discuss these tribal governments within the context of three broad categories which I refer to as: (1) traditional governments, (2) autonomous constitutional governments, and (3) dependent constitutional or corporate governments.

A. Traditional Governments

Traditional governments are those in which the method of governance has not formally changed since the colonization of the American continent. As a general matter, traditional government structure and procedure is unwritten. The governing law is passed down orally and is communicated in the language of the Indian people involved, although there may be cultural mnemonic devices — such as wampum belts or sand paintings — to assist in conveying information. As a result of this nexus between law and culture, traditional government may include social and spiritual elements associated with carrying out what might otherwise be secular governmental activities.

Having a traditional form, however, is not to suggest that governance under such systems has not changed since colonization began. . . . Despite these changes, I will refer to traditional governments simply as those which have their origins within the Indian community itself and which remain fundamentally unchanged in their structure and operations. . . . Examples of these types of governments include the Onondaga Nation and the various Pueblo communities.

B. Autonomous Constitutional Governments

Autonomous constitutional governments are those that have evolved from their aboriginal foundations to a written form of government. Tribal governments of this type, while they may yet be based upon traditional governing principles, no longer function in accordance with the form of the traditional government. Moreover, they have changed not as the result of some forced colonial influence, but rather as the result of deliberate internal effort to transform the method of government organization. . . .

In short, these governments evolved in the absence of direct efforts by the federal government to transform the traditional method of governance. Like the traditional governments, autonomous constitutional governments are not subject to any overriding authority in the exercise of their governing powers. Examples of this type of government include the Cherokee Nation and the Seneca Nation of Indians.

C. Dependent Constitutional or Corporate Governments

Dependent constitutional or corporate governments are those that have been established pursuant to the direct influence of the United States. While tribal governments of this sort are inherently sovereign and thus may establish

their own forms of government, they are dependent because they are founded upon non-tribal law as the basis for their governing structure and may even require approval of one of these foreign governments to take official action.

The most significant of the federal laws establishing dependent tribal governments is the Indian Reorganization Act of 1934 (IRA). Approximately 200 tribal governments are organized pursuant the IRA's provisions. Unlike the traditional and autonomous constitutional governments, dependent constitutional or corporate governments are subject to the direct governing authority of the United States. Thus, IRA constitutions generally require that all tribal laws enacted by the tribal council be approved by the United States before they become effective. In addition, federal courts exercise jurisdiction over a wide variety of internal political affairs, including election disputes and membership determinations.

The most significant recent federal legislation establishing tribal governments is the Alaska Native Claims Settlement Act of 1971 (ANCSA). Under ANCSA, traditional governance through the village structure was undermined by the establishment of a system of corporate federalism established pursuant to federal and state law. . . .

Having identified these three categories of tribal governments, it is important to point out that these descriptions may be imprecise to the extent that tribal governance is always in a state of flux and, in many cases, truly unique. For example, several tribal governments organized under the IRA have eliminated the need for Secretarial approval for tribal laws to be effective. Thus, even though some governments are still organized under the IRA, they are clearly more like autonomous constitutional governments. Also, the largest indigenous nation in the United States, the Navajo Nation, does not even have a constitution but is otherwise governed by a well-developed written legal tradition. It may not be a constitutional government, but it also certainly is not a traditional one either. . . .

VI. Can Tribal Governance Dysfunction Be Remedied Through Reform?

. . . The actual process for how tribal government reform might take place will be unique for every indigenous nation. Nonetheless, I believe there are a few basic concepts that should be considered before any Indian nation attempts to take up such an effort.

A. Step 1 — Redefine the Role of Tribal Government

The key to any successful government reform process is for the entire tribe to focus on what they believe to be the central purpose of tribal government authority in their lives. This should be an idealistic process, one driven by notions of what the ideal government could do to help people's lives, not what the old government could do to make things even worse. This is likely to provoke a wide range of responses, but it is necessary to include as many definitions of government as possible. Only when every member of the community has had the opportunity to share his or her view, can the process of consensus building begin. These views should be distilled so as to begin

defining a new governmental framework. Once a general framework is established, the parameters for shaping more specific textual provisions will be set.

B. Step 2 — Research Historical Political Behavior and the Historic Function of Tribal Government

When engaging in any new drafting effort — especially if you have lawyers involved — the instinct is to want to look and see what others have done before. This can be especially dangerous when dealing with tribal governmental reform. In too many indigenous nations, the most obvious and well-known governing tradition is not the tribal one, but the American one. Simply borrowing the form and structure of the American constitution is a recipe for self-colonization. The American constitution was based upon a variety of governmental theories that were brought together for the unique purpose of governing a large and immigrant-populated republic. It is unreasonable to think that such a governmental form would be well-suited for the often small, more homogenous indigenous societies.

While the increasing diversity of our nations may mean that many governing principles underlying American government ultimately may be useful to us, if we are to preserve our distinct existence, we should begin with our own traditions, rather than theirs. Where there remains a significant population of elders to share an understanding of earlier times, those elders must be consulted. Even the old dog politicos that have haunted tribal government for years will have important stores of unwritten knowledge about how tribal politics is conducted. All of this information must be identified and recorded.

Moreover, if any ancient texts about tribal life can be obtained, they too must be utilized. This includes some of the old anthropological reports written in terms suggesting that our forefathers were some kind of zoo animals. Regardless of how offensive you might find some of this work, some of this work is quite good and we should be sophisticated enough to be able to sift through the garbage of some of these anthropological conclusions about how our ancestors lived.

In short, the starting point for any governmental precedent should be the unique governing traditions of the indigenous nation itself. If this yields little information, the next best alternative is to look at the governing traditions of related Indian people. If that process too yields little information, the next source of information should be indigenous communities that share many of the same size and demographic characteristics. Only as a last resort, should the governing tradition of the United States be relied upon.

C. Step 3 — Assess the Degree to Which Historical Notions of Governance Still Apply

Once the historical review is complete, there should be a determination of which of the historic governing traditions continue to be relied upon by the People. This includes both the oral and written traditions. If any particular governing traditions within a tribe can be identified as surviving American colonization to the present day, then these practices undoubtedly must be the core of the political belief system. Especially in those tribes that have undergone some form of constitutional development, the identification of

political practices that have been carried on under both the traditional and constitutional forms of government is tapping into the mother lode of that tribe's governing traditions.

D. Step 4 — Evaluate Historical Norms for Continued Viability

As part of the historical review process, there should be a deliberate effort to evaluate which of the traditional governing practices should be continued and/or revitalized. This may be the most difficult step because it requires a two-pronged approach.

At one level, historical governing provisions must be viewed from the perspective of their literally being continued and/or revitalized. For example, a requirement under traditional governance that no action shall be taken until there is consensus could mean that the tribal council should not be able to act unless there is a unanimous vote. Thus, part of the inquiry should include whether any of the actual traditional governing practices should be continued.

At another level, however, there should be an assessment as to whether any of the values underlying a specific traditional governing provision should be continued and/or revitalized. Thus, to continue with the example above, the value underlying the requirement that no action shall be taken until "all of the people are in agreement" is simply that there should be widespread agreement as to the course of action. As a practical matter, this might be satisfied in a number of different ways other than by unanimous council votes. Council could only have to obtain a three-quarters or two-thirds majority, or council could have to vote twice, at least one week apart, and so on.

Focusing on traditional governing values rather than on literal requirements, is tremendously important for the entire governmental reform process. It may be extremely difficult for some traditional people to relinquish time honored procedures for doing things. Focusing on the fact that the underlying values and teachings of those time honored procedures could be continued and expanded, albeit in a modern form, may be the key to gaining their support for any ultimate changes in governmental form. Similarly, many of the progressives might support traditional governing principles that they otherwise might reject if they are conveyed in a form that they can comprehend. In short, if the focus is on substance, and not exclusively on form, the seeds of compromise can be sown. This will be important when it comes time to address the difficult issue of how much, if any, of the new government structure should be memorialized in writing.

E. Step 5 — Be Creative When Drafting

Because of the many changes that have occurred within our nations, it seems inevitable that some important aspects of any governmental reform effort must be reduced to writing. If there are still communities that can sustain a wholly unwritten governing tradition, then obviously few, if any, changes will need to be made. But in all of the others, drafting will take on a special role in the reform process.

Basing tribal governmental reform on historic notions of governance will have little impact unless drafting takes place with an eye towards creativity. Mindlessly borrowing language from federal, state, or even tribal constitutions

will wholly undermine the historical research just engaged in and will ensure that the reform process will have little positive long-term effect. If writing is to be done, it must be with original prose and devoid of legalese. Indeed, it may be the case that with some issues, no writing should be done at all. Cutting and pasting is simply too crude of a process for what needs to be done here in redesigning tribal governance. Only when a conscious decision has been made about adopting certain practices from American government should some of the "terms of art" under American law be adopted in the tribal constitutional text (e.g. "due process," "equal protection," etc.).

F. Step 6 — Work Deliberately and Openly

For any governmental reform effort to be successful, the People must understand and support what is happening. The only way I think that this can occur is if the reform process is approached like an educational process. If the tribal members are teaching each other about the governing traditions and working together to develop modern ways to perpetuate those traditions, then, when it comes time to put such changes into place, resistance should be minimal.

Sharing information about the reform process is critical to gaining acceptance. Often in tribal government there is a tendency to keep things close to the vest to minimize the opportunity for the opposition — whoever that might be at any given time — to undermine your efforts. Unless the process is one open to all, the reality, or merely the perception, that something fishy is going on will condemn any possibility that honest reform can be achieved. If the ideas are worth doing, they will be sustained by the people. Good ideas will rise like cream; bad ideas will sink like stones. Allowing an open process will ensure that this natural process will occur.

G. Step 7 — Convince the Conservatives that Good Government Is Good Politics

There is likely to be considerable resistance to governmental reform from conservatives within the tribal community. These conservatives may either be traditional people concerned that any change will undermine their position in the tribe, or old-dog politicos who are fearful that the light of day may shine and expose their long-running con games. If there is one thing in most Indian communities that people can agree on, it is that they do not like what the tribal government is doing. The process of governmental reform is one that the People in any Indian nation will support. Conservatives within the community, who do have the ability to halt change, must be convinced that reform is politically in their self-interest.

H. Step 8 — Exercise Great Patience and Listen to the People

My working theory for dealing with change is based on the axiom that "people usually do not know what they want, but they usually know what they do not want." I think this is especially true when working with Indian people because we have developed such a good defense mechanism against colonization over the years. In many ways, working with Indians is like working with a giant tortoise. At the slightest sign of danger, the head and legs retract to allow

the protective shell to do its work. There is no movement and no progress, only the hope that the big shell will keep the threat away.

Well, the threat that we have been dealing with for all these years — American colonization — has been both a poison in our food and an acid eating through our shell. We either have to have some faith that we can change our traditional eating patterns in the face of this danger, get a new shell, or do both. Unfortunately, this kind of change is difficult for many to accept, either because they do not perceive the problem, or because they are simply resistant to change. I think that the time for simply sitting with our head and legs tucked in is over. As things are going, our destruction will come from our failure to act.

There is already some evidence that the People already know that governmental reform must happen if their lives are to improve. One of the best examples of this process of change that I have heard about involves the Comanche Tribe. In the early 1990s, many Comanches had concluded, after an extremely divisive election, that their IRA constitutional "system of governance was a major source of conflict and disharmony among them." They concluded that the process of electing just a handful of leaders contrasted too greatly with the traditional value of consensus-building and thus allowed too many people to feel left out of the decisionmaking process. The resulting "bad feeling" produced considerable anger that intensified the disharmony. In response, the Comanches developed a long term response that would allow the tribe to return to traditional values but within a contemporary, culturally specific process. This lengthy process involved many meetings that allowed all Comanches to have a say, but which focused discussion on critical issues that allowed for a new constitutional scheme to be developed. The changes have yet to be incorporated into a new constitution, but the process appears to have maximized the chances of success.

Another example of a tribe initiating constitutional reform is the San Carlos Apache, who recently are revising their constitution to end "corruption and infighting" by removing the requirement of BIA approval, expanding the size of the tribal council, and establishing independent branches of government. The Mohawks at Akwesasne, the Eastern Band of Cherokee, and the Northern Cheyennes are others who have participated in government reform efforts.

I have had my own experience with constitutional and administrative reform when I served as Attorney General of my own Nation. In 1992, my first major project was to work on proposed constitutional amendments to change the Nation's court system. These proposed changes included expanding the jurisdiction of the Nation's court system, creating an intermediate court of appeals, and staggering and extending the judicial terms of office. While the amendments were eventually approved by our People in a referendum, I learned much about the process of how long-term change can occur. I also learned how easy it is to aim low when engaging in constitutional reform. In retrospect, while I think the changes were an improvement over the old system, they did little to address some of the fundamental problems in how our Nation administers justice.

I was also involved in a year-long effort to restructure the administrative operations of the Seneca government. The project was ambitious, and was

designed to give the People greater voice in the government, empower the Council, redefine and strengthen the leadership role of the President, and otherwise develop a systematic method for ensuring accountability among the 800 member tribal workforce. Eventually, the restructuring occurred. Unfortunately, it was implemented less than a year before the next general election. The so-called Government Law became a political issue. In significant part, it was attacked by conservatives on the Council and within the workforce who were opposed to abandoning the old, inefficient regime and being held accountable. After the election, the law was opposed by the new President because it actually required that he act in concert with the Council, and not as a dictator. Eventually, the Government Law was nullified.

What this experience taught me is that many of the most important changes that must be made within Indian nations are outside of the government's power. The administrative reform effort I was involved in tried to do too much in too short a time frame. Many of our deepest governmental problems should have been taken directly to the People and effectuated through constitutional change, not simply through Council actions. Simply put, the merits of proposed changes mean little if the process by which they come about is not accepted. Many of the former opponents of that reform effort who are now in office now admit that much of it was a good thing since they have now seen some of the government's problems as insiders. With time, I am confident that all people can learn these lessons without simply having to rely on their own method of trial-and-error. When we do so, we will have gone a long way toward unleashing the power of our People and preparing ourselves to addressing the challenges to our sovereignty in the future.

NOTES

Richard Loudbear wrote that many American Indian people are searching for ways to make radical changes in tribal governments. Numerous American Indian nations have faced forms of nonviolent (and occasionally violent) revolution. He writes, in a primer about how to effectuate a "nonviolent seizure of political power":

> Are some Indian nations going through civil war? With that in mind, how do systems of government collapse, evolve, and improve? Perhaps revolutionary Indian politics is one form of growing into a better form of government? One useful definition of revolution is found in the Oxford English Dictionary: "A complete overthrow of the established government in any country or state by those who were previously subject to it; a forcible substitution of a new ruler or form of government." Therefore, how does one evolve or revolutionize an ailing political system? If the people mourn when the wicked rule, what is their recourse? When democracy and its methods of elections, petitions, recalls, and letters fail, change is required outside the usual governmental paradigm.

Richard Loudbear, *Indian Country Politics: Theories of Operation and a Strategy for the Nonviolent Seizure of Political Power*, 31:1 Am. Indian Q. 66, 66-67, 69-72 (2007).