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Dedication

To all the children, grandchildren, great-grandchildren, nieces and nephews
of Roland John Morris Sr,
each and every one.

He became involved with politics for you.
This paper would not have been possible without his leading so many years ago.

May these efforts bring genuine change to public policy;
change that advances your liberty, production, and happiness,
strengthening your lives and those of your children and grandchildren.

Most especially –

To my children and grandchildren,
each and every one.

This paper is the cumulation of all we have done over the years.
Hopefully, the work is almost finished.

Finally, to our God –

It is without question that this work could not have been done without the help of
our Lord God: The Father, his Son Jesus Christ, and Holy Spirit.
Preface

My husband and I began our lives together in a symbiotic alcoholic-enabler relationship in the late 70's. With our family on the edge of self-destruction in 1987, my husband, an enrolled member of the Minnesota Chippewa Tribe, born and raised on the Leech Lake reservation, had a transformational experience which changed his worldview and led him to take our family in a new direction.

Having watched many of his relatives suffer within the reservation system, he began to see reservation violence and crime as an outcome of current federal Indian policy more than it was about past policy. This led us to forming an advocacy in the late 90’s for families hurt by federal Indian policy. We did our best to share hope and life, as inadequate as we were, by assisting extended family in our home, neighbors in our community, and strangers across the nation. We never did it for money; there was never any money. Everything we did came from passion for the lives of our children, nieces and nephews, and extended communities.

Unfortunately, reservation crime, corruption, drug abuse and violence have continued to increase over the years. My husband has since passed away and I am a widow, continuing the work we had begun in 1996.

This thesis compiles some of the documented history, philosophy, and consequences of federal Indian policy. It also includes a preliminary quantitative causal comparative survey with 1351 participants – 551 of whom identify tribal heritage – and explores the relationship between differences.

We serve a powerful God with whom all things are possible. Our job is to serve in the capacity He has given us, even if we do not understand why, and then enjoy watching what He does next.
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Dr. Jennifer Anderson Purvis
Dr. Greg Mathison

The prayers and support of so many family and friends

and

All readers searching for the heart of the matter
List of Case Law Authorities

2. Johnson v. McIntosh, (8 Wheat.) 523 (1823)
6. United States v. Rogers, 45 U.S. (4 How.) 567 (1846)
11. In Re Heff, 197 U.S. 488, 489 (1905)
12. Rassmussen v. United States, 197 U.S. 516 (1905)
Abstract

This paper will examine the philosophical underpinnings of current federal Indian policy and its physical, emotional, and economic consequences on individuals and communities.

The U.S. Civil Rights Commission found in 1990 that “[T]he Government of the United States has failed to provide civil rights protection for Native Americans living on reservations” (W. B. Allen 1990, 2). As Regan (2014) observes, individuals have been denied full title to their property – and thus use of the property as leverage to improve their economic condition (Regan 2014). Tribal executive and judicial branches have been accused of illegal search and seizures, denial of right to counsel or jury, ex parte hearings and violations of due process and equal protection (W. B. Allen 1990, 3). Violence, criminal activity, child abuse and trafficking are rampant on many reservations (DOJ 2018). Largely because of crime and corruption, many have left the reservation system. The last two U.S. censuses’ report 75% of tribal members do not live in Indian Country (US Census Bureau 2010).

Research suggests current federal Indian policy and the reservation system are built on philosophies destructive to the physical, emotional and economic health of individual tribal members. This paper contends that allowing property rights for individual tribal members, enforcing rule of law within reservation systems, supporting law enforcement, and upholding full constitutional rights and protections of all citizens would secure the lives, liberties and properties of affected individuals and families.
Introduction

For almost 200 years the U.S. federal government has claimed wardship over members of federally recognized Indian tribes. Yet, despite the nineteenth century U.S. federal court rulings that propagated this view, disagreement continues as to whether tribes located within the United States are sovereign, whether Congress has plenary power over them, and whether individual tribal members have U.S. Constitutional rights:

- Some say the nineteenth century U.S. Supreme Court cases known as the ‘Marshall Trilogy’ contradict tribal sovereignty. Others say they uphold it.
- Some say treaties promise a permanent trust relationship. Others point out that most treaties have clearly specified final payments of federal funds and benefits and were written and signed with clear intent for gradual assimilation.
- Some say the Constitution never gave Congress anything more than the power to regulate trade with tribes. Others claim the Constitution not only gave Congress total and exclusive plenary power to decide every aspect of life in Indian Country – but by unstated extension, gave the executive branch this power as well.
- Some argue that the Constitution never had authority over tribes or tribal members. Others cite the Constitution when seeking judicial redress.
- Some tribal officials argue that international law should not have been forced upon non-European cultures that had no say in it. Others point to natural law and international law - the grounds for treaties between nations - as basis for uninterrupted tribal sovereignty.

Inherent, retained tribal sovereignty was reality for tribal governments prior to the formation of the United States and in the immediate years following its birth, but is not reflected in case law from the 1800s and much of the 1900s. By the time of Andrew Jackson, the United States had taken a position of control. Further, over the last two centuries, the vast majority of tribal leaders accepted large payments for land, accepted federal trust benefits, and submitted to federal government's de facto power over them.

Throughout history and every heritage, various men have coveted power over others. Today, tribal governments, while accepting and playing into Congress’ claim of plenary power, have themselves, also, claimed exclusive jurisdiction and authority over unwilling citizens.
Tribal governments regularly lobby and petition both Congress and the White House to codify tribal jurisdiction over the lives, liberty and property of everyone within reservation boundaries as well as some outside reservation boundaries. While claiming exclusive jurisdiction, tribal governments have requested and given blessing for the federal government to manage children of tribal heritage – asking Congress to write the Indian Child Welfare Act and the executive branch to write federal rules governing the placement of every enrollable child in need of care. Some tribal governments and supportive entities have gone further - asking even governors and state legislators to expand on and strengthen control over children with heritage.

Often cited as justification for the ICWA is a 1998 pilot study by Carol Locust, a training director at the Native American Research and Training Center at the University of Arizona College of Medicine. Locust’s study is said to have shown that “every Indian child placed in a non-Indian home for either foster care or adoption is placed at great risk of long-term psychological damage as an adult” (Locust, Split Feather Study 1998). Referring to the condition as the “Split-feather Syndrome,” Locust claims to have identified “unique factors of Indian children placed in non-Indian homes that created damaging effects” (Locust, Split Feather Study 1998). The Minnesota Department of Human Services noted “an astonishing 19 out of 20 Native adult adoptees showed signs of “Split-feather syndrome” during Locust’s limited study (DHS 2005).

“Unfortunately,” according to Bonnie Cleaveland, PhD ABPP, “the study was implemented so poorly that we cannot draw conclusions from it.” Only twenty adoptees with tribal heritage - total - were interviewed. All were removed from their biological families and placed with non-native families. There were no control groups to address other variables.
According to Cleaveland:

Locust asserts that out-of-culture removal causes substance abuse and psychiatric problems. However, she uses no control group. She doesn’t acknowledge the high rates of trauma, psychiatric and substance abuse among AI/AN people who remain in their culture and among the population of foster children. These high rates of psychosocial problems could easily account for all of the symptoms Locust found in her subjects (Cleaveland 2015).

Cleaveland concluded, “Sadly, because many judges and attorneys, and even some caseworkers and other professionals, are not familiar with the research, results that may be very wrong are leading to the wrong outcomes for children” (Cleaveland 2015). While supporters of ICWA cite “Split-feather Syndrome” as proof the ICWA is in the best interest of children, many children have been hurt by application of the law.

Questions that need more extensive study include whether children who were adopted into non-Indian families as children show greater problems with self-identity, self-esteem, and inter-personal relationships than do their peers. Are the ties between children who have tribal heritage and their birth families and culture stronger than that of their peers, no matter the age at adoption? Other considerations include whether all tribal members support federal policies that mandate their cases be heard only in tribal courts and whether a percentage of persons of tribal heritage believe federal Indian policy infringes on their life, liberty and property.

The central concern of this paper is how current federal Indian policy has affected the lives, liberty and property of those who have tribal heritage – most specifically the Indian Child Welfare Act. Through research of the historical foundations of federal Indian policy and a nation-wide comparative survey of family dynamics, this paper will attempt to answer these and other questions.
PART I

Background
Chapter 1

Select Literature Review

Research of the historical foundations of federal Indian policy and the effect these foundations have had on the lives, liberty and property of those who have tribal heritage includes literature concerning political philosophy and American history and literature concerning sociological and psychological issues. Included within political philosophy and American history is natural law in relation to Indian affairs, historical research and legal research. Included within sociological and psychological concerns are child abuse and neglect prior to foster care, as well as alcohol abuse, drug abuse, and fetal alcohol spectrum disorder.

Political Philosophy and American History

Can a nomadic people group legitimately hold claim to a vast territory when they physically occupy only a portion of it? While a North American tribal member might answer this differently than a sixteenth century European explorer would, 500 years ago a specific answer was needed. People had begun crossing oceans and exploring previously unknown territories. Diverse populations were meeting each other for the first time. Men who owned firepower could potentially harm those that did not. In order to reign in those that might take advantage of the lives, liberties and properties of others, a set of ethics and standards needed to be established.

European scholars, having previously encountered the difficulties of diverse cultures stumbling upon each other, attempted to develop a solid, acceptable rule of law to make these encounters viable. For people to co-exist, a primary, accepted, enduring rule of law was, and remains, crucial. Obviously and unavoidably, Europeans wrote from their own point of experience.
One man attempting this massive task was Spanish philosopher, theologian, and jurist Franciscus de Victoria, (also known as Francisco de Vitoria, 1483-1546). Victoria has been said to be at the root of International laws that informed United States federal Indian policy (Cohen [1942] 1971). Another scholar who took the challenge was 18th century international lawyer Emer (Emmerich) de Vattel. He proposed that naturally and morally, the earth belonged to all mankind, but when man puts personal labor into a particular portion, he gains exclusive rights to that portion. Initially nomadic, as populations grew and men began working the immediate surroundings, investing their effort and sweat into drawing sustenance from the land, the concept of private property developed. He said of the world and the populations within it:

…destined by the creator to be their common habitation, and to supply them with food, they all possess a natural right to inhabit it, and to derive from it whatever is necessary for their subsistence, and suitable to their wants. But when the human race became extremely multiplied, the earth was no longer capable of furnishing spontaneously, and without culture [agriculture], sufficient support for its inhabitants; neither could it have received proper cultivation from wandering tribes of men continuing to possess it in common. It therefore became necessary that those tribes should fix themselves somewhere, and appropriate to themselves portions of land, in order that they might, without being disturbed in their labour, or disappointed of the fruits of their industry, apply themselves to render those lands fertile, and thence derive their subsistence. Such must have been the origin of the rights of property and dominion: and it was a sufficient ground to justify their establishment. ...The country which a nation inhabits, whether that nation has emigrated thither in a body, or that the different families of which it consists were previously scattered over the country, and there uniting, formed themselves into a political society,—that country, I say, is the settlement of the nation, and it has a peculiar and exclusive right to it (Vattel [1758,1773] 1844, 98 §203).

According to natural law as described by Vattel, tribal members had an exclusive right to land within North America. But Vattel’s analysis questions exclusive right to the portions of land tribal members did not cultivate. While originally a European construct and “Eurocentric,” today international law is accepted and applied globally. Tribal nations around the world seek justice through the United Nations, which relies on international law.
However, Professor Kent McNeil of Osgoode Hall Law School at York University does not believe international law should apply to communities that had not created it.

He states:

Although leading seventeenth and eighteenth-century jurists, such as Hugo Grotius, Samuel Pufendorf, and Emmerich de Vattel, tried to make the law of nations universal by appealing to natural law, by the nineteenth-century most jurists acknowledged the positive sources and limited scope of international law: it was made by and applied only to states recognized as such by the existing circle of European states. For these legal positivists, sovereignty could not be vested in political entities, such as Indigenous peoples, that were not states as defined and acknowledged by international law” (McNeil 2016, 94).

According to Vattel, as communities grew, the need for security in one’s labor grew. Laws were established to protect the significant time and effort individuals spent cultivating their property for harvests; the need for protection of life, liberty and property as natural rights was acknowledged. Further, it was understood that because the earth had been created for the sustenance of all, uninhabited or underused land should be available for that use.

English common law had developed from natural law over a period of more than 500 years (McWilliams 2010). Monsieur Vattel reflected that the natural laws, rights and responsibilities that apply to a mother country apply to her colonies as well.

…[a] nation which establishes dominion over a distant country and sets up colonies in it, that country, although distant from the mother country, constitutes a natural part of the latter, entirely like its ancient territories. Whenever the political laws or treaties make no explicit difference between them, all that one may say about the nation’s own territory must also apply to its colonies (Vattel [1758,1773] 1844, 100 §210).

Dr. William B. Allen, Emeritus Professor of Political Philosophy, MSU, and former Chair of the U.S. Commission on Civil Rights, notes, “Interestingly, these seventeenth century views were directly echoed in the American Revolution (and also in McIntosh and Worcester, though later commentators have misunderstood this relation), while the sixteenth century views
of [Jurist Franciscus de] Victoria played no role at all, Felix Cohen\(^1\) to the contrary notwithstanding” (W. B. Allen 1990, 12).

American forefathers embraced natural law and with that, a sense of justice. They realized that if natural law applied to them, it applied to the land’s indigenous communities as well. This sense of justice that the authors of the Constitution embraced viewed North American tribes as the owners of the land and was influenced by the Christian Bible, St. Augustine, Blackstone, Vattel’s “The Law of Nations,” and others.

According to Allen, Vattel “recognized in the principal American settlers a disposition to deal with the Indians as ‘owners’ despite any liberty nature may have accorded them.” Jurist Franciscus de Victoria’s work cited by Cohen, on the other hand, “dealt with a different question\(^2\)…namely, ‘what relations could legitimately subsist between the Spanish and the Indians in the new world?’” (W. B. Allen 1990, 12).

Cohen’s citation of Victoria as the source of colonial and constitutional policy toward North American tribes, however, has driven resentment against and mischaracterization of the European Christians who settled America - as illustrated in a 2018 Amicus brief by the Yakama tribe of Washington State.

The brief states “[t]he ‘doctrine of Christian discovery’ is the legal fiction that Christian Europeans immediately and automatically acquired legally recognized property rights in our lands upon reaching the Americas, thereby diminishing our sovereignty. Courts have used the doctrine to build a false legal framework to attack Native sovereignty” (Yakama 2018, 3). The brief elaborates:

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This doctrine was propagated by the Roman Catholic Church through a series of papal bulls in the 15th century, including Pope Nicholas’ 1455 papal bull authorizing Portugal to ‘invade, search out, capture, vanquish, and subdue all Saracens and pagans’ and to place them into perpetual slavery and take their property. Id. at 11. The Roman Catholic Church then implemented a framework where the right to subjugate the Americas was split between Spain and Portugal, although they were later joined by other European states. Id. at 12. The doctrine was therefore one of domination and dehumanization of Native Peoples and was used to perpetuate the most widespread genocide in human history. Robert A. Williams, Jr., The American Indian in Western Legal Thought 317 (1990). The United States relies on this genocidal religious doctrine to diminish Native sovereignty to this day (Yakama 2018, 7-8).

The brief concludes, “Where a centuries-old doctrine no longer comports with the morals of the time, the use of that doctrine should no longer withstand the Court’s scrutiny” (Yakama 2018, 20). Yakama has not only accepted Cohen’s assertion that Victoria and other Spanish Christians were responsible for the colonists and Founding Fathers, but also overlooked statements Victoria made refuting the doctrines Yakama cites.

With the amount of historical data available, some can be easily overlooked. The American Indian Policy Review Commission noted in its final report that it has been the “fortune of this Commission to be the first in the long history of this Nation to listen attentively to the voice of the Indian rather than the Indian ‘expert’” (AIPRC 1977, 10). While few tribal members wrote academic articles in the last few centuries, documentation of meetings between varied officials and tribal members abound. We can hear diverse voices through speeches made or letters written. Not all tribal members were in agreement with present day experts. For example, tribal member Samson Occom described his view of the world in his 18th century account, “Short, Plain, and Honest Account of my Self” which is preserved in the Dartmouth College Archives. Despite abuses by mentors, Occum embraced Jesus Christ throughout his life and ministered to many tribal members. In Pushmataha’s “Response to Chief Tecumseh on War Against the Americans,” archived in the American Rhetoric, Online Speech Bank, he resolves to
continue stand in battle with the Americans, whom he considers his friends. Unfortunately, Pushmataha was later betrayed by Andrew Jackson. Chief Seattle, in his speech “Cautioning Americans to Deal Justly with His People,” concedes defeat to the United States and warns the Americans to treat his people well.

To understand current federal Indian policy, the centuries of events that led up to it need to be appreciated. While many academic articles written in the last 60 years have been done with the understanding that the Marshall Trilogy and Cohen’s Handbook on Federal Indian Law have correctly construed the U.S. Constitution as well as historical events, it is interesting to note the research that does not.

Tribal member and publisher William J. Lawrence, J.D., in his work, “In Defense of Indian Rights” (2002), stated that the Indian Citizenship Act “should have made Indians equal to all other citizens of the United States, with the same Constitutional protections, rights, and responsibilities. But the federal government has continued to treat Indians separately from other citizens, especially if they live on reservations” (395).

Tribal member and historian Billie J. Kingfisher Jr., in his dissertation, “Dogma: Felix S. Cohen, The Indian Law Survey and the Spanish Model,” notes that Cohen “had never given the ‘Indian Problem’ a shred of thought, much less met an Indian before he came to work for the government” (Kingfisher 2016, 3). Commenting on a 1995 article by Quinnipiac University’s Jill E. Martin titled “A Year and a Spring of My Existence: Felix S. Cohen and The Handbook of Federal Indian Law,” Kingfisher states that while Martin’s descriptions of historic events in her article “are, for the most part, factual,… her work is like so many others in that she is still convinced that the Handbook is ‘the bible of Indian law.’…that Cohen ‘analyzes all issues of American-Indian Law’ and that his conclusions are sound” (2016, 137). Martin’s article was
reprinted in the forward of the 2012 edition of Cohen’s Handbook and has been a source for other scholars concerning the genesis of the Handbook (Kingfisher 2016, 137).

Allen, in his 2010 “Review of Federal Indian Policy,” agrees with Kingfisher concerning Spanish origins and explores the work of Victoria (1580) and Vattel (1758) as he researches the genesis of American federal Indian policy. Allen maintains that land ownership in colonial times was not title by conquest as Victoria suggests, but a form of title by discovery as suggested by 18th century international lawyer Emer (Emmerich) de Vattel. Further, Allen shows how President Washington viewed tribes as separate, sovereign nations.

The important point to this is that not every historical researcher, whether a tribal member or not, agrees with the premises given by Cohen and Marshall, and if these foundational premises are questionable, then federal Indian policy is as well.

Contemporary law papers also tend to follow the lead of Marshall and Cohen. A 2016 study, “American Indian Children and U.S. Indian Policy,” published in the Tribal Law Journal by Angelique Eaglewoman and William Rice reiterates the accepted “Indian Industry” perspective on children but also has good historical research, legal explanations and statistical support (2016). Nonetheless, it continues with the false premise that all children of tribal heritage have the same wants and needs and does not recognize that some individuals choose to separate themselves from the tribal community.

Professor Sarah Krakoff, in her 2017 paper titled “They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum,” claims that equal protection is not applicable to members of federally recognized tribes because their status “predates” the Constitution and sets them apart as a people group. Krakoff strangely argues in favor of racism when she states “Native nations’ governmental status situates them differently from other
minority groups for many legal purposes, including equal protection analysis” and “…using equal protection doctrine to demand a highly formalized and acontextual race neutrality with respect to tribes and their members today would, ironically, perpetuate the settler/colonial project of elimination” (Krakoff 2017, 496).

Another paper in defense of current federal Indian policy is “A Call for an Assessment of the Welfare of Indian Children in South Dakota” by Patrice H. Kunesh (2007). Kunesh’s article claims there is an “overrepresentation of minorities in South Dakota’s juvenile justice system” and that the state is not in “compliance with the procedural mandates of the Indian Child Welfare Act.” Some details of Kunesh’s research are not accurate. For example, she claims the Mashantucket Pequot is the oldest "continually occupied" reservation, and that the Pequot have reestablished as a tribe (Kunesh, A Call for an assessment of the Welfare of Indian Children in South Dakota 2007, 10). However, the reservation was uninhabited for several years, and the current tribe is made up primarily of persons with no Mashantucket heritage who were adopted into the tribe - a tribe recreated for the express purpose of establishing a casino (Benedict 2000).

More importantly, when citing population numbers for tribal members, Kunesh uses figures from the U.S. census, which reflects those who self-report tribal heritage (Kunesh, A Call for an assessment of the Welfare of Indian Children in South Dakota 2007, 7). The actual number of citizens enrolled in federally recognized tribes and use tribal services is about half the 4 million noted in the 2010 U.S. census (US Census Bureau 2010).

Nevertheless, there is a growing body of work that construes federal Indian law and policy from a constitutional perspective and is finding current policy wrong-headed. Tribal member and attorney Mark Fiddler, in his article “Adoptive Couple v. Baby Girl, State ICWA Laws, and Constitutional Avoidance,” explains the constitutional ramifications of Adoptive
Couple v. Baby Girl and various State ICWA laws. He explains that one of the questions asked in Adoptive Couple was “if a birth father has no rights under state law, what specifically is it in ICWA that accords him greater federal rights?” (2014, 3)

Law professor Robert G. Natelson, in “The Original Understanding of the Indian Commerce Clause,” researched the original meaning of the Indian Commerce Clause and concluded that the Indian Child Welfare Act is an unconstitutional use of the clause. Several studies have found that “‘commerce’ meant mercantile trade.” Thus, “‘commerce’ did not include manufacturing, agriculture, hunting, fishing, other land use, property ownership, religion, education, or domestic family life” (R. Natelson 2007, 214-215). Attorney James A. Poore, in his research titled “The Constitution of the United States Applies to Indian Tribes,” also questioned the conclusions of Justice Marshall.

**Sociological and Psychological Research**

Many claim sociological and psychological research supports and justifies the necessity of the Indian Child Welfare Act. In the late 1990’s, Training Director Carol Locust, of the Native American Research and Training Center at the University of Arizona, conducted a pilot study concerning outcomes for children who had experienced foster care or adoption in a non-tribal home. After advertising for Native American’s who had been adopted and interviewing 20 young adults, Locust concluded that "there are unique factors of Indian children being placed in non-Indian homes that create damaging effects in the later lives of the children." According to Locust, “The pilot study conducted by this investigator indicated that every Indian child placed in a non-Indian home for either foster care or adoption is placed at great risk of long-term psychological damage as an adult” (Locust 1998). An early publication of the study was a
posting on a non-academic blog, the "American Indian Adoptees Split Feathers Study." The posting does not include necessary details that would allow for a repeat of the study. Along with the omission of criteria used to choose participants, weaknesses to the study included the small number of participants, use of field notes rather than an audio recording, and lack of control groups.

A later publication of the study, “Split Feathers: Adult American Indians Who Were Placed In Non-Indian Families As Children,” notes the challenges of finding persons of heritage who are no longer associated with tribal government and the lack of sufficient study on the matter. There has been no subsequent study following the pilot stage. Despite this, a spate of articles published in the ensuing years cite the “Split-feather” pilot study as documentation of the consequences of non-tribal members raising children who have heritage.

While there has been no scientific study concerning the Split-feather hypothesis, other qualitative studies have addressed foster care, health and historical trauma. Student researcher Shanley Swanson Nicolai explains historical trauma refers to “past histories of injustice” (Swanson 2012, viii), or “…cumulative emotional and psychological wounding, over the lifespan and across generations, emanating from massive group trauma experiences” (2012, 2).

Explaining in her thesis, “Acknowledging the Past while Looking to the Future: Exploring indigenous child trauma,” Swanson states:

The concept of intergenerational trauma states that individuals who have not directly experienced the traumatic events of historical loss may still be affected by these traumas on multiple and complex levels; that the effects of trauma can be passed down through generations (Yellow Horse Brave Heart & DeBruyn 1998: 64). Historical trauma response refers to “the pattern of diverse responses that may result from exposure to historical trauma,” (Denham, 2008: 391).(Swanson 2012, 2).
In 2010, “American Indian Grand Families: A Qualitative Study Conducted with Grandmothers and Grandfathers Who Provide Sole Care for Their Grandchildren,” was published in the Journal of Cross-Cultural Gerontology. This study conducted by Suzanne L. Cross, Angelique G. Day, and Lisa G. Byers interviewed 31 Native American grandparents selected non-randomly by several tribal outreach workers, community health professionals, and tribal community leaders. Recording responses in field notes, the researchers interviewed the grandparents to discover their reasons for raising grandchildren, the impact of historical trauma—meaning generalized distress assumed to affect the emotional make-up of persons with heritage in a historically marginalized group—and whether the Indian Child Welfare Act was implemented. Researchers determined these grandparents cared for their grandchildren for reasons identical to non-tribal grandparents but claimed they were less likely to use state and federal programs due to fears and mistrust related to historical trauma, preferring to instead seek help from tribal or Indian urban agencies. Nevertheless, the study admitted 23 of the participants had accessed state and federal services and only nine accessed tribal services (2010). This suggests participants may have given answers they thought were desired. Other weaknesses to the study include the small number of participants, use of field notes and not audio recordings, and omission of criteria used by tribal leaders and outreach workers to choose participants.

In 2012, in a qualitative study called, “Acknowledging the Past while Looking to the Future: Conceptualizing Indigenous Child Trauma,” 17 social service providers in Montana and Norway were interviewed concerning whether current trauma experienced by indigenous children is linked to historical trauma, and whether the trauma is unique. All those interviewed agreed that “…trauma experiences of indigenous youth are influenced by historical and intergenerational trauma relating to colonization, assimilation and oppression" and is "unique"
from trauma of other heritages. However, participants were not randomly chosen. Using ‘Snowball Sampling,’ the researcher interviewed three personal school friends, which led to her "best friend’s aunt, another friend’s mother," one of the researcher’s psychology professors, and "a number of women…referred to by other interviewees…” (Nicolai and Saus 2012). While this sample related valid personal experience, the small size and non-random survey method, which constrained selection to friends and family, limited generalizability.

Neither study specifically interviewed persons who had been children in need of care, but a larger study published in 2017 did. Purposing to discover whether violence affected those "marginalized" by society in the same manner it does others and whether close attachments made a difference, researchers Jillian J. Turanovic and Travis C. Pratt conducted a study that focused on youth assumed to be "socialized in a unique structural and cultural context." Titled “Consequences of Violent Victimization for Native American Youth in Early Adulthood,” the study used data from a national study to find and physically interview 558 tribal youth. Turanovic and Pratt asserted that although subjects were diverse and lived "from urban to suburban to Reservation" communities, they had commonality in historical "racial and ethnic subjugation"(Turanovic and Pratt 2017). Further, while admitting inability to gain trust, Turanovic and Pratt concluded that the diverse youth had a higher risk for victimization, poor health, financial hardship, criminal behavior, and chemical abuse.

Variables that were not examined but could have affected results include lack of rapport from lack of trust, biased questioning due to expectation of past marginalization and a pre-conceived belief that heritage was a decisive commonality, and a lack of controls for familial or physical variables that could affect behavior. Two other possible independent variables concerning observed psychological damage to foster children include child abuse and neglect
prior to foster care placement and Fetal Alcohol Spectrum Disorder. The researchers did, however, acknowledge more quantitative and qualitative research is needed.

**Child Abuse and Neglect Prior to Foster Care**

There are many quantitative studies concerning child abuse and trauma for children of all heritages prior to foster care. One such study is the “National Study of the Impact of Outpatient Mental Health Services for Children in Long Term Foster Care” in 2010. This study evaluated 439 foster-care children of diverse heritage and found that children in foster homes that have been abused in the past have more behavioral issues than other children. The study admitted weakness in not knowing whether professionals addressed actual needs of individuals or assumed needs of a demographic (Bellamy, Gopalan and Traube 2010).

Nevertheless, according to a 2017 study by Colleen C. Katz, Mark E. Courtney, and Elizabeth Novotny, titled, “Pre-foster Care Maltreatment Class as a Predictor of Maltreatment in Foster Care,” youth of all heritages abused by relatives are at increased risk of abuse when placed in foster care (Katz, Courtney and Novotny 2017). Further, a 2013 study, the “Sociodemographic risk, developmental competence, and PTSD symptoms in young children exposed to interpersonal trauma in early life,” examined racially diverse children exposed to physical and sexual abuse or neglect. In this study, researchers showed that the greater exposure to trauma, the greater PTSD and sociodemographic risk and lower developmental competence (Enlow, Blood and Egeland 2013).

A 2014 report titled “Health Outcomes in Young Adults from Foster Care and Economically Diverse Backgrounds” compared risk between young adults who were foster children, young adults from low income homes, and young adults from economically secure
homes. Researchers found that former foster children of all heritages are at greater risk for multiple health issues (Ahrens, Garrison and Courtney 2014).

The 2015 study, “Childhood Trauma and Its Effects: Implications for Police” discusses current understanding of the effects of ongoing trauma on young children, how these effects impair adolescent and young adult functioning, and the possible implications for policing (R. G. Dudley 2015). The report acknowledges that a combination of repeated childhood trauma and absence of parental nurture and protection can result in multiple psychiatric and neuropsychiatric disorders, including:

1. trauma-related neurological symptoms,
2. trauma-related psychological symptoms,
3. developmental difficulties brought on by poor parenting, and
4. other associated difficulties

Dudley warns that each of these four sets of difficulties “cause children considerable emotional distress and impair their ability to function,” and are hard to “cure” (R. G. Dudley 2015, 4-5). However, as observed by Perry et al, without treatment, “trauma-related difficulties and their effects tend to persist into adolescence and adulthood and become difficult to reverse (Perry et al., 1995; Schore, 2001)” (2015, 5). According to Dudley:

…it is estimated that 35 percent of children exposed to domestic violence will develop trauma-related difficulties …Similarly, it is estimated that between 42 percent and 90 percent of child victims of sexual abuse will develop trauma-related difficulties…statistics related to both these issues are thought to be underestimates… More difficult to estimate is the number of children repeatedly exposed to or even directly threatened by various forms of neighborhood violence” (R. G. Dudley 2015, 9).

One of the most important studies concerning the effect trauma has on children was in the late 1990’s. In the “Relationship of Childhood Abuse and Household Dysfunction to many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study,” almost 10,000 diverse adults responded to a questionnaire concerning childhood abuse and later
illnesses. Researchers found that those who experienced more than four categories of abuse had up to 12 times the risk for substance abuse, depression and suicide, and were more likely to have multiple health issues, indicating tribal children are not unique in trauma response (Felitti VJ, ACE Study 1998). This study birthed the “Adverse Childhood Experiences test.”

Following this, a 2013 study, “The relationship between adverse childhood experiences and mental health in adulthood. A systematic literature review” examined 65 relevant publications related to trauma in childhood and adult depression. Researchers M. De Venter, K. Demyttenaere, and R. Bruffaerts found that anxiety and drug/alcohol abuse also showed correlation, regardless of heritage (De Venter, Demyttenaere and Bruffaerts 2013).

Alcohol Abuse, Drug Abuse, and Fetal Alcohol Spectrum Disorder
Examining the effect that parental drug and alcohol abuse has on children, a 2016 quantitative study titled “Worldwide Prevalence of Fetal Alcohol Spectrum Disorders: A Systematic Literature Review Including Meta-Analysis” researched multiple databases to gain an overview of global Fetal Alcohol estimates. In the United States, “native populations showed higher prevalence estimates for FAS” than the general population (Roozen, et al. 2016).

The 2007 study, “Perceptions of Methamphetamine Use in Three Western Tribal Communities: Implications for Child Abuse in Indian Country,” published by the Tribal Law and Policy Institute, found the likely reason for the high incidence of violence, child sexual abuse, and child maltreatment within Indian Country revolves around the high incidence of drug and alcohol abuse found on many reservations” (Roe Bubar 2007, 13 (9)). The authors cite various studies reporting “American Indian and Alaska Native populations have seen a 164% increase in the number of drug-related deaths from 3.9% in 1979-1981 to 10.3% 1998.” A 2002 North Dakota report “concluded that meth use and distribution
was a problem in all reservations within the state, including Turtle Mountain, Standing Rock
Nation, Fort Berthold, Spirit Lake Nation, and Lake Traverse.” The authors state:

U.S. and tribal law enforcement agencies have witnessed a large increase in violent
crimes stemming from meth use. Furthermore, there have been reports of tribal
diners and family members being involved with meth distribution…According to
media reports coming out of the Wind River reservation in Wyoming, the tribal
community had been targeted by Mexican drug cartels in an attempt to create a
market for meth that dwarfs the demand for alcohol and marijuana. As a result,…
social services agencies have seen a large increase in child neglect cases. The
addition of meth-exposed children to an already strained network of social services
in tribal communities almost guarantees additional complications in educational,
social, and medical services on the reservation. Requests through the Indian Health
Service (IHS) for drug rehabilitation services for meth addicts increased from 137
in 1997 to 4,946 in 2004 (Roe Bubar 2007, 15-17).

Further, officials report increases in child abuse and neglect, domestic violence, sexual
assault and prostituting one’s own children due to methamphetamine. Meth use also “increases
the difficulty of family reunification.” The perceptions by tribal professionals in this survey “are
supported by recent data gathered by the Bureau of Indian Affairs and Office of Justice Services
from 96 Indian country law enforcement agencies that suggests meth is the greatest threat in their
communities.” (Roe Bubar 2007, 10). They warn, however, that “a systematic examination into
the impact of the meth crisis on emergency services, social services, law enforcement, and
schools has not taken place on a tribal basis, much less on a pan-tribal level” (Roe Bubar 2007,
7).

While none of these works in themselves comprehensively address the varied facets
underlying the philosophies of federal Indian policy and negative consequences of the Indian
Child Welfare Act, each provides a vital piece to the puzzle. Taken together, the level of research
pointing to present day causes—shared by all heritages—rather than solely racism and historical
trauma as genesis of psychological trauma for tribal members, is overwhelming. For full
understanding, these works need to be brought together and explored.
Chapter 2
Philosophical Underpinnings of Federal Indian Policy

Natural Law

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. (General Congress 1776).

Professor of American Institutions & Jurisprudence, Hadley Arkes notes in the Harvard Journal of Law & Public Policy that Man’s intrinsic understanding of right and wrong has long been the foundation for European rule of law. That shared understanding is what many have called ‘natural law,’ ‘the laws or canons of reason,’ or “what Blackstone called ‘the laws of Nature and reason.’” (Arkes 2013, 962). Alexander Hamilton had described it in Federalist No. 31 (Publius 1787) as "primary truths, or first principles, upon which all subsequent reasonings must depend" and explained that these truths contain "an internal evidence which antecedent to all reflection or combination commands the assent of the mind.” This ‘natural law’ formed the basis of ‘international law,’ which governed procedures for the colonists and is at the heart of treaty-making between nations.

Some Tribal officials have cited natural law as the foundation for their sovereignty. The Confederated Tribes of the Warm Springs Reservation of Oregon proclaimed in 1992,

We declare the existence of this inherent sovereign authority—the absolute right to govern, to determine our destiny, and to control all persons, land, water, resources and activities, free of all outside interference—throughout our homeland and over all our rights, property, and people, wherever located...Our sovereignty is based, not on the laws of human beings, but on natural laws given to us by our Creator; these natural laws are as they are, not as human beings may define them (CTWS 2016).
Similar sentiments were expressed by the authors of the U.S. Declaration of Independence. Founding Father and Supreme Court Justice, James Wilson, wrote of the primary purpose of government: “Was it,” he asked, “…to acquire new rights by a human establishment? Or was it, by a human establishment, to acquire a new security for the possession or recovery” of rights previously entitled to by our Creator? (Wilson 1790-91)

The founders of the United States federal government were well-read in many of the pivotal tomes concerning history, philosophy, and law. Many embraced natural laws and deliberately wrote the constitution to embody its principles (George 2001). The 15th Article of the Virginia Bill of Rights, drafted by Patrick Henry states, “That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles” (Vaughan 1997, 103). British legal philosopher Herbert L.A. Hart agreed, notes “…human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) …” (Hart, Positivism and the Separation of Law and Morals 1958), and thus have natural tendency to require and understand certain prime societal rules. While many today believe ‘law’ is set apart from the Creator God, that was not the understanding of most European colonists or Tribal communities.

Many philosophers through the centuries believed that human law is based on a “natural law” created outside of humans (George 2001). St. Augustine believed that while men have the “capacity to know which precedes the faith” (Strauss and Cropsey 1987, 177), man’s ability to ‘reason’ is a gift from God. Thomas Aquinas also believed natural law was obtained only through God’s ‘Revealed Law’ (Vieru 2010) and William Penn wrote to the Tzar of Russia in
1698, "If thou wouldst rule well, thou must rule for God, and to do that, thou must be ruled by him... Those who will not be governed by God will be ruled by tyrants" (Janney 1852).

In the 18th century, professor William Blackstone wrote “the laws of God are superior in obligation to all other laws…and all valid laws derive their force from that Divine original” (Hart 1958). President George Washington agreed. Emphasizing the importance of a sense for God in the application of law, he asked, “Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice?” (Washington, 1796).

In the Declaration of Independence, Thomas Jefferson justified the American Revolution through an appeal to ‘the Laws of Nature and of Nature's God.’ The natural rights specified within the document were said to be self-evident: “That all men are created equal; that they are endowed by their Creator with certain unalienable rights; among these are life, liberty, and the pursuit of happiness; and to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed” (General Congress 1776). Arkes states that some of the genius of the Founding Fathers³ was their ability to explain the application of the principles of natural right and reason (Arkes 2013, 964). The Declaration of Independence carried six principles in its message: A Creator exists; the Creator gave men inalienable rights; government exists to protect those rights; moral law is transcendent law; there is a social compact in the consent of the governed; and if Government does not meet those standards, it can be abolished and a new one created.

³ “That first generation of jurists in this country showed a remarkable knack for tracing their judgments back to those anchoring axioms of the law” (Arkes 2013, 962).
America has attempted to correct and re-correct federal Indian policy numerous times, resulting in the confusion of contradictory laws and policies we have today. Dr. William B. Allen, Emeritus Professor of Political Philosophy, MSU, and former Chair of the U.S. Commission on Civil Rights, believes it is essential for America to go back to the beginning and understand the historical foundation of Indian law before current federal Indian policy can be meaningfully addressed. Economic and legal analysis are both insufficient without historical context (W. B. Allen 1990, 6).

To this end, Allen, while working with the Civil Rights Commission, examined Felix Cohen’s “Handbook of Federal Indian Law.” Cohen’s handbook, which has become the primary text for federal Indian policy, asserts that Spanish philosopher, theologian, and jurist Franciscus de Victoria was the root of International laws that informed United States federal Indian policy. Allen compared evidence of colonial reliance on Victoria’s work with that of international lawyer Emer (Emmerich) de Vattel and came to a different conclusion.

**Theories Suggested for Colonization in the Americas**

Victoria

In 1580, the Reverend Father, Brother Franciscus De Victoria, had given several justifications for colonization of distant lands under the *jus gentium*, or international law. He wrote in his First Relectio, *On The Indians Lately Discovered*, “It being premised, then, that the Indian aborigines are or were true owners, it remains to inquire by what title the Spaniards could have come into possession of them and their country” (Victoria 1580, Sec. 2).
Victoria’s list of possible justifications for Spanish ownership, most of which he declared illegitimate, included:

1. The Spanish Emperor is lord of the whole world and therefore of the America’s as well
2. The Pope has full jurisdiction in temporal matters over the whole earth
3. Right of Discovery
4. The tribes refused to accept faith in Christ, although they have been advised to accept it
5. The sins of these Indian aborigines. Though their rejection of the Christian faith is not a good reason for making war on them, they may be attacked for other mortal sins
6. Consent of the majority of natives. - by voluntary choice
7. Right of Conquest by grant from God
8. Natural right to assume control over others for their own good

The first title to property that Victoria explores is that “the Emperor is lord of the whole world…” (Victoria 1580, Sec. 2). Victoria lays out the origin of that belief - then refutes it, saying “no one by natural law has dominion over the world.” He refutes the presumption of this title by citing Aristotle’s Politics, bk. 1 and St. Thomas’ De regimine principium, bk. 1, ch. 2, as well as Scripture, pointing out the proof that God did not ordain a ruler over the entire world is in the fact the Jewish nation was forbidden to have a foreigner as their lord (Deuteronomy, ch. 17). Further, “… the Empire was divided into Eastern and Western, first among the sons of Constantine the Great and then, later, by Pope Stephen, who conferred the Empire of the West on the Germans, as is held in X, 1, 6, 34?” (Victoria 1580).

The second potential title was one given through the Pope. “For it is claimed that the Pope is temporal monarch, too, over all the world and that he could consequently make the Kings of Spain sovereign over the aborigines in question…” (Victoria 1580, Sec. 2). A Scriptural citation that seems to support this is "The earth is the Lord’s and the fulness thereof," followed by the doctrine that “the Pope is the vicar of God and of Christ.” However, Victoria points out Scripture that states Jesus is not a temporal king, and “if Christ the Lord had not temporal power,
as has been shown in the foregoing discussion to be more probable and as is also the opinion of St. Thomas, much less has the Pope it, he being Christ's vicar” (Victoria 1580).

The third title, the “right of discovery,” was quickly dismissed by Victoria. He states that although Columbus set sail with a mission of discovery and uninhabited regions, by natural and international law, can become the property of the first occupant, “the barbarians were true owners, both from the public and from the private standpoint” (Victoria 1580, Sec. 2).

The fourth suggested title involves a population that refuses to accept Jesus Christ. The reasoning for this lies in Scripture, which states:

“No one has ever gone into heaven except the one who came from heaven-the Son of Man. Just as Moses lifted up the snake in the wilderness, so the Son of Man must be lifted up, that everyone who believes may have eternal life in him.” For God so loved the world that he gave his one and only Son, that whoever believes in him shall not perish but have eternal life. For God did not send his Son into the world to condemn the world, but to save the world through him. Whoever believes in him is not condemned, but whoever does not believe stands condemned already because they have not believed in the name of God's one and only Son. This is the verdict: Light has come into the world, but people loved darkness instead of light because their deeds were evil. Everyone who does evil hates the light and will not come into the light for fear that their deeds will be exposed” (John 3:20).

The precept here is not that God wants people to be condemned or to die – but that due to the evil in the world and everyone’s propensity to act in it, everyone is already doomed to die. God is reaching out to save everyone from it the only way possible - by sending his Son to take their sins on himself and be their ‘scapegoat.’ Willingness to recognize and accept his Son Jesus is the evidence that separates those who welcome this gift of love from those who do not.

However, Victoria concluded that unwillingness of aboriginals to respond to the Gospel message was not a legitimate excuse to take control of their land. He pointed out that in the first place, Romans 10:14b states, “‘How shall they believe in him of whom they have not heard, and how shall they hear without a preacher?’” Victoria said, “Therefore, if the faith has not been
preached to them, their ignorance is invincible, for it was impossible for them to know”
(Victoria 1580, Sec. 2).

Hence, Victoria, citing Cajetan as well as St. Thomas, explains:

…if before hearing anything of the Christian religion they were excused, they are put under no fresh obligation by a simple declaration and announcement of this kind, for such announcement is no proof or incentive to belief. Nay, as it would be rash and imprudent for anyone to believe anything, especially in matters which concern salvation, unless he knows that this is asserted by a man worthy of credence, a thing which the aboriginal Indians do not know, seeing that they do not know who or what manner of men they are who are announcing the new religion to them (Victoria 1580, Sec. 2).

Victoria maintains that if there are no signs worthy of belief to indicate to the non-believer what the truth is, there is no sin.

He elaborates:

There is no doubt about the doctrine of the Council of Toledo, that threats and fears should not be employed against the Jews in order to make them receive the faith. And Gregory expressly says the same in the canon qui sincera (can. 3, Dist. 45): “Who with sincerity of purpose,” says he, “desires to bring into the perfect faith those who are outside the Christian religion should labor in a manner that will attract and not with severity; ... for whosoever does otherwise and under cover of the latter would turn them from their accustomed worship and ritual is demonstrably furthering his own end thereby and not God's end.

Our proposition receives further proof from the use and custom of the Church. For never have Christian Emperors, who had as advisors the most holy and wise Pontiffs, made war on unbelievers for their refusal to accept the Christian religion. Further, war is no argument for the truth of the Christian faith. Therefore the Indians cannot be induced by war to believe, but rather to feign belief and reception of the Christian faith, which is monstrous and a sacrilege...It is clear, then, that the title which we are now discussing is not adequate and lawful for the seizure of the lands… (Victoria 1580, Sec 2).

Victoria then suggests a fifth title which involves the sins of the population in question.

“For it is alleged that, though their unbelief or their rejection of the Christian faith is not a good reason for making war on them…they may be attacked for other mortal sins which (so it is said) they have in numbers, and those very heinous” (Victoria 1580, Sec. 2).
Again, Victoria refutes this reasoning. In the first place, non-Christians aside:

…the Pope cannot make war on Christians on the ground of their being fornicators or thieves or, indeed, because they are sodomites; nor can he on that ground confiscate their land and give it to other princes; were that so, there would be daily changes of kingdoms, seeing that there are many sinners in every realm. And this is confirmed by the consideration that these sins are more heinous in Christians, who are aware that they are sins, than in barbarians, who have not that knowledge. Further, it would be a strange thing that the Pope, who cannot make laws for unbelievers, can yet sit in judgment and visit punishment upon them (Victoria 1580, Sec. 2).

Further, Victoria notes, even within the violence of the Old Testament, Israel never seized land of unbelievers “or idolaters or because they were guilty of other sins against nature” such as “sacrificing their sons and daughters to devils.” Israel only fought when directed to by God, when enemies had “hindered their passage or had attacked them” (Victoria 1580, Sec. 2).

The sixth title examined by Victoria was one in which North American tribes could have chosen to give up land and sovereignty voluntarily. “For on the arrival of the Spaniards we find them declaring to the aborigines how the King of Spain has sent them for their good and admonishing them to receive and accept him as lord and king; and the aborigines replied that they were content to do so.” Further, “there is nothing so natural as that the intent of an owner to transfer his property to another should have effect given to it” (Victoria 1580, Sec. 2).

Nonetheless, Victoria wrote “this title, too, is insufficient.” Addressing southern lands acquired by the Spanish, he explained:

[F]ear and ignorance, which vitiate every choice, ought to be absent. But they were markedly operative in the cases of choice and acceptance under consideration, for the Indians did not know what they were doing; nay, they may not have understood what the Spaniards were seeking. Further, we find the Spaniards seeking it in armed array from an unwarlike and timid crowd. Further, inasmuch as the aborigines, as said above, had real lords and princes, the populace could not procure new lords without other reasonable cause, this being to the hurt of their former lords. Further, on the other hand, these lords themselves could not appoint a new prince without the assent of the populace (Victoria 1580, Sec. 2).
Victoria, referring to tribes encountered by Spaniards of his century, concludes that because all elements of a valid choice were not present among the aborigines, this title would be “utterly inadequate and unlawful.” In his third section, Victoria further explained “true and voluntary choice” could only occur if the majority of the population freely accepts the King of Spain as their sovereign, as “a State can appoint any one it will to be its lord” (Victoria 1580, Sec 3).

Almost 200 years later, Vattel, agreed and discussed voluntary choice as it relates to treaties:

… although a nation is under an obligation to preserve with the utmost care the liberty and independence it inherits from nature, —yet, when it has not sufficient strength of itself, and feels itself unable to resist its enemies, it may lawfully subject itself to a more powerful nation on certain conditions agreed to by both parties: and the compact or treaty of submission will thenceforward be the measure and rule of the rights of each. For since the people who enter into subjection resign a right which naturally belongs to them, and transfer it to the other nation, they are perfectly at liberty to annex what conditions they please to this transfer… (Vattel [1758,1773] 1844, 94 §193).

The “necessary law of nations,” according to Vattel, guides states into agreements, recording in treaties whatever points necessary for the arrangement ([1758,1773] 1844, §9). These guiding laws can be termed necessary because nations are “absolutely bound” to observe them,” just as men are bound to observe the law of nature ([1758,1773] 1844, §7). The law of nations - also known as ‘the natural law of nations,’ or ‘international law’ - is simply “the law of nature applied to nations” ([1758,1773] 1844, §6). However, it is not “precisely and in every case the same as the law of nature.” A society is not the same as an individual and therefore has some different obligations and rights ([1758,1773] 1844, §6). Nevertheless, since the necessary law of nations is the “application of the law of nature to states,” it is as immutable as the law of nature ([1758,1773] 1844, §8). “[E]very treaty, every custom, which contravenes the injunctions or prohibitions of the necessary law of nations, is unlawful” ([1758,1773] 1844, §9).
Treaties are a tool for use in international law, which is an extension of natural law. If you have one, you have the other. If one were to dismiss international law out-of-hand as ‘European’ and therefore irrelevant and invalid, treaties would no longer have foundation.

With no evidence the tribes visited by the Spaniards in the 16th century had freely given their societies over to the King of Spain in keeping with natural law, Victoria did not believe the sixth potential title was valid.

The seventh title concerned the ‘right of conquest,’ which was said to be by special grant from God in condemnation of abominations committed by “barbarians” (Victoria 1580, Sec 2). However, Victoria said he was “loath” to expound on this or give it any credence. Even if approved by God, he said, those who cause harm to others are still to blame for their actions. “And…apart from the sin of unbelief, there might be no greater sins in morals among certain Christians than there are among those barbarians! (Victoria 1580, Sec 2).

Having refuted all the titles he felt were invalid, Victoria proceeded to examine exceptions. A community has the right to refuse Jesus Christ. A problem arises, however, when some in the community want to learn about Jesus, and others will not let them. Victoria wrote that if people “prevent the Spaniards from freely preaching the Gospel, the Spaniards, after first reasoning with them in order to remove scandal, may preach it despite their unwillingness and devote themselves to the conversion of the people in question.” In the minds of the Spanish, this would prevent those who are interested from enduring condemnation and death as a result of separation from Jesus. This was felt so crucial that Victoria concurred war could be necessary “until they succeed in obtaining facilities and safety for preaching the Gospel.” Victoria was especially alarmed about tribal leaders who had initially allowed preaching but then began “killing or otherwise punishing” those who had accepted Jesus (Victoria 1580, Sec. 3). In defense of the
weak. Victoria felt violence might be justified – but with stipulation that it be done “…with a regard for moderation and proportion, so as to go no further than necessity demands, preferring to abstain from what they lawfully might do rather than transgress due limits, and with an intent directed more to the welfare of the aborigines than to their own gain” (Victoria 1580, Sec. 3).

War was allowed not because an aboriginal group rejected the Gospel, nor because of sins committed by the group, but because those who wanted the Gospel were prevented from receiving it:

Careful attention must, however, be paid to what St. Paul says (I Corinthians, ch. 6): "All things are lawful unto me, but not all things are expedient." So everything said above must be taken as spoken absolutely. For it may be that these wars and massacres and spoliations will hinder rather than procure and further the conversion of the Indians. Accordingly, the prime consideration is that no obstacle be placed in the way of the Gospel, and if any such be so placed, this method of evangelization must be abandoned and another one sought for. What we have been showing is what is lawful in itself. I personally have no doubt that the Spaniards were Bound to employ force and arms in order to continue their work there, but I fear measures were adopted in excess of what is allowed by human and divine law… (Victoria 1580, Sec. 3).

Victoria also deemed war lawful against any society that “allows the sacrifice of innocent people or the killing in other ways of un-condemned people for cannibalistic purposes.” Victoria asserts that even without the Pope's permission:

Spaniards can stop all such nefarious usage and ritual among the aborigines, being entitled to rescue innocent people from an unjust death. This is proved by the fact that “God has laid a charge on every individual concerning his neighbor,” and they all are our neighbors. Therefore, anyone may defend them from such tyrannical and oppressive acts, and it is especially the business of princes to do so. A further proof is given by Proverbs, ch. 24: "Deliver them that are drawn unto death, and forbear not to free those that are being dragged to destruction (Victoria 1580, Sec 3).

Finally, Victoria wrote his reasoning for ‘wardship’ or ‘pupillage’ of North American tribes, explaining:

There is another title which can indeed not be asserted, but brought up for discussion, and some think it a lawful one. I dare not affirm it at all, nor do I entirely
condemn it. It is this: Although the aborigines in question are (as has been said above) not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful State up to the standard required by human and civil claims. Accordingly, they have no proper laws nor magistrates, and are not even capable of controlling their family affairs; they are without any literature or arts, not only the liberal arts, but the mechanical arts also; they have no careful agriculture and no artisans; and they lack many other conveniences, yea necessaries, of human life. It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly for their benefit. … And surely this might be founded on the precept of charity, they being our neighbors and we being bound to look after their welfare. Let this, however, as I have already said, be put forward without dogmatism and subject also to the limitation that any such interposition be for the welfare and in the interests of the Indians and not merely for the profit of the Spaniards (Victoria 1580, Sec 3).

While pupilage was a title entertained by Victoria, it is important to note that the American colonists did not make any tribe their ‘ward.’ While the early 1800’s saw a push in that direction, many 16th and 17th century colonists and tribes lived side by side, trading with each other and coming to various agreements. There is no evidence that the colonists or Founders of the United States were guided by Victoria’s suggestion of wardship, let alone the many titles Victoria had dismissed as illegal or without foundation. After studying Victoria’s Relectio, Allen wrote “…neither discovery, conquest, nor a ward or pupilage theory could justify sovereignty over the Indians. This [the writings of Victoria] did not, then, inform the American position toward the Indians” (W. B. Allen 1990, 13). In fact, the principle of discovery that Cohen attributed to Victoria “bore strong marks of the constitutional debate through which the Americans had so recently come. That is why it is incautious at best simply to relate it to the theory of Victoria” (2010, 8).

Native American historian Billie J. Kingfisher disputes the Spanish origin theory as well. Referring to reports that Cohen had visited the southwest while working for the Department of Interior, Kingfisher notes, “While acquiring knowledge of Spanish Native law and policy from a
trip to the region sounds plausible,” Cohen’s assertion of Victoria might also have been in the service of Department of Interior’s goals. Kingfisher goes notes the lack of adequate research performed by Cohen and infers he was writing to fulfill a predetermined purpose (Kingfisher, 2016, p. 186). Allen notes:

Cohen claimed that Franciscus de Victoria had elaborated the moral basis for these relations with Indians. (Cohen, 1942, 47) He attributed to these principles the main influence in deciding Johnson v. McIntosh (8 Wheat. 523 [1823]) and Worcester v. Georgia (6 Pet. 515 [1832]). Justice Marshall, though, cited Emmerich de Vattel (given minor notice by Cohen) and did not cite Victoria. Cohen does cross-reference, from chap. 3, sec. 4, to chap. 15, sec. 4, in which the same theme, ‘aboriginal possession’ or title is treated in detail, and in which Vattel is properly cited. Still, Cohen’s main argument relies on Victoria, stating, “…the theory of Indian title put forward by Victoria came to be generally accepted by writers on international law of the sixteenth, seventeenth, and eighteenth centuries who were cited as authorities in early federal litigation on Indian property rights.” Vattel, however, did not rely on Victoria and indeed disagreed with Victoria (W. Allen 2010, 3).

The argument in McIntosh more deeply echoed Vattel, “including his praise of American sensitivity to the Indians” (W. Allen 2010, 8).

Vattel

The focus of Victoria’s writings was not the same as that of Vattel. Vattel’s writings were more concerned with the colonists’ sovereignty over themselves in respect to their relationship with tribal nations than they were with sovereignty over tribal members or control of land. Vattel had concluded that “the establishment of several colonies in the continent of North America, while restricting itself to just limits, can only be very legitimate” since it brings cultivation and more intense usage to the land. Additionally, “the peoples of these vast lands rather wander than dwell in them.” (I, §814)” (W. Allen 2010, 3).

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With these two factors in mind, Vattel reasoned that:

When therefore a nation finds a country uninhabited and without an owner, it may lawfully take possession of it: and after it has sufficiently made known its will in this respect, it cannot be deprived of it by another nation. Thus navigators going on voyages of discovery, furnished with a commission from their sovereign, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their nation: and this title has been usually respected, provided it was soon after followed by a real possession (Vattel [1758,1773] 1844, 99 §207).

That said, Vattel does not advocate or justify conquest. Vattel questioned whether a distant nation can possess a territory that it does not actually occupy, and whether an arriving group can “legitimately occupy a portion of a vast territory ‘in which one finds only some nomadic peoples, incapable by reason of their small numbers of inhabiting the entire land’” (W. B. Allen 1990, 11,12).

These two questions contended with the world’s growing population and limited resources. Is it right and moral for any people group to claim all the land it desires despite not needing it or using it for any sustaining purpose? Vattel’s reasoning in §81 is that there is a moral obligation to cultivate the earth for sustenance and that no one should “claim exclusive power over land” that they neither need nor will live in or cultivate (W. B. Allen 1990, 11).

Vattel argued that leaving land barren when others needed it would be “absolutely contrary to natural right.” The earth’s resources were to benefit the common needs of all men and “extends a right to particular men only to the extent that they may benefit, not in order to obstruct others” (W. B. Allen 1990, 11). Vattel felt ‘the law of nations’ would not support the “property and sovereignty of a nation over any uninhabited countries” that it had not taken genuine possession of in the form of settlements or cultivation (Vattel [1758,1773] 1844, 99

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§208). Within the context of the days of exploration, it was “[n]ot discovery, then, but discovery and use [that] conveys legitimate title… without respect to the conventions of Europe” (W. B. Allen 1990, 11).

Finally, Vattel submitted that Europeans occupied relatively small, crowded islands and had a genuine need to “legitimately occupy” portions of the America’s that native peoples had no need for” (W. B. Allen 1990, 12).

Vattel justifies the need for cultivation with an explanation some might consider socialist or globalist – although he also states that those nations that practice good stewardship of their land should have their borders respected. He stated:

The cultivation of the soil deserves the attention of the government, not only on account of the invaluable advantages that flow from it, but from its being an obligation imposed by nature on mankind. The whole earth is destined to feed its inhabitants; but this it would be incapable of doing, if it were uncultivated. Every nation is then obliged by the law of nature to cultivate the land that has fallen to its share; and it has no right to enlarge its boundaries, or have recourse to the assistance of other nations, but in proportion as the land in its possession is incapable of furnishing it with necessaries. Those nations (such as the ancient Germans, and some modern Tartars), who [36] inhabit fertile countries, but disdain to cultivate their lands, and chuse rather to live by plunder, are wanting to themselves, are injurious to all their neighbours, and deserve to be extirpated as savage and pernicious beasts. There are others, who, to avoid labour, chuse to live only by hunting, and their flocks. This might, doubtless, be allowed in the first ages of the world, when the earth, without cultivation, produced more than was sufficient to feed its small number of inhabitants. But at present, when the human race [130] is so greatly multiplied, it could not subsist if all nations were disposed to live in that manner. Those who still pursue this idle mode of life, usurp more extensive territories than, with a reasonable share of labour, they would have occasion for, and have therefore no reason to complain, if other nations, more industrious and too closely confined, come to take possession of a part of those lands. Thus, though the conquest of the civilized empires of Peru and Mexico was a notorious usurpation, the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them (Vattel [1758,1773] 1844, 35-36 §81).
Vattel recognizes that all men have an equal right to properties not already owned by someone. “Accordingly, possession falls to the first occupant of any uninhabited territory” (W. B. Allen 1990, 11). But while a form of discovery, what he is describing is predicated on a natural and justified need for sustenance. In the case of American colonists, the need was not only to provide effectively for one’s family, but to experience religious freedom. The original American settlers came for seemingly open land and liberty, not with intention to join, infiltrate or conquer an existing society of people, but to create independent, self-supporting communities alongside those already existing.

**Examining the Evidence**

The United States of America was founded less than 250 years ago. Documentation of events is plentiful. Yet several false stories over the years have made their way into contemporary understanding of history.

One example that persists is the tale of chicken-pox infected U.S. Army blankets being deliberately given to the Mandan Indians. This account was first told by University of Colorado ethnic studies professor Ward Churchill. Yet, there was no army base at Fort Clark, let alone one handing out blankets, as Churchill claimed. “The closest U.S. military unit was an eight-hundred-mile march away at Fort Leavenworth” (Brown 2006, 100). An investigation by the University found that Churchill had fabricated incidents, individuals, and sources (Brown 2006, 100). Churchill publicly admitted in a 2005 interview that he had “Glad-handed things a bit” in his story of the chicken-pox virus (Churchill 2005).

Anecdotes persist concerning customs, mores, events and motivations of the tribes, colonists and Founding Fathers. As Allen sharply and starkly points out, “…before we credit
tales of customs and usages from time immemorial, we must at a minimum establish an accurate recall of those events, laws, and usages that [are well documented]. Who fails at relating what is well within memory must not be trusted…to recall time immemorial” (W. B. Allen 1990, 8-9).

Despite Victoria’s assertion that it was not possible for the tribes that were visited by the Spanish to give genuine consent, it is evident that in the north, some tribal members did. Tribal members chose to become part of the larger colonial communities for various reasons: including but not limited to protection, trade, education, or even to be part of the Christian church.

In 1740, when Samson Occom (Occum), a member of the Mohegan tribe of Connecticut was 19 years old, he asked his mother if he could go to Eleazar Wheelock’s Bible College to learn to read. He wrote later in 1768:

I was Born and Brought up in the traditional ways…My Parents Lived a wandering life, as did all the Indians at Mohegan. They Chiefly Depended upon Hunting, Fishing, & Fowling for their Living and had no Connection with the English, excepting to Traffic with them in their small Trifles; They Strictly maintained and followed their traditional Ways, Customs & Religion, though there was Some Preaching among them. Once a Fortnight, in ye Summer Season, a Minister from New London used to come up, and everyone attended. Not that they cared about the Christian Religion, but they had Blankets given to them every Fall of the Year and for these things they would come and there was a Sort of School kept, when I was quite young, but I believe there never was one that ever Learnt to read anything, — when I was about 10 Years of age there was a man who went about among the Indian Wigwams, and wherever he Could find the Indian Children, would make them read; but the Children Used to take Care to keep out of his way; —and he used to Catch me Some times and make me Say over my Letters; and I believe I learnt Some of them. But this was Soon over too; and all this Time there was not one amongst us, that made a Profession of Christianity — Neither did we Cultivate our Land, nor kept any Sort of Creatures except Dogs, which we used in Hunting; and we Dwelt in wigwams. These are a Sort of Tents, Covered with Matts, made of Flags.

And to this Time we were unacquainted with the English Tongue in general though there were a few, who understood a little of it. When I was 16 years of age, we heard a Strange Rumor among the English, that there were Extraordinary Ministers Preaching from place to Place and a Strange Concern among the White People. This was in the Spring of the Year. But we Saw nothing of these things, till Some Time in the Summer, when Some Ministers began to visit us and Preach the Word of God; and the Common People all Came frequently and exhorted us to the
things of God…amongst whom I was one that was Impressed with the things we had heard…After I was awakened & converted, I went to all the meetings, I could come at…And when I was 17 years of age, I had, as I trust, a Discovery of the way of Salvation through Jesus Christ, and was enable’d to put my trust in him alone for Life & Salvation. From this Time the Distress and Burden of my mind was removed, and I found Serenity and Pleasure of Soul, in Serving God. By this time I just began to Read in the New Testament without Spelling, — and I had a Stronger Desire Still to Learn to read the Word of God, and at the Same Time had an uncommon Pity and Compassion to my Poor Brethren - I used to wish I was capable of Instructing my poor Kindred. I used to think, "if I Could once Learn to Read I would Instruct the poor Children in Reading” —and used frequently to talk with our Indians Concerning Religion. This continued till I was in my 19th year: by this Time I Could Read a little in the Bible. At this Time my Poor Mother was going to Lebanon, and having had Some Knowledge of Eleazar Wheelock and hearing he had a Number of English youth under his Tuition, I wanted to go to him and be with him a week or so, and Desired my Mother to Ask Mr. Wheelock whether he would take me a little while to Instruct me in Reading. Mother did so; and when She Came Back, She Said Mr. Wheelock wanted to See me as Soon as possible. So I went up, thinking I Should be back again in a few Days; when I got up there, he received me With kindness and Compassion and in Stead of Staying a Forthnight or 3 Weeks, I Spent 4 Years with him (Occom (1768) 1982).

In all, about 70 tribal-member students attended Wheelock’s Bible college (The Storied History of Dartmouth 2006).

Occom’s "A Short Narrative of My Life" is one of the earliest memoirs written by a tribal member. Occom began writing the narrative, which he originally called a "Short, Plain, and Honest Account of my Self," in the spring of 1768, soon after he returned from England. It is said that he originally wrote it to “refute false reports that he was a Mohawk, that Wheelock received large sums for his support, and that he had been converted just before the English tour in order to become a special exhibit (Blodgett 27)” (Ruoff n.d.).

This is the story of one man and his community and does not apply to all. Too often it is assumed that the report of one or a few in a people group applies to the entire group. Humans, even when raised in a tribal community, are individuals. Occom went on to become well-read and well-traveled. He was an educated, adept, eighteenth century man; not forced to become a
Christian, not beaten in school, and not – as many viewed tribal members - an incapable caricature in need of paternalistic care. Despite full awareness that he was being used as a prop later in life – Occum chose to focus not on the negative of men who he knew were exploiting him, but on the positive of Jesus Christ, who he knew was assisting for him.

Other tribal members shared his independence. Diverse stories run the gamut throughout the history of the United States. Some eastern tribes did not object to domination. Vattel warns:

> [When a nation] has placed itself in subjection [and] does not resist the encroachments…makes no opposition to them, —if it preserves a profound silence, when it might and ought to speak,—its patient acquiescence becomes in length of time a tacit consent that legitimates the rights of the usurper. There would be no stability in the affairs of men, and especially in those of nations, if long possession, accompanied by the silence of the persons concerned, did not produce a degree of right. But it must be observed, that silence, in order to shew tacit consent, ought to be voluntary (Vattel [1758,1773] 1844, 95 §199).

Allen notes that while Vattel might seem to endorse confiscation of Indian land, “its… rather the contrary” (W. B. Allen 1990, 12). Vattel praised the English Puritans for not having confiscated the land, despite having been given permission by the assuming King of England to do so. The Puritans, instead, purchased land from tribes of New England. “This praiseworthy example was followed by William Penn and the colony of Quakers that he led into Pennsylvania⁵” (W. B. Allen 1990, 12).

In other words, European international law concerning underused land aside, certain colonies willingly paid local tribes, and certain tribes willingly chose to accept the exchange as compensation for the land.

Professor of Law Stuart Banner, who has carefully researched and detailed three centuries of land transactions involving Indian land, wrote that documented history includes many “accounts of land purchases, transactions that at first sight are hard to square with a belief

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⁵ (Vattel [1758,1773] 1844, 100 §209).
in a right of conquest” (Banner 2007, 3). According to Banner’s research, the British were initially uncertain whether they needed to buy land from the tribal members or could just take it, “By the late seventeenth century, ... the English recognized the Indians as the owners of North America. If the English wanted Indian land, they would have to buy it” (Banner 2007, 40).

Constitutional law Professor Robert G. Natelson, on the other hand, found documentation of early colonies adopting laws requiring the title of conqueror. Natelson wrote that “[C]olonies (and later states) regularly exercised, or attempted to exercise, police power over those Native Americans...who lived within their borders.” He attributed this power to a 1693 English case called Blankard v. Galdy, where the Court of King’s Bench ruled that foreign peoples within British domains might initially keep their own laws, but that British law applied once it was “declared so by the conqueror or his successors.” According to Natelson, colonies and states had “declared so” in numerous statutes. Along with laws governing the behavior of tribal members, there were laws concerning land sales from “Indians” to whites. Natelson stated that these measures could result in the voided deed transfers (R. Natelson 2007, 223-225).

While some colonies used a law that was specific to conquered regions, Banner infers that most of the “borders” North American tribes would have lived within were created through genuine land sales. Banner suggests it would make little sense for England to set up a pretense of buying the land and asks, “…[I]f I were a settler planning to seize the Indians’ land, why would I go through the trouble of tricking or forcing them into signing a piece of paper?” (Banner 2007, 2). There was no United Nations at the time; no reason to carefully create an “appearance that no conquest is taking place.” Furthermore, ”If settlers purchased land from the Indians because that was easier than seizing it,” that does not make the transactions inauthentic (Banner 2007, 2).
The next question would be whether the land sales were fair. The tendency has been to group all such transactions as one, with one side labeling them as ‘forced’ and the other side labeling them as ‘voluntary.’ Yet, Banner points out, these land sales were conducted over a period of 300 or more years in states and regions hundreds of miles apart. Further, neither the settlers nor tribal members can be lumped into one stereotype. Innumerable people were involved; “diverse groups of people with a wide range of interests and motivations.” (Banner 2007, 2). The transactions must be viewed on a spectrum. “Whites were never a single bloc with uniform interests, and neither were Indians. At all times there have been Indians with good reasons to sell land and others with good reasons not to sell… Indians were no more monolithic in their views than whites” (Banner 2007, 6).

Banner explains, “At most times, and in most places, the Indians were not exactly conquered,” but at the same time, not every transaction was free of pressure. “The truth was somewhere in the middle… every land transfer of any form included elements of law and elements of power” (Banner 2007, 4).

Non-tribal members, for the most part, purchased land within the constraints of the law of the time. “Law was always present, but so was power” (Banner 2007, 4). In seventeenth century, colonial America, tribal members and Europeans were almost equal in power. Transactions at that time were usually profitable for both sides and were for the most part voluntary. Banner points out that many transactions on the east coast occurred in areas where tribal members and settlers had contact for years. Following the first land sale or two, the tribal leaders would have understood the consequence of a sale. Further, it is evident from documents that tribal leaders came to negotiations with requests to include in the transaction. If tribal members wanted tools, guns, or commodities and were able to trade land for it, historical documents show they did so.
Banner suggests that if transactions were unfair to tribal members, the unfairness might not have been in that land was sold, “but rather in the quantities that were sold or the prices the sellers received” (Banner 2007, 2).

Following the Revolutionary War, the newly created American government continued treating tribes as property owners, not because the federal government had inherited the policy from Britain, but in part because real estate titles had been established. “[M]uch of the English population derived title to their land from the Indians. Many colonists had bought land either from the Indians directly or at the end of a chain of title that originated with the Indians” (Banner 2007, 25).

More importantly, following the Revolutionary War, Americans had a responsibility to follow through on the constitutional claims they had presented to Great Britain (W. Allen 2010, 7). “The American Revolution occurred on the basis of the theory that the land of the Indians belonged, not to the King of Great Britain …but to the Indians” (W. Allen 2010, 1). Most of the Founding Fathers valued integrity. The newly founded United States needed to keep its promises and maintain the high standards of decency it had set. The new government had no intention of continuing England’s posture as conqueror of North American tribes. “Not only would deriving their relationship to the Indians from England undermine the justifications of American independence, but it would surrender the just claim to principles of right, newly enunciated and applied to human life (W. B. Allen 1990, 8).

Unfortunately, as years passed, subsequent leaders were not as concerned about the principles of America’s founding. The power relationship between tribal members and non-tribal members became increasingly unequal and in the nineteenth century, “there was little pretense
that land cessions were voluntary in any meaningful sense of the word, even as they retained the form of negotiated treaties” (Banner 2007, 4).

Nevertheless, the law was always involved, even during the worst of the nation’s history. The Rule of Law, even when bent and broken, kept conscientious people in check and put pressure on the less-conscientious (Banner 2007, 4). In the twentieth century, tribes were able to win back land or compensation through effective use of the legal system. “[T]he law of the past is still relevant – in some cases, even more relevant than it was at the time – because it is still the standard by which the actions of the past are measured” (Banner 2007, 5).

Legal scholar Matthew L. M. Fletcher wrote in 2005 that Banner's research indicates Chief Justice Marshall was incorrect in saying the Doctrine of Discovery had always been the rule for acquiring Indian lands. Banner shows that “the English purchased a huge portion of the East Coast without regard to the Doctrine of Discovery” (Fletcher 2006, 680) and “As more and more English speculators bought land from Indians, more and more land purchases began to rely on that chain of title” (Fletcher 2006, 633). Allen adds:

The tribes did not integrate the colonists who wanted to own the land into their tribal jurisdictions, even though “they generally and freely integrated within tribes Europeans and Africans. Indians sold the jurisdiction both because it mattered little to them and because they received valuable consideration” – including the promise of protection (W. B. Allen 1990, 13).

Federal Indian Policy: Revamped with America’s Independence

Coming to peace with the many tribes that had sided with Britain was a challenge for the new United States. “The Iroquois in the North and the Cherokees, Creeks, and Chickasaw in the South were particularly troublesome,” so the Continental Congress created “three departments for Indian affairs, each focused on a different geographical region” (Kinney 2007-2008, 908). Benjamin Franklin, Patrick Henry, and James Wilson were all appointed to the middle
department and “‘empowered to treat with the Native Americans’ in the name and on behalf of the united colonies” (Kinney 2007-2008, 908).

The colonists in general had “debated the law of discovery and the law of conquest with the Crown long before they employed the terms in their dealings with Indians,” Allen explains. “To sustain their own just claims, they had to refute the claims of the Crown, reflected in Blackstone’s *Commentaries*, that the lands of the colonies were conquered lands, carrying with them the absolute dominion, or ‘plenary power,’ of Great Britain—a meaning Blackstone elaborated in the observation that ‘sovereignty and legislature are indeed convertible terms; one cannot subsist without the other’” (W. B. Allen 1990, 13).

Sixteenth century Genevan legal and political theorist, Jean-Jacques Burlamaqui had asserted that absolute sovereignty over the people of another land is a right conveyed by conquest. However, “discovery” does not convey absolute sovereignty. Discovery, as described by Vattel in reference to colonization of a deserted land, carries “corporate standing under the constitution of the mother country” (W. Allen 2010, 8).

Allen notes, “The Americans, then, articulated a principle of discovery, a constitutional principle, which was essential to the attainment of their independence and in accord with which it was necessary for them to maintain that America was not conquered but rather freely settled. This meant, in turn, that their relations with the Indians could not have been the relations of conquerors to conquered, if they were to maintain consistency with their revolutionary claims” (W. B. Allen 1990, 13).

Their claims, articulated in the July 1776 “Causes and Necessity of Taking up Arms” against Britain within their “Declaration by the Representatives of the United Colonies of North-
America,” colonists stated how they viewed themselves, their status, and their cause. America was their home – the land where they were born and raised; the only home they had ever known:

In our own native land, in defense of the freedom that is our birth-right, and which we ever enjoyed till the late violation of it – for the protection of our property, acquired solely by the honest industry of our fore-fathers and ourselves, against violence actually offered, we have taken up arms. We shall lay them down when hostilities shall cease on the part of the aggressors, and all danger of their being renewed shall be removed, and not before (Congress 1775, 129).

Further, in that same document, they expressed their view that Great Britain did not have a God-given sovereign authority over the land – or over any of its people:

If it was possible for men, who exercise their reason to believe, that the Divine Author of our existence, intended a part of the human race to hold an absolute property in, and an unbounded power over others, marked out by his infinite goodness and wisdom, as the objects of a legal domination never rightly resistible, however severe and oppressive, the inhabitants of these colonies might at least require from the Parliament of Great-Britain some evidence, that this dreadful authority over them has been granted by that body (Congress 1775, 120).

In 1776, when Congress began drafting the Articles of Confederation, “they disagreed over the scope and authority of the central government over Indian affairs.” Several states were concerned their authority would be limited if the federal government were given exclusive jurisdiction over tribal affairs. “Virginia was particularly concerned over the control of the tributary tribes within its borders-including the Mattaponi-and wanted some guarantee that it would be able to manage its own Native American affairs” (Kinney 2007-2008, 908). Other delegates disagreed and James Wilson argued, “[w]e have no rights over the Indians, whether within or without the real or pretended limits of any Colony. They will not allow themselves to be classed according to the bounds of Colonies” (Kinney 2007-2008, 908). James Madison contended that the compromise reached in the Articles of Confederation was, “obscure and contradictory” (Kinney 2007-2008, 908-909). The wording of the Article read:
The United States in Congress assembled shall also have the sole and exclusive right and power of... regulating the trade and managing all affairs with the Indians, not members of any of the States provided that the legislative right of any State within its own limits be not infringed or violated (Kinney 2007-2008, 909).

“In effect, this provision created more confusion over Native American affairs than it resolved” (Kinney 2007-2008, 909). Therefore, the new Constitution in 1789 removed references to state power over tribal affairs and changed the way negotiations with tribes were to be handled. George Washington, having determined the colonists to be a free people, considered the tribes to be so as well. Consequently, he opposed treating the tribes as conquered nations (W. Allen 2010, 12).

Colonial Negotiations

A treaty is a compact under international law, “made between two or more independent nations with a view to the public welfare” (Black 2018). According to Vattel, the necessary law of nations is immutable and binding, therefore, “every treaty, every custom, which contravenes the injunctions or prohibitions of the necessary law of nations, is unlawful” (Vattel [1758,1773] 1844, §9). Equally, if a treaty is within the bounds of international law, a violation of the treaty is a violation of the law of nations ([1758,1773] 1844, Ch 15, §221). “This is the principle by which we may distinguish lawful conventions or treaties from those that are not lawful, and innocent and rational customs from those that are unjust or censurable” ([1758,1773] 1844, §9).

Because the British and colonists recognized natural law, they approached tribal leaders with treaties, requesting various permissions and trades. While differences in language and culture can make negotiations difficult, steps were taken by both sides to alleviate misunderstanding. According to history professor Nancy L. Hagedorn, good interpreters were a vital part of the process. “Between 1740 and 1770 more than one hundred men and women of
varied ethnic and occupational backgrounds served as interpreters in the British colonial territories north of Virginia” (Hagedorn 1988, 62).

Hagedorn explains the history of treaty making and describes some of the process:

Although the roots of forest diplomacy can be traced to the Iroquois Condolence Council… by the mid-eighteenth century it incorporated many elements borrowed from European practice. Gun salutes, toasts, the distribution of European trade goods as presents at the conclusion of councils, and especially the keeping of written records of the proceedings and treaties were European innovations. In short, the Indian conference is a product par excellence of European-Indian contact, as well as one of the primary arenas in which contact occurred…English government officials found it necessary to operate within the established system of Iroquois council protocol, just as the Indians had to accept and adopt certain colonial practices. At the center of this process of adaptation and accommodation was the interpreter (Hagedorn 1988, 61).

Chosen interpreters “demonstrated a command not only of English and one or more Indian languages, but also of European and Iroquois ‘methods of business.’ … The Iroquois also recognized these differences and encouraged potential interpreters to "learn the ways and manners of the Indians in propounding any matter" so that they would know ‘how negotiations were carried on when conducted according to their method’” (Hagedorn 1988, 62).

The interpreters assisted in meeting rooms and at council fires to mediate between the two cultures. The concept of “culture” refers to the “pattern of meanings, values, and norms” shared by members of a society and is based on the different meanings separate societies assign to colors, objects, activities, and vocalized sounds. To properly mediate, the interpreter needed to deal with the differing “perceptions, expectations, meanings, and values” of both societies simultaneously (Hagedorn 1988, 61).

The tribal members and non-tribal members both looked for good interpreters; “‘a friend to go between them’ - a person of ‘Ability and Integrity’ in whom both sides could ‘place a confidence’” (Hagedorn 1988, 61). While some historians have indicated interpreters were
biased - and some obviously were motivated by their own agenda - they were rarely without checks and balances. For example, if the trustworthiness of an interpreter was questioned by either side, others could be – and were – asked to attend and listen to the translations. For the most part, interpreters were trusted by both sides. “Conrad Weiser was one interpreter who seemed to fit this image of an individual ‘equally allied to both’ sides” (Hagedorn 1988, 61).

A person had to have the language skills and cultural sensitivity to perform the job correctly. “Metis, as persons of mixed European and Indian parentage, were particularly well suited for the position of interpreter and came by the required knowledge most easily. Not surprisingly, two of the most prominent mid-eighteenth-century interpreters, Arent Stevens and Andrew Montour, were metis” (Hagedorn 1988, 62). Others learned by living with the Iroquois for an extended period:

As Sir William Johnson told Lord Hillsborough in 1769, an intimate knowledge of Indian affairs was not to be gained ‘during the period of a Governor's residence at an American Capital, of a Commandant at an Outpost, or of a Traveller in the Country.... It is only to be acquired by a long residence amongst them, a daily intercourse with them, and a desire of information in these matters Superseding all other consideration’ (Hagedorn 1988, 62).

While some were unscrupulous and took advantage of tribes, most interpreters, according to Hagedorn, seem to have been “true mediators interested in maintaining amicable relations between the two sides of the fire” (Hagedorn 1988, 65). Documentation was primarily written and stored by the colonists and surviving records predominantly reflect the European’s point of view. However, tribal officials did secure “written copies of deeds and treaties.” They were also known to request gun salutes and toasts at council meetings, so had some understanding of European business customs (Hagedorn 1988, 71-72). Further, Attorney Adam F. Kinney contends that despite the disadvantages borne by tribes during that time period, “… several Native American tribes managed to manipulate the colonial powers' rival interests expertly
during the seventeenth and eighteenth centuries” (Kinney 2007-2008, 907). Nevertheless, some treaties reflect cooperation and trust by certain eastern tribes, several of which agreed to ally and fight with one nation or the other during conflicts. For example, several tribes from Wisconsin, including the Menominee, Ho-Chunk, Ojibwe, and Potawatomi, joined “military campaigns led by French army officer Charles de Langlade” (MSU 2018). Kinney notes:

The Iroquois, for example, were especially adept at manipulating French, Dutch, and English interests to secure for themselves significant power, despite their comparative weaknesses in technology and population. For example, at the onset of the Seven Years War the Iroquois indicated favoritism for the French, but ultimately aligned with the British in exchange for the promise that no British subjects would be permitted to settle on Iroquois lands and hunting grounds west of the eastern mountains. With Iroquois support, the British won the Seven Years War and effectively ejected France from North America, and the Iroquois then stood in a stronger political position vis-a-vis the British (Kinney 2007-2008, 907).

Between 1756 and 1763, every European power was at war and the combat was ensuing on five continents. This was referred to as the Seven Years’ War. However, the first battles began two years earlier on North American soil. This component of the worldwide war was between Great Britain and France and was known as the French and Indian War. Fought between the years 1754 and 1763, the North American conflict was meant to settle which nation would control the colonial territories.

Following the signing of the Treaty of Paris by the British, French and Spanish on February 10, 1763, conflicts began over who among the denizens of the western territories had jurisdiction over the land. British colonists, having fought and won against the French, believed they now had the right to move west into former French areas. But these were also areas where tribes were living. The British, in effort to prevent conflict as well as prevent unscrupulous land purchases, decided to manage tribal affairs “under the central authority of the Crown rather than through the various local colonial governments” (Kinney 2007-2008, 907). On October 7, 1763,
the British issued a Royal Proclamation that ordered all settlers to leave Indian Country and forbade any further private land purchases for the time being. Only “government agents could trade with the Native Americans” or make treaties with the tribes. “…centralized control over tribal affairs…” would become a tenet of America’s federal Indian policy (Kinney 2007-2008, 907).

Tribes were similarly at odds with each in the Revolutionary War. Some tribes believed the promise of the British to stem the tide of colonies and settlements and assisted them during the war. Others, having established good relationship with the colonists, agreed to fight with the Americans. James Bowdoin, president of the Massachusetts General Court, reported:

…it was strongly urged upon [Delegates from the St John’s & Mickmac Tribes in Nova Scotia and a couple chiefs from the Penobscot Tribe] to join with us in the war: and accordingly they have engaged to do it, and have Signed a Treaty for that purpose” …“ they looked on themselves to be one people with us; and that whatever Governmnt we were under, they were willing to Subject themselves to; that they had no doubt their Tribe would be willing to join Genl Washington;… (Bowdoin 1776).

On July 12, 1776, in Watertown, Massachusetts, Bowdoin asked delegates for proof they represented their tribes before beginning their treaty conference. Ambrose of the St. John Indians presented “a large parchment, containing a Treaty made between those Tribes and the Government of Nova-Scotia in 1760,” as well as a letter from General Washington and a letter to them from the General Court of Massachusetts-Bay. Ambrose told Bowdoin that the letters were the reason he and others had come to see General Washington [see Force, American Archives, 5th ser., 1:]839)” (The Rector and Visitors of the University of Virginia 2018). Ambrose then delivered a speech on behalf of the native delegation, stating:

The St. John’s and Mickmac Tribes are all one people, and of one tongue and one heart. We are very thankful to the Almighty to see all the Council; the Almighty has given the English and Indians one heart. General Washington sent us something (the letters aforesaid) last fall and this spring, and that is the reason of our coming here now to speak. The Captains that are come up with me, and all our people, are
all one as Boston; our eyes and our ears will not turn to the other side of the water
to see or hear what they do. We want a Father or a French Priest. Jesus we pray to,
and we shall not hear any prayers that come from England. We shall have nothing
to do with Old England, and all that we shall worship or obey will be Jesus Christ
and General Washington… General Washington advised us to pray to Jesus for aid
and assistance, and to be thankful for the lands that God had given us. All our old
men and women pray that the Almighty would enable us to walk in the right way.
General Washington wrote us a letter desiring us to pray for him, and assist him all
in our power. All our Captains and Chiefs do pray that he and his brothers may be
masters of this country. We are both one country. We are of their country and they
are of our country [Peter Force, ed. American Archives. 9 vols. Washington, D.C.,
1837–53. 1:839] (The Rector and Visitors of the University of Virginia 2018).

While treaties may have granted the British and American governments significant
benefit and authority, many tribes never signed treaties (R. Natelson 2007, 208-209).

Federal Power Over Tribal Members

“Life, faculties, production – in other words, individuality, liberty, property – this
is man. And in spite of the cunning of artful political leaders, these three gifts from
God precede all human legislation, and are superior to it” (Bastiat 1998, 1).

The Fifth Amendment to the United States Constitution provides that: “No person shall
be…deprived of life, liberty, or property, without due process of law…” and the Fourteenth
Amendment, Section 1, states "nor shall any State deprive any person of life, liberty, or property,
without due process of law..." (Congress 1787). But for about two centuries, the federal
government has assumed a power that has at times deprived tribal members of these privileges.

Natelson writes, “For many years, Congress has claimed, and the Supreme Court has
conceded, a plenary power over American Indian tribes” (2007, 204). But according to
Natelson, there are problems with how historical documents have been construed. Fletcher
agrees and notes that the origin of federal authority over Indian tribes is unclear, as the
Constiution carried no “clear textual provisions” concerning such power. Due to that lack, the
Supreme Court has created a body of “unwritten constitutional law.” (Fletcher 2006, 654).
Justice Breyer’s 2004 majority opinion in *United States v. Lara* is an example of Congressional authority in dealing with Indian affairs being categorized as “beyond the strictures of the Constitution” (Fletcher 2006, 656). This unwritten authority, according to Natelson, is said to have been inherited from the British Crown, which transmitted “extraconstitutional sovereign authority to the Continental Congress, which then passed it to the Confederation Congress, which in turn conveyed it to the federal government” (2007, 204). However, Natelson argues:

As a matter of historical record, the British Crown did not transfer its foreign affairs powers to the Continental Congress, but to the states. The Confederation Congress did not receive its authority from the Continental Congress, but from the states. The federal government did not receive its powers from the Confederation Congress, but from the people (R. Natelson 2007, 205-206).

Natelson further contends that case law does not support the doctrine of inherent plenary authority. The Supreme Court “has acknowledged the [plenary] theory, but only rarely and in limited respects” (R. Natelson 2007, 204). He added, “The Supreme Court’s reluctance to fully accept inherent sovereign authority is understandable, for the doctrine is fundamentally unconvincing. It clashes with the Constitution’s underlying theory of enumerated powers and would render some enumerated powers redundant.” (R. Natelson 2007, 205).

Natelson explained that the dicta of Chief Justice Marshal and others has frequently been cited as recognizing Congress’s plenary authority over Indian Affairs – but it does not (R. Natelson 2007, 204). Other cases often cited are similarly lacking. “A passage in Chief Justice Taney’s opinion in *Dred Scott v. Sandford* suggests an inherent sovereignty theory, but later in the opinion Taney made it clear that he was invoking an enumerated power” (R. Natelson 2007, 204). Natelson explained further, “*Kansas v. Colorado* (1907), the Supreme Court’s clearest pronouncement on inherent sovereign authority in internal affairs, actually rejected the doctrine.

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6 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857)
7 *Kansas v. Colorado* 206 U.S. 46 (1907)
United States v. Curtiss-Wright resuscitated it, but only for foreign affairs. In 2004, the Court suggested an application to Indian concerns, but the Court’s language was neither definitive nor necessary to its decision” (R. Natelson 2007, 205).

Lastly, if inherent authority had in fact existed in any context when the federal government was created, Natelson clarifies its fate: “[T]he doctrine of inherent sovereign authority is simply contradicted by the text of the Constitution. Any extra-constitutional authority inhering in the federal government in 1789 was destroyed two years later, when the Tenth Amendment became effective. By its terms that Amendment precluded any federal power beyond those bestowed by the Constitution… precisely to re-assure Anti-Federalists who feared that the new government might claim powers beyond those enumerated” (R. Natelson 2007, 206-207).

This leaves theories that plenary authority comes from within the Constitution. Several Constitutional powers are suggested, including the War Power, Executive Power, Necessary and Proper Clause, the Treaty Clause, Territories and Property Clause, and the Indian Commerce Clause. However, Natelson contends “…[M]ost of those provisions can be readily dismissed” (R. Natelson 2007, 207). For example, Natelson states that if it were true that the Territories and Property Clause, were the source of plenary power:

…then legal title to this land is federal ‘property’ subject to congressional management under the Territories and Property Clause, and such title would give Congress at least some jurisdiction over the minority of Indians who reside on reservations. But this begs the question of the source of authority for holding reservation land in trust. As already noted, pre- or extraconstitutional power is not a viable answer. Nor, as originally understood, is the Territories and Property Clause, for that Clause originally granted Congress the unlimited power to dispose of federal lands within state boundaries, but not the unlimited capacity to retain or acquire such lands. As for the treaty power, it happens that not a single Indian treaty provides that the government has retained or acquired trust title to the reservation. The sole references to trust arrangements in Indian treaties are peripheral
provisions, such as temporary trusts incident to sale and trusts to fund Indian schools and other amenities (R. Natelson 2007, 209-210).

Just one theory for the origin of plenary power remains. Felix Cohen, in his ‘Handbook of Federal Indian Law,’ states that Congress has power over tribes through the Indian Commerce Clause as long as members are wards of the government (Cohen [1942] 1971, 353). A large body of law has been written in support of this.

Commerce Clause

‘Federalism’ involves two or more levels of government, each with unique, independent, political authority ruling over the same land and people. Further, in “market-preserving federalism,” there is a common market, and sub-governments “have primary regulatory responsibility over the economy;” but are unable to print money or access unlimited credit from the central government” (Weingast 1995, 4).

The United States Constitution was written to protect the lives, liberty and property of the People. As part of that protection, the Constitution needed to clarify roles and responsibilities necessary for the promotion of a stable and productive economy. The founding fathers understood that regulation of commerce was a proper function of government, and regulation of interstate and international commerce was a proper function of federal government.

Article 1, Section 8 of the United States Constitution enumerates the powers vested in the federal government to regulate commerce between lower and foreign political entities:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; To borrow Money on the credit of the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes… (Congress 1787).
The commerce clause is one of the Constitution's central pillars. It prevented states from setting up trade barriers, while at the same time not giving the federal government complete power. In protecting markets, the commerce clause is at the heart of what has become one of the “largest common markets in the world” (Weingast 1995, 8). But this clause also contains one of the limited mentions of tribes within the Constitution. The third clause refers to Congress’ power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” (Congress 1787, Art. 1 Sec 8).

The United States Constitution goes on to reserve all other rights and powers to the people and to the States. Amendment IX declares that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people” and Amendment X declares "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people” (Congress 1787).

Despite this, the Bureau of Indian Affairs claims “Article 1, Section 8 of the United States Constitution vests Congress, and by extension the Executive and Judicial branches of our government,” with exclusive authority over the tribes (BIA, 2013).

Constitutional Law Attorney Philip J. Prygoski affirms Congress’s constitutional power to regulate commerce with tribal governments, and states the “Indian Commerce Clause” is the primary power source and vehicle for Congress to define tribal sovereignty (Prygoski 2015).

Natelson asks, “[W]hy were treaties understood for so long as the principal method of dealing with tribes if Congress could regulate all affairs under the ICC?” (R. Natelson 2019). In his historical research, Natelson found that the “drafting history of the Constitution, the document’s text and structure, and its ratification history all show emphatically that the Indian
Commerce Power was *not* intended to be exclusive” to the federal government. He further notes, “Throughout the Colonial and Revolutionary period, colonies and states frequently entered into treaties with Indians within their territorial limits. New York even appointed treaty commissioners after the Constitution had been issued and ratified” (R. Natelson 2007, 223). Founding Fathers, Thomas Jefferson and William Samuel Johnson, alluded to this state authority to regulate commerce with Indian tribes inside their borders (R. Natelson 2007, 225).

State authority over commercial regulation aside, *United States v. Kagama (1886)*¹⁸ “rejected the Indian Commerce Clause as a source of plenary congressional authority” (R. Natelson 2007, 210). The Supreme Court stated “it would be a ‘very strained construction’ of the Commerce Clause to conclude that it authorized creation of a federal criminal code for Indian country” (R. Natelson 2007, footnote 65, at 210 ). *Kagama* “did recognize unenumerated federal power over Indian affairs, but the Court’s justification was Indian dependency on the federal government, not inherent sovereignty” (R. Natelson 2007, 204-205).

Patent attorney Nathan Speed notes that when Congress first began asserting authority over tribes beyond trade, the Indian Commerce Clause was not cited as the source of that authority. Further, the Supreme Court rejected the claim that the Clause was the source of plenary power over tribes (Speed 2007)

Despite this, according to Cohen, the Clause has become “the most often cited basis for modern legislation regarding Indian tribes” [ (LexisNexis 2005, 397) ] In the case *Cotton Petroleum Corp. v. New Mexico, (1989)*, it was stated that “the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs” (R. Natelson 2007, 211).

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¹⁸ United States v. Kagama 118 U.S. 375, 378 (1886)
Many have argued that the Founding Fathers intended the word “commerce” within the cited clause to refer not just to merchant trade, but to all economic activity and even beyond to any and every transaction. Natelson contends that a meaning that expansive would not belong in a list of ‘enumerated’ powers. However, this argument persists, and being so pervasive, several studies have recently examined how the word was employed in constitutional, lay and legal contexts “before and during the Founding Era” (R. Natelson 2007, 214).

Those studies found that “commerce’ meant mercantile trade, and that the phrase ‘to regulate Commerce’ meant to administer the lex mercatoria (law merchant) governing purchase and sale of goods, navigation, marine insurance, commercial paper, money, and banking (R. Natelson 2007, 214). Natelson states:

In both lay and legal discourse in the 18th Century, the term “commerce” “was almost always a synonym for exchange, traffic, or intercourse. When used economically, it referred to mercantile activities: buying, selling, and certain closely-related conduct, such as navigation and commercial finance (2006).

In Justice Clarence Thomas’ concurrence in United States v. Lopez, (1995) agreed, stating:

At the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes. See 1 S. Johnson, A. Dictionary of the English Language 361 (4th rev. ed. 1773)11 (defining commerce as “Intercourse; exchange of one thing for another; interchange of anything; trade; traffick”); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Exchange of one thing for another; trade, traffick"). This understanding finds support in the etymology of the word, which literally means "with merchandise." See 3 Oxford English Dictionary 552 (2d ed. 1989) (com--"with"; merci--"merchandise"). In fact, when Federalists and Anti Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably (United States v. Lopez 1995).

11 (reprint 1978)
Thomas quoted his Lopez comments in his concurrence in *Adoptive Couple v. Baby Girl* (2013), and added, “The term ‘commerce’ did not include economic activity such as ‘manufacturing and agriculture,’ ibid., let alone noneconomic activity such as adoption of children” (Adoptive Couple v. Baby Girl 2013). Thomas also cited Natelson nine times in his concurrence.

“Thus,” Natelson writes, “‘commerce’ did not include manufacturing, agriculture, hunting, fishing, other land use, property ownership, religion, education, or domestic family life.” In fact, the Federalists during the Constitution’s ratification explicitly maintained that “all of the latter activities would be outside the sphere of federal control” (R. Natelson 2007, 214-215). He adds in his article concerning the legal meaning of the Commerce Clause, “The fact that other uses of the term “commerce” existed during the pre-ratification and post-ratification periods, does not change the accepted general meaning of the word ‘commerce’” (R. G. Natelson 2006, 789, 811)

Finally – and most obvious - the word ‘commerce’ could not have had a broader meaning for Indian tribes than it had for States and foreign Nations, which are located in the exact same clause (R. Natelson 2007, 215). Natelson notes, “I have been able to find virtually no clear evidence from the Founding Era that users of English varied the meaning of “commerce” among the Indian, interstate, and foreign contexts” (R. Natelson 2007, 216).

Attorney Krystal V. Swendsboe concurs, quoting *Vielma v. Eureka Co.*, 12 “When the terms of a statute are ambiguous, we will employ cannons of statutory construction to discern the legislature’s intent…In the absence of some indication to the contrary, we interpret words or phrases that appear repeatedly in a statute to have the same meaning’ (citations omitted)”

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12 218 F.3d 458, 464–65 (5th Cir. 2000)
(Swendsboe 2019) and in Clark v. Martinez,\textsuperscript{13} “To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one” (Swendsboe 2019).

Natelson further asks “If a broad power was intended, why use the same word for Indians as was used for foreign nations and interstate commerce? Why not use instead the readily available and traditional phrase ‘Indian affairs’?" After all, he notes, the writers of the Constitution were meticulous in the word usage and “knew about the presumption of the same word not changing meaning” (R. Natelson 2019). Natelson wrote in 2019:

Edmund Randolph’s list of powers that can be exercised under the Commerce Clause with foreign nations, interstate commerce, and Indian tribes is a list of examples of common kinds of regulation within the three categories. It does not define different scopes. For example, Randolph speaks of restricting the travel of merchants with the Indians, but he could have used exactly the same example for merchants with foreign countries, as in the case of embargoes (R. Natelson 2019).

Despite this, the United States government has not asserted plenary jurisdiction over state and international actors in the same manner it has tribes and tribal members.

Assistant Professor of Law, Gregory Ablavsky, agrees and stated: “[T]he history of the Indian Commerce Clause’s drafting, ratification, and early interpretation does not support either ‘exclusive’ or ‘plenary’ federal power over Indians. In short, Justice Thomas is right: Indian law’s current doctrinal foundation in the Clause is historically untenable” (Ablavsky 2015).

The final draft of the Constitution gave James Madison, a nationalist, less authority than he had wanted for the federal government and the ratification process reduced the powers even further. But even with this, not even Madison “suggested granting Congress plenary dominion over the Indians. His proposal was for Congress to ‘regulate affairs with the Indians’—to govern transactions between tribes and citizens. Yet this still was more than the convention, or the

\textsuperscript{13} 543 U.S. 371, 378 (2005)
public, was willing to accept” (R. Natelson 2007, 258). Fellow delegate, John Rutledge of South Carolina, instead suggested to the Committee of Detail a federal power concerning Indians that “stripped down Madison’s proposal to a mere commerce power” (R. Natelson 2007, 258).

Among the issues defined by the Federalists as outside of congressional regulation (and therefore, under state jurisdiction) were “crimes malum in se (except treason, piracy, and counterfeiting), family law, real property titles and conveyances, inheritance, promotion of useful arts in ways other than granting patents and copyrights, control of personal property outside of commerce, torts and contracts among citizens of the same state, education, services for the poor and unfortunate, licensing of public houses, roads other than post roads, ferries and bridges, and fisheries, farms, and other business enterprises” (R. Natelson 2007, 248-249).

To summarize, the Indian Commerce Clause was included to give Congress the power to regulate trade between tribes and non-tribal members. It gave Congress the ability to override state laws, but not to abolish or alter “pre-existing state commercial and police power over Indians within state borders” (R. Natelson 2007, 265). The Commerce Clause did not establish a ‘Trust status” authorizing a pupilage condition. Nor did it grant Congress a plenary police power over tribal members or a license to interfere in Indian affairs.

Natelson concludes, “…the results of textual and historical analysis militate overwhelmingly against the federal government having any ‘inherent sovereign power’ over Indians or their tribes” and “…the Founders intended the states to retain their broad residual police power” (R. Natelson 2007, 266).

Neither the British nor the early federal government of the United States have title from North American tribes by right of conquest of the entire land. They did, however, have title over certain parcels by purchase of deed and may have had title of other lands by right of discovery
and use. But questions remain, including how much was stolen, whether some western tribes lost title by conquest, or whether most tribal nations, over the years, had voluntarily ceded authority to the federal government through various agreements, trades, legislation, or attrition.

Federal Treaties

It is very important to note that both prior to the founding of the United States and in the near century after, the treaty process was the necessary method of official interaction with the Indian tribes. Federal government delegations needed to meet with the leaders of each one of the scores of tribes in order to come to agreements. This is not the way one deals with conquered nations. It was the way Christian gentlemen dealt with other sovereign nations.

The first US treaty was the Treaty with the Delaware, signed on September 17, 1778, also known as the Treaty of Fort Pitt. Treaties outlined the negotiated territories, set up basic rules, and detailed the price and items the United States were giving in exchange. According to William J. Lawrence J.D.,14 “Treaties were not solemn promises to preserve in perpetuity historic tribal lifestyles, lands, or cultures, as is often claimed today. In fact, plans for assimilating Indian people into mainstream American life were spelled out in most treaties, often requiring that treaty payments be used for construction of schools, homes, programs to train

14 A member of the Red Lake tribe, William J. Lawrence “earned a bachelor's of arts degree in business administration at Bemidji State University in 1962. He served as a commissioned officer with the U.S. Marine Corp from 1962-66. He also earned a Juris Doctor Degree from the University of North Dakota in 1972. He was employed as the director of economic development and planning for the Red Lake Band of Chippewa Indians from 1968-69; he was an educational administrator for the Minnesota Department of Education, 1968-75; the superintendent of the Colorado River Agency Bureau of Indian Affairs, 1975-78; the executive director for the Fort Mohave Indian Tribe, 1978-82; a contract representative for Honeywell Inc Military Avionics Division, 1984-92, and the owner and publisher of the Native American Press/Ojibwe News 1988-2009. He was an adjunct instructor teaching a class on investigative reporting in the Mass Media Department at Bemidji State University, during the spring of 2006. He received the Freedom of Information Award by the Society of Professional Journalists in 2007.
Indian adults in agriculture, and promises to aid the transition from a subsistence lifestyle to active citizenship” (Lawrence 2002, 393).

One example is in the wording in the 1828 Treaty of the Cherokee:

It is further agreed by the United States, to pay two thousand dollars, annually, to the Cherokees, for ten years, to be expended under the direction of the President of the United States in the education of their children, in their own country, in letters and the mechanic arts; also, one thousand dollars towards the purchase of a Printing Press and Types to aid the Cherokees in the progress of education, and to benefit and enlighten them as a people, in their own, and our language. It is agreed further that the expense incurred other than that paid by the United States in the erection of the buildings and improvements, so far as that may have been paid by the benevolent society who have been, and yet are, engaged in instructing the Cherokee children, shall be paid to the society, it being the understanding that the amount shall be expended in the erection of other buildings and improvements, for like purposes, in the country herein ceded to the Cherokees (U.S. GPO 1828, 290 Art. 5).

Another example is in the 1855 Treaty of the Chippewa:

Four thousand dollars ($4,000) per annum, for thirty years, to be paid or expended, as the chiefs may request, for purposes of utility connected with the improvement and welfare of said Indians; subject to the approval of the Secretary of the Interior: Provided, That an amount not exceeding two thousand dollars thereof, shall, for a limited number of years, be expended under the direction of the Commissioner of Indian Affairs, for provisions, seeds, and such other articles or things as may be useful in agricultural pursuits. Such sum as can be usefully and beneficially applied by the United States, annually, for twenty years, and not to exceed three thousand dollars, in any one year, for purposes of education; to be expended under the direction of the Secretary of the Interior (U.S. Govt 1855, Art. 3).

The treaties between the United States and Indian nations have had a significant impact on the life, liberty and property. Because of the significant legal, emotional, social, physical and economic impact treaties have had on tribal members, state and federal agencies, non-members who live on or near reservations, there is much controversy concerning them.

George Washington had decided to treat tribal members as free and not as conquered nations, “but the pre-eminent case of the Cherokees and related tribes eventually led to abandonment of that policy in later administrations” (W. Allen 2010, 12). According to Allen,
the territorial claims of the Cherokees ran from the northward-flowing Tennessee on the west to the Kanawha, Broad, Edisto on the east; from the Chattahoochee, Coosa, and Black Warrior on the south to the Ohio on the north. Although none of those boundaries was conceded by their [immediate] neighbors, the Cherokees succeeded in transmitting their claims thereto into an ownership sufficient for sale\textsuperscript{15} (W. B. Allen 1990, 9). This raises the question whether the Cherokee had sold land that might not have been theirs. He goes on:

Thus, the great acquisitions by the United States were effectuated by purchase through treaties. During this period, tribes such as the Chickasaws remained small and sustained their integrity through a policy of naturalizing alien people. The southern Indians in general had mated economic communism with individual liberty by means of maintaining a state so near anarchy that only “unanimous consent” could attain any practical purpose and dissident minorities consequently did not exist.

Against this background, neighboring states, like Georgia, were often tempted beyond resistance to intrude on Indian holdings, with the result that the U. S. dealt as often and as much with American citizens as with Indians in attempting to maintain a stable policy. The failure to execute the Treaty of New York, which concerned boundary lines, effectively undercut efforts to restrain Georgia. This set up conflicts, for which the Chief McGillivray\textsuperscript{16} was also in part responsible. In 1785-86 three Treaties of Hopewell were signed, one with the Cherokees (November 28), one with the Choctaws (January 3), and one with the Chickasaws (January 10). That with the Choctaws contained an acknowledgment of American sovereignty (although the 31 signators had been inundated with liquor) (W. B. Allen 1990, 9).

Chief McGillivray came to New York on July 21, 1790 “on Washington’s invitation to form a treaty in which he ‘refused . . . acknowledgment of United States sovereignty except over those Creeks living within the limits of the United States.’ Here is where the connection between land cessions and sovereignty began to be formed” (W. B. Allen 1990, 9). The day after McGillivray arrived, “President Washington signed an Act for Regulating Trade and Intercourse with the Indian Tribes. The Act was founded on continuing nationhood for Indians, save as

\textsuperscript{15} Cotterill, 5, 7, 12, 85, 174, 188-89, 196, 202, 203, 207, 215, 217-18, 220, 234

\textsuperscript{16} Alexander McGillivray, the Muscogee Chief of the Upper Creek towns
explicitly surrendered in treaty. This had the effect of obligating the United States to defend established Indian land claims” (W. B. Allen 1990, 9).

The Early Years of the New Nation

The Non-Intercourse Act of 1790

The Indian Trade and Intercourse Act (also known as the Nonintercourse Act, the Indian Non-Intercourse Act, or the “Act to Regulate Trade and Intercourse with the Indian Tribes”) was passed on July 22, 1790, to protect tribal members from being taken advantage of by thieves. It set reservation boundaries, established regulations, banned the sale of land to non-tribal members unless approved by the federal government, and created federal licenses for those who wanted to trade with tribal members. While some of it remains in effect today, revisions in 1793, 1796, 1799, 1802, and 1834 removed some of the protections (W. Allen 2010, 14).

Some have argued that section 5 of the Act, which clarifies what will happen to non-tribal members who commit a crime against tribal members, is proof that the Commerce Clause was meant to involve more than just commerce. It appears to address “criminal rather than a commercial regulation” (R. Natelson 2007, 252).

However, in Worcester v. Georgia (1832), Justice McLean contended that “this section’s successor was, despite its criminal content, a merely routine trade regulation. He emphasized that the law regulated the conduct of United States citizens and residents only. It did not regulate the conduct of Indians and certainly was not an assertion of ‘political jurisdiction’ over Indian country.” He said measures like this are no different from laws requiring citizens to honor embargos. “McLean’s unsupported statement is not really probative of original understanding,
for he was writing long after the Founding Era and did not cite sources from that time.” (R. Natelson 2007, 253).

“Whatever the merits of Justice McLean’s conclusion, the fundamental problem with arguing that the Indian Intercourse Act sheds light on the Commerce Clause is this: the Indian Intercourse Act was not adopted pursuant to the Commerce Clause. It was adopted pursuant to the Treaty Power” (R. Natelson 2007, 254).

The 1834 version of the Intercourse Act is codified at 25 U.S.C. section 177 and remains substantially the same today. Adult men who are tribal members continue to be prohibited from selling land received through allotment or inheritance that the tribal government might have an interest in - unless it is “negotiated in the presence of a federal commissioner and ratified by Congress” (DOJ 2015).

For example, Gideon Peon, a member of the Flathead Reservation in western Montana, wanted to sell his property in 1947. Unfortunately, although he had been a respected postal worker for twenty years, he was declared “incompetent” to manage his own property. Furious, he went to Congress to obtain permission to take his land out of trust. Congress acquiesced and passed a bill to free his land, but President Truman vetoed it on the advice of his Secretary of Interior – who had gotten his advice from the BIA (Scofield 1992, 10, 11). A similar request by a tribal member named Joseph J. Pickett was also vetoed that same month (Univ of Illinois 1947)\(^\text{17}\) (E. Morris 2017).

\(^{17}\) See Appendix 6
President Washington’s Perspective

Throughout his presidency, Washington strived to serve with integrity and principle, honoring God to the best of his ability. He did not believe in using the executive veto unless Congress was enacting something unconstitutional. It was not a tool to push his own version of policy – because it was the job of Congress to create law, not the president. Washington did not believe the President should take over the duties of Congress or usurp the Constitution. If the Constitution needed to be changed, it should be done through the amendment process (Newell 2012, 11).

In his final farewell speech in 1796, Washington asked those who would follow him into office to follow his example and “confine themselves within their respective constitutional spheres” (Washington 1796). He warned, that if “virtue and morality do not underlie American behavior: … ‘cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government’” (Newell 2012, 19).

This is true at any level of government – federal, state, county or tribal. Therefore, Washington encouraged those who would seek public office to be “servant-leaders”- delegates guided by obligations to followers” (Newell 2012, 20).

But he also wisely reminded the followers that they themselves have obligations as well. “They must cherish union, constrain self-interest, obey the Constitution and laws, and let reason guide their public affairs. They were not just people; they were citizens” (Newell 2012, 20).

The Early 1800s

Self-constraint and reason have both proven difficult obligations for the citizens of the nation to uphold and servant-leaders have struggled to maintain Washington’s advice. It was around this
time that the myth of federal control over tribes began to develop. Natelson writes, “During the nineteenth century, judges and advocates began to advance the view that the federal power over foreign, interstate, and Indian commerce is exclusive, implicitly barring all state regulation within those spheres” (R. Natelson 2007, 211).

Although the myth of plenary power was to grow from this point on, Allen believes the 1802 Intercourse Act allowed for states’ rights and included the potential to extinguish land claims (W. B. Allen 1990, 9), while Fletcher maintains that Congressional acts from the beginning, “and especially that of 1802, which is still in force,” treated tribes as nations, respected their rights and boundaries, and purposed to protect them (Fletcher 2006, 646).

On April 16, 1811, Indian Agent Return J. Meigs wrote to the Secretary of War concerning the Cherokees’ resistance to surrendering their land and stated, “I have ever been of the opinion that the Indians have not the right to put their veto on any measure deliberately determined and decreed by the Government” (W. B. Allen 1990, 9).

Agent Meigs did not seem to view tribal members with the same regard of President Washington, but Chief Pushmataha of the Choctaw continued to believe the Choctaw nation was on equal footing with the American government. In 1811 he told the Shawnee Chief, Tecumseh:

Halt! Tecumseh, listen to me. You have come here, as you have often gone elsewhere, with a purpose to involve peaceful people in unnecessary trouble with their neighbors. Our people have no undo (sic) friction with the whites. Why? Because we have had no leaders stirring up strife to serve their selfish personal ambitions.

You heard me say our people are a peaceful people. They make their way not by ravages upon their neighbor, but by honest toil. In that regard they have nothing in common with you. I know your history well. You are a disturber! You have ever been a trouble-maker. When you have found yourself unable to pick a quarrel with the white man, you have stirred up strife between different tribes of your own race.

Not only that! You are a monarch, an unyielding tyrant within your own domain; every Shawnee, man, woman, and child must bow in submission to your imperious will. The Choctaws and Chickasaws have no monarchs. Their chieftains
do not undertake the mastery of their people, but rather are they the people's servants, elected to serve the will of the majority. The majority has spoken on this question, and it has spoken against your contention. Their decision has, therefore, become the law of the Choctaws and Chickasaws, and Pushmataha will see that the will of the majority, so recently expressed, is rightly carried out to the letter.

If, after this decision, any Choctaw should be so foolish as to follow your imprudent advice and enlist to fight against the Americans, thereby abandoning his own people and turning against the decision of his own council, Pushmataha will see that proper punishment is meted out to him, which is death.

You have made your choice; you have elected to fight with the British. The Americans have been our friends and we shall stand by them. We will furnish you safe conduct to the boundaries of this Nation, as properly befits the dignity of your office. Farewell, Tecumseh. You will see Pushmataha no more until we meet on the fateful warpath (Pushmataha 1811).

Some of the Creek agreed with Tecumseh and in 1813, using red painted sticks as weapons, went to war against brethren who chose to side with Europeans. The United States eventually intervened in this Creek Civil War, with Major General Andrew Jackson leading troops.

In 1814, Jackson defeated the Creek at the battle of Horse Shoe Bend, near the Alabama/Georgia border. “On August 9, 1814 Andrew Jackson exacted the ‘Treaty of Fort Jackson’” (W. B. Allen 1990, 9) and closed the war. The Creek were forced to surrender:

“Under the terms of the treaty, the Creek Nation ceded nearly 22 million acres to the United States – taking land even from those who fought alongside the United States. Jackson justified the seizure of so much territory as payment for the expense of an “unprovoked, inhuman, and sanguinary” war (Braund 2017). It was through early wars such as this that the impression of ‘title by conquest’ began to develop – and Jackson’s reputation grew.

This “set Cherokees and Choctaws in an impossible position from which they would never recover—despite an apparent respite won by the Cherokees on March 22, 1816, when two treaties acknowledged their land claims south of the Tennessee at the price of cession of all their South Carolina claims. The very concept of the ‘Indian Agent’—at once an ambassador but also a factor—worked against Indian claims of sovereignty. Nevertheless, tribes often demanded the
appointment of such an official” (W. B. Allen 1990, 9). It was through the request for federal agents that the voluntary acquiesce to federal and state control began to develop.

“The treaties of March 22, 1816 were dead by fall, replaced by separate treaties liberally defended by the eloquence of bribery, with Cherokees, Chickasaws, and Choctaws. These were followed immediately by calls for ‘removal’ and further demands for cession.

President James Monroe said in his annual message to Congress in 1817, “The earth was given to mankind to support the greatest numbers of which it is capable, and no tribe or people have a right to withhold from the wants of others more than is necessary for their own support and comfort” (ICC 1978, 1). In March of the same year President Monroe declared that tribal members should no longer be dealt with by treaties but rather by legislation” (W. B. Allen 1990, 9). Nonetheless, the policy of treaties continued for about 50 more years.

By July 1817, and under coercion, Cherokees had agreed to swap land in Georgia and Tennessee for that territory in Arkansas on which a few voluntary emigrants already lived.” The ‘Calhoun Treaty’ was the fresh policy of the newest Secretary of War, John C, Calhoun. Additional negotiations with the Cherokee tribe took place in 1819. This brought only another decade of peace, and the agreement “included clauses that foreshadowed Cherokee citizenship and permanent inhabitancy” – setting up the tragic and “ultimate confrontation” of the Trail of Tears (W. B. Allen 1990, 9).

In October 1820, Andrew Jackson led a team to meet with the Choctaw and sign the Treaty of Doak’s Stand. “Under the terms of the treaty, the Choctaws were to cede half of their land in what was by then the state of Mississippi in exchange for land in Arkansas.” During the meetings, Chief Pushmataha accused Jackson of exaggerating the quality of the western land, but on October 18, despite continuing dissatisfaction and suspicion, signed the treaty (NPS 2017).
In the first of what came to be known as the ‘Marshall Trilogy’ of Indian Law precedents, *Johnson v. M’Intosh (1823)*\(^{18}\) decided that non-Indian private citizens could no longer purchase land from tribal members. Only the federal government could purchase tribal land. This not only began the open articulation of a plenary power over tribal members, it effectively eliminated competition for the land; keeping the price of tribal land low for the federal government. To rationalize the decision, Chief Justice John Marshall described the tribes as “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness” (*Johnson v. M’Intosh* 1823).\(^{19}\)

The Yakama Tribe asserts:

Under that doctrine, this Court judicially manufactured an extra-constitutional congressional plenary authority to abrogate treaties and regulate Native Nations. This manufactured authority rests on the false assertion that our sovereignty and free and independent existence were ‘necessarily diminished’ upon Christian European arrival on the North American continent (*Yakama* 2018, 5-6).

Attorney James Poore states it was not the initial arrival of European’s that diminished sovereignty, it was the trading of land in the early 1800s that did it. When the United States gained control of all the territories and incorporated the tribes into the fabric of the states, the tribes lost their sovereignty. Now living within U.S. territory, they were subordinate to the sovereignty of the state and federal governments with only limited jurisdiction subject to the U.S. Constitution. Poore states, “The Supremacy Clause of the Constitution requires such a result” (*J. A. Poore* 1995/1999, 23-24).

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\(^{18}\) 21 U.S. (8 Wheat.) 543, 590 (1823)

\(^{19}\) 21 U.S. 543; 1823 U.S. 293; 5 L. Ed. 681; 8 Wheat. 543
Chief Justice Marshall wrote concerning Constitutional authority over subordinate governments in *McCulloch v. Maryland* (1819):

> It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view, while construing the constitution (427).

Chief Justice Marshall had also ruled in *Gibbons v. Ogden* (1824) that the "nullity of any act, or law, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law" (J. A. Poore 1995/1999, 23-24). In further depreciation of tribes as sovereign nations, Chief Justice Marshall found in *American Ins. Co. v. Canter*, (1828), that the power to govern and legislate comes with possession of territory (1998, 55, footnote). Poore maintains there is no question that tribal government are subordinate:

> Thus, the Property Clause and the Supremacy Clause of the United States Constitution, as interpreted by Chief Justice Marshall and in later decisions of the United States Supreme Court, compel the conclusion that tribes may not have powers or laws which are inconsistent with the Constitution (1995/1999, 23-24).

Poore notes that “The analysis that forms the basis for this conclusion has not been rejected, or even considered, by Talton or the other cases recognizing the continuing existence of pre-constitutional sovereignty” (J. A. Poore 1995/1999, 24). Attorney General William Wirt agreed and asserted in 1828 that there were three criteria for tribal independence:

1) Government by their own laws  
2) Absolute power of war and peace; and  
3) Inviolable territory and sovereignty.

Allen holds that Wirt’s criteria does not apply to tribes in the United States even today. He further states that referring to tribes as sovereign while they clearly are not “is a cruel and

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20 17 U.S. (4 Wheat.) 316, 323-24 (1819)
inhuman pun—for they are capable of none of the essential attributes of sovereignty” (W. Allen 2010, 17). Allen contends that lacking genuine sovereignty, the status of those with tribal heritage is further injured by lack of full rights as United States citizens. While tribal members today are given some of the benefits of sovereignty and some of the benefits of citizenship, they are clearly denied the ability to be fully one or the other. Allen writes, “It is an extreme aggravation of the joke, therefore, to deny Indians at the same time the essential protections of citizenship” (W. Allen 2010, 17)
Chapter 3

History Leading Up to the ICWA

The current stated mission of the Bureau of Indian Affairs, created in 1824, is to “enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes and Alaska Natives” (BIA 2019). The BIA, admitting this has not always been the mission, states that the agency has “changed dramatically over the past 185 years, evolving as Federal policies designed to subjugate and assimilate American Indians and Alaska Natives have changed to policies that promote Indian self-determination” (BIA 2019).

Referring to his work on the U.S. Commission on Civil Rights, Allen states, “In our study we found it a particularly striking and revealing fact that the BIA was created on March 11, 1824 by then Secretary of War John C. Calhoun, who later became the greatest of all antebellum defenders of slavery”21 Calhoun’s influence on Indian policy occurred at the same time as the shift from treating tribal members as “friends and brothers” to treating them as “children of the Great White Father.” According to Allen, “Washington’s language had always been, ‘my brothers,’ from the early 1750s through the end of his Administration” (1990, 8). Thomas Jefferson had initially introduced use of the term “father” in an unratified 1803 compact with the Cherokee. He then began referring to himself as “their father the President of the United States,” and asked them to refer to him as “our Father, the President.” Calhoun took the concept and enlarged it to the “Great White Father” (W. B. Allen 1990, 8)

21 Francis Paul Prucha, The Great White Father, vol. 1, p. 164.]
Allen reports that Calhoun’s writings “demonstrate an intention to civilize the Indians.”

He elaborates:

In other words, only by treating Indians unequally, i.e. as lower than human, will they become human. In embarking upon an enterprise to civilize a race by direct intervention and superintendence of their way of life, Calhoun involved himself in tyranny as much as he did in denying the possibility of civilization to the black race (W. B. Allen 1990, 8).

An excerpt from a Calhoun report illustrates:

Our views of their [the Indians] interest, and not their own, ought to govern them. By a proper combination of force and persuasion, of punishments and rewards, they ought to be brought within the pales of law and civilization . . . When sufficiently advanced in civilization, they would be permitted to participate in such civil and political rights as [the government] might safely extend to them . . . It is only by causing our opinion of their interest to prevail, that they can be civilize and saved from extinction22 (W. B. Allen 1990, 8).

Allen maintains that “the logical conclusion of such sentiments is the constitutional and administrative tyranny which still serves as the linchpin of our Indian policy (plenary power and guardianship), and under which tribes still suffer” (W. B. Allen 1990, 8). It was in this season, less than 50 years after the founding of the United States, that George Washington’s recognition of tribal members as a free people appears to have come to a halt and the myth of ‘Title by Conquest’ began to take root. Where there is a ‘conqueror,’ there must be a ‘conquered.’

Allen writes:

By December 1, 1824 Americans who negotiated with Creeks announced (in a timid echo of a claim made to the Cherokees in 1823) that ‘they [Creeks] had been conquered in the Revolution and had since held their land as tenants at will . . . ,’ holding only by the forbearance of the United States. This explicit renunciation of the original policy fostered by George Washington is the immediate cause of the entire tragedy of Indian history in the United States since that day. At the very same time the fraudulent ‘Indian Springs Treaty’ had the Creeks abandoning all claims and agreeing to removal! The treaty was subsequently abrogated by President Adams, but it had in fact been ratified by the Senate, clearly indicating the disposition of official opinion in the United States toward Indians (W. Allen 2010, 15).

Pushmataha and other Choctaw chiefs travelled to Washington, D.C. in 1824 to renegotiate the flawed Doak’s Stand treaty. Tragically, Pushmataha died of illness just before Christmas in 1824. He was given a military funeral by the United States with burial in the Congressional Cemetery (NPS 2017).

Wardship

Indian Removal Act of 1830

In 1829, newly elected President Andrew Jackson purportedly wrote a letter to the Southeastern tribes that was then carried by a representative to tribal leaders and read aloud at various community gatherings. The original letter, assumed for decades to have been lost, is said to have reappeared and been recently sold at auction. The Raab Auction house avers the wording of the letter to be the following:

Say to them as friends and brothers to listen [to] the voice of their father, & friend. Where [they] now are, they and my white children are too near each other to live in harmony & peace. Their game is destroyed and many of their people will not work & till the earth. Beyond the great river Mississippi, where a part of their nation has gone, their father has provided a co[untry] large enough for them all, and he ad[vises] them to go to it. There, their white...[will not trou]ble them, they will have no claim to [the l]and, and they & their children can live upon [it as] long as grass grows or water runs, in peace and plenty. It shall be theirs forever. For the improvements which they have made in the country where they now live, and for the stock which they [can]not take with them, their father will [sti]pulate, in a treaty to be held with them, [to] pay them a fair price.

Say to my red Choctaw children, and my Chickasaw children to listen. My white children of Mississippi have extended their laws over their country; and if they remain where they now are...must be subject to those laws. If they will [remove] across the Mississippi, they will be free [from] those laws, and subject only to their own, and the care of their father the President. Where they now are, say to them, their father the President cannot prevent the operation of the laws of Mississippi. They are within the limits of that state, and I pray you to explain to them, that so far from the United States having a right to question the authority of any State to regulate its affairs within its own limits, they will be obliged to sustain
the exercise of this right. Say to the chiefs & warriors that I am their friend, that I wish to act as their friend, but they must, by removing from the limits of the States of Mississippi and Alabama, and by being settled on the lands I offer them, put it in my power to be such (Raab 2019). [See Appendix for full text]

Choctaw Chief David Folsom, himself a Christian who had fought alongside Jackson, received the President’s message concerning removal in late November 1829 and rejected it.

After learning of the rejection by the Southeastern tribes, Jackson pushed the Indian Removal Act through Congress. The result of this act would become known as the Trail of Tears. To justify the horror he had determined to commit, Jackson gave the following speech to Congress:

It gives me pleasure to announce to Congress that the benevolent policy of the Government, steadily pursued for nearly thirty years, in relation to the removal of the Indians beyond the white settlements is approaching to a happy consummation. … It puts an end to all possible danger of collision between the authorities of the General and State Governments on account of the Indians. … It will relieve the whole State of Mississippi and the western part of Alabama of Indian occupancy, and enable those States to advance rapidly in population, wealth, and power. … The present policy of the Government is but a continuation of the same progressive change by a milder process. The tribes which occupied the countries now constituting the Eastern States were annihilated or have melted away to make room for the whites. The waves of population and civilization are rolling to the westward, and we now propose to acquire the countries occupied by the red men of the South and West by a fair exchange, and, at the expense of the United States, to send them to land where their existence may be prolonged and perhaps made perpetual. … Can it be cruel in this Government when, by events which it cannot control, the Indian is made discontented in his ancient home to purchase his lands, to give him a new and extensive territory, to pay the expense of his removal, and support him a year in his new abode? … Rightly considered, the policy of the General Government toward the red man is not only liberal, but generous. He is unwilling to submit to the laws of the States and mingle with their population. To save him from this alternative, or perhaps utter annihilation, the General Government kindly offers him a new home, and proposes to pay the whole expense of his removal and settlement (NARA 1830). [See Appendix for full text]

Scholar of Native American history, Willard Hughes Rollings, wrote that Congress, “under intense pressure from eastern politicians” as well as President Jackson, passed the Indian Removal Act in 1830, authorizing “removal of all eastern tribes to lands west of the Mississippi.” Rollings noted that while the Act required the government to “negotiate treaties of removal with
all of the eastern tribes,” the massive removal “forced over 80,000 Indians to surrender their homelands and move west” (Rollings, 2004).

The Marshall Trilogy

In 1830, the Cherokee Nation asked the United States Supreme Court for relief from Georgia laws on the grounds the Cherokee tribe was a foreign nation and not subject to state law. They asked that the laws of Georgia that purported to govern them be ruled unconstitutional.

In the second case of the Marshall Trilogy (Johnson v. M’Intosh having been the first), Cherokee Nation v. Georgia (1831) held that “there was no original jurisdiction [held by the Cherokee tribe] because the Cherokee Nation was not a ‘foreign state’” (Wilkinson and Volkman 1975, 613). Chief Justice John Marshall wrote:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian (Cherokee v. Georgia 1831).

Rollings contends that Marshall used the term “ward” in error; that he was “only referring to their special status as Indians, and for lack of a better word, he used ward.” Rollings believes that ‘wardship’ as intended by Marshall meant something “far different from that of white wards” (Rollings, 2004, p. 136). Nevertheless, Shawn Regan, former ranger for the National Park Service and a public affairs fellow at the Property & Environment Research Center (PERC), wrote, “Chief Justice John Marshall set Native Americans on the path to poverty in

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23 Cherokee v. Georgia 30 U.S. (5 Pet.) at 17
1831 when he characterized the relationship between Indians and the government as ‘resembling that of a ward to his guardian’” (Regan 2014). These words established the federal trust doctrine, which essentially says tribes and tribal members are incapable of owning and managing land. “The government is the legal owner of all land and assets in Indian Country and is required to manage them for the benefit of Indians” (Regan 2014).

Fletcher asserts Marshall had come up with the term “Domestic Dependent Nation” out of “whole cloth” to “avoid classifying Indian tribes as either states or foreign nations.” He also equated tribes to “wards” and claimed they were “in a state of pupilage.” Justice Johnson, in his concurrence, used the terms "master and conqueror" and said tribes are in a "feudal dependence" to the United States. Justices Thompson and Story dissented. Citing Vattel, Justice Thompson found that “weaker states signing treaties of protection do not, as a side-effect, lose their sovereignty. All that is required for a weaker state to retain statehood is a reservation of the right to self-government, a staple in American Indian treaties” (Fletcher 2006, 651).

While self-government continued to be inferred by treaties, the Jackson administration dictated all outcomes. In 1831, the Choctaw were the first to walk the Trail of Tears in accord with the Indian Removal Act. The Seminole followed in 1832, and the Creek in 1834.

In the third case of the Marshall Trilogy, while confirming “inherent sovereignty of tribes existed before their integration into the United States,” Worcester v. Georgia (1832)24 ruled that the federal government had jurisdiction over the tribes (J. A. Poore 1998, 54). The “core of the majority opinion relied upon the enactment of the First Congress of the trade and intercourse acts” (Fletcher 2006, 645). The Marshall Court voted 5-1 in Worcester that Georgia laws governing the Cherokee tribe were unconstitutional – not because the tribes currently carried an

24 Worcester v. Georgia 6 Pet. 515 (1832)
inherent and original jurisdiction, but because federal government held power over the tribes. The ruling rescued tribes from State jurisdiction by maintaining the federal government had exclusive control. Nevertheless, “Justice Story wrote to his wife, ‘Thanks be to God...the Court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights’” (Fletcher 2006, 645). The Cherokee Nation had won *Worcester*, but they and the Chickasaw would still walk the Trail of Tears before the end of the decade. Marshall wrote:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial; with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others (Worcester v. Georgia 1832).

Attorney Blythe Marston maintains that Marshall “addressed the paradox of a subordinate sovereign in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. In Cherokee Nation.” Marston states that while Marshall held the tribes are "domestic dependent nations" with "relationship to the United States resembl[ing] that of a ward to his guardian," he also contended that "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence-its right to self-government, by associating with a stronger, and taking its protection." Thus, he stated that tribes are "independent political communities" (Marston, 1984, p. 377). Fletcher believes Marshall “threw down the gauntlet” in making it clear state law did not apply in Indian Country:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States (Fletcher 2006, 647).
Marshall's opinion includes Vattel’s assessment that a weaker power “does not surrender the right to self-government by agreeing to the protection of the more powerful nation” (Fletcher 2006, 653). M’Lean concurred with the majority opinion, but wrote:

The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. This is shown by the settled policy of the government, in the extinguishment of their title… (A) sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political communities.

At best they can enjoy a very limited independence within the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them; and their existence within a state, as a separate and independent community, may seriously embarrass or obstruct the operation of the state laws. If, therefore, it would be inconsistent with the political welfare of the states, and the social advance pf their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds it, or seek its exercise beyond the sphere of state authority (Worcester v. Georgia 1832, at 562).

Despite Worcester rejecting the "dependency" theory and replacing it with a "distinct and independent" theory, the Court went on to use the dependency view articulated in Cherokee v. Georgia to create plenary power and a trust relationship over tribes (Fletcher 2006, 654). Due to the contradictions, the Marshall Trilogy, while often cited as the precedent for plenary power and trust relationship, continues to generate questions, confusion and disagreement.

Trust Relationship and Plenary Power

While the Marshall Trilogy instigated tribal subordination to the federal government, some claim the Trilogy supports an inherent sovereignty doctrine. Nevertheless, Natelson writes:

…Marshall’s dicta simply do not support the doctrine. Marshall observed in Cherokee Nation v. Georgia that the federal-tribal relationship “resembles that of a ward to his guardian.” But a guardianship analogy implies a restricted, fiduciary power. The Founders themselves used the fiduciary analogy to emphasize the limited nature of federal authority. Similarly, while Marshall’s dictum in Worcester
v. Georgia suggested that federal governance of Indian affairs was exclusive of the states, the pronouncement was unrelated to inherent sovereign authority. Neither dictum would be particularly probative of the Constitution’s original meaning in any event, since they were issued more than four decades after the Constitution’s ratification (R. G. Natelson 2007, 206).

Concerning Worcester’s holding that “federal power over the Cherokee tribe was exclusive,” Natelson notes that Worcester was decided four decades after the Constitution’s ratification and therefore is not evidence and has no bearing on the Constitution’s original meaning (R. G. Natelson 2007, 211).

In explaining the wardship status, Fletcher argues that ‘plenary power’ and the ‘trust relationship’ both came out of an argument within the Marshall Court over the word ‘protection’ in Indian treaties. Justice Baldwin’s concurrence in Cherokee Nation was the first to concentrate on the word. Baldwin concluded that the use of the word “protection” in the Northwest Ordinance and Treaty of Hopewell “granted Congress the right to decide the ‘internal affairs’ of tribes should it wish to at a later date.” This discussion led to the “creation of the canon of construing Indian treaty language” (Fletcher 2006, 649-650). Importantly, in ignoring the constitutional rights of states and giving Indian tribes a political status not articulated in any founding documents, the Court created tribal immunity from state jurisdiction and plenary power for federal government (Fletcher 2006, 649). Fletcher notes that in Johnson, “Chief Justice Marshall wrote in dicta that Indians …‘shall not be wantonly oppressed.’” Fletcher states:

The trust relationship exists because the Marshall Court opined that Indians were weak and dependent and needed the assistance of a higher power - the United States - to become civilized to the extent that they could save themselves from extinction. The Trilogy does not include a holding that the federal government should take action to assist Indians as moral imperative, but the origins of that view are there. There are two (mis)conceptions of the trust relationship. Since the Marshall Court declared that Indians were weak and dependent (even if they could not make such a holding clear in the Cherokee cases), the Court asserted that the United States must treat them well. The Court would help out the policy making branches by holding them to a higher standard, what the Court referred to a hundred years later
as a ‘fiduciary relationship.’ Nongovernmental entities such as the Friends of the Indian pushed this conception as well (Fletcher 2006, 658-659).

Allen believes “[t]here was a crucial historical error reading American citizens who are Indians out from under the protections of the Constitution. It is only partially, and not most importantly, the reliance upon the common law of citizenship though that is closely related to the error. The error is a misconstruction of the international law of ‘discovery’ as it applies to the status of Indians” (W. Allen 2010, 2).

United States Supreme Court Justice Joseph Story’s Commentaries,25 “written just after the landmark decisions of the early 1830s as well as his 1859 abridgment of that work” are authoritative concerning the jurisprudence of the era. “In the first work he reported the law as the Supreme Court had decided it, although indicating along the way that the history did not justify it. By 1859, however, he was sufficiently removed from the controversies of the 1830s that he could rewrite the sections dealing with Indian law” (W. Allen 2010, 9).

Story, while still sitting on the court, claimed in his Commentaries that “America had inherited from the British Crown a prerogative power in dealing with the Indians.” According to Allen, “this would have depended upon a right of conquest as opposed to that form of discovery the Americans had asserted in the Revolution. Nevertheless, this was precisely the argument the Court had developed in the series of cases from McIntosh.” Story went on to say that because of conquest, tribes are “distinct political societie[s], capable of self-government.” In other words, as the court had ruled, “domestic dependent nations” …and yet as well, “ward to a guardian” (W. Allen 2010, 9).

Story quoted Marshall’s writing, “All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the

\[25\] 2:41, §1099 & 43, §101
Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians” (W. Allen 2010, 9). Allen argues:

The problem, however, is that if the Indians had no such absolute and complete title, the Americans had no basis for their Revolution! After Story quoted Marshall’s McIntosh opinion at length, presenting the history of “conquest or treaty” that led to European domination of Indians, and in the very few mentions of Indians at all - New Haven, Rhode Island, Pennsylvania, all counter to the thesis - one gets a picture of ready and easy accommodation, punctuated by the generosity of William Penn. In short, Story comes very near to certifying the “desert land” point of view, reducing the notion of European discovery to nothing more than a polite fiction of realpolitik (W. Allen 2010, 10).

Interestingly, after Story was no longer on the bench, he gave a different analysis. In chapter sixteen of his Commentaries he refutes both the Doctrine of Discovery as well as “Blackstone’s claim that colonies were conquered lands.” Story wrote:

At the time of the leading grants from the Crown, there had been no ‘conquest or cessions from the natives.’ The Indians were not overcome by force and were not considered as ‘having any regular laws, or any organized government.’ They were subjected to obedience ‘as dependent communities, and no scheme of general legislation over them was ever attempted.’ Indeed, they were generally regarded as at liberty to govern themselves, so long as ‘they did not interfere with the paramount rights of the European discoverers.’ The implication that the ‘discoverers’ acquired no rights over the Indians was then affirmed by Story in the declaration, ‘as there were no other laws there to govern them, the territory was necessarily treated, as a deserted and unoccupied country, annexed by discovery to the old empire and composing a part of it.’ This shows clearly that the theory of discovery does not undergird the notion of a ‘domestic dependent nation’ and cannot, therefore, constitute the foundation of a wardship or pupilage (W. Allen 2010, 10-11).

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26 Quoted at 1 Story 15
Allen writes, “This subtle reading of Story’s famous work gains further credence when we consider the critical portion of his subsequent work *Familiar Exposition*. There, Story uses a different voice to describe the Indian situation:”

At the time of the discovery of America...the various Indian tribes, which then inhabited it, maintained a claim to the respective limits, as sovereign proprietors of the soil. They acknowledged no obedience, nor allegiance, nor subordination to any foreign nation whatsoever; and *as far as they have possessed the means*, they have ever since consistently asserted this full right of dominion, and have yielded it up only, when it has been purchased from them by treaty, or obtained by force of arms and consent. In short, *like all civilized nations of the earth*, the Indian tribes deemed themselves rightfully possessed, as sovereigns, of all the territories, within which they were accustomed to hunt, or to exercise other acts of ownership, upon the common principle, that the exclusive use gave them an exclusive right to the soil, whether it was cultivated or not. It is difficult to perceive, why their title was not, in this respect, as well founded as the title of any other nation, to the soil within its own boundaries. How, then, it may be asked, did the European nations acquire the general title…? The only answer which can be given, is their own assertion…that their title was founded upon the right of discovery… The truth is, that the European nations paid not the slightest regard to the rights of the native tribes. They treated them as mere barbarians and heathens, whom, if they were not at liberty to extirpate, they were entitled to deem mere temporary occupants of the soil. They might convert them to Christianity; and, if they refused conversion, they might drive them from the soil, as unworthy to inhabit it. They affected to be governed by the desire to promote the cause of Christianity and were aided in this ostensible object by the whole influence of the papal power. But their real object was to extend their own power and increase their own wealth, by acquiring the treasures, as well as the territory, of the New World. Avarice and ambition were at the bottom of all their original enterprise. This Justice Story no longer sits on the Court and no longer defers to the ‘settled rule of law’ (W. Allen 2010, 11).

Allen explains, “When Story accepted Marshall’s reliance on Spanish and Portuguese experience, instead of distinguishing the U. S. from the other America, his voice changed, and he blasted the foundation as a hypocrisy.” Story writes that the “right of discovery” is now viewed as settled foundation and considered incontestable – despite being doubtful in origin and “unsatisfactory in its principle” (p. 30).” Allen then notes, “This means that the principle of discovery yields the occupation of the territory of North America, and perhaps even jurisdiction
over it, but can by no means yield ‘plenary power’ over either individual Indians or tribes” (1990, 13-15).

Fletcher adds that it is “…ironic that Chief Justice Marshall's final constitutional opinion was *Barron v. Baltimore*, a decision holding that the Bill of Rights does not apply to the states.” *Barron* was also the decision the Court later used to hold that the Bill of Rights does not apply to tribes, either (Fletcher 2006, 645).

The Definition of an “Indian”

*United States v. Rogers*, (1846)\(^{29}\) defined an Indian as someone who has a degree of Indian blood and is recognized as an Indian. In *United States v. Dodge*,\(^ {30}\) the Court stated, “The definition of exactly who is and who is not an Indian is very imprecise…Courts have generally followed the test discussed in *United States v. Rogers*.” Case law has not diverged from this since 1846.

Thus, according to Attorney Jon Metropoulos, “… the one immutable requirement to be an ‘Indian’ for purposes of the statutory definition on which Congress relied is an immutable racial characteristic; the person’s race must be, at least in part, Indian. *United States v. Rogers*, 45 U.S. 67 (4 How.) 567, 572-73, 11 L.Ed. 1105 (1845). (By adoption into a tribe, a non-Indian does not become an Indian.) (Brief for Amicus Curiae of TM. EM & RM 2003, 19).

The application of that seemingly sensible rule has run into difficulties. Americans move about the country, inter-marrying and freely choosing their political and religious affiliations. Not everyone with Tribal heritage is affiliated with the tribe or their customs. Metropoulos explains how this also raises the issue of racial discrimination:

Even if Congress limited the class of people it subjected to tribes’ pre-constitutional criminal jurisdiction to tribal members (i.e., depriving ‘only’ 1.7 million citizens of

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\(^{29}\) 45 U.S. (4 How.) 567, (1846)  
\(^{30}\) 538 F2d 770, 786 (8th Cir. 1976)
their rights rather than 4 million) every single one of those people would be an ‘Indian’ by race. Not one non-Indian would suffer that treatment. At the very best, in that case, the person’s membership in a tribe would be an additional factor, but race would be the one indispensable and obviously immutable characteristic of the class of U.S. citizens given such ‘special treatment’ (Brief for Amicus Curiae of TM. EM & RM 2003, 20).

The Birth of the Reservation System

The Indian Appropriations Act of 1851

The Indian Appropriations Act of 1851 created the reservation system, forcing those who could be classified as Indian to move to a set area for management. This freed land for others to move on to and avoided the problem of clashes between people groups.

On January 12, 1854, Chief Seattle announced his surrender to the reservation system and gave a short speech accepting a diminished life they would lead. He also cautioned Americans to be just with his people. He said:

Yonder sky that has wept tears of compassion upon my people for centuries untold, and which to us appears changeless and eternal, may change. Today is fair. Tomorrow it may be overcast with clouds. My words are like the stars that never change. Whatever Seattle says, the great chief at Washington can rely upon with as much certainty as he can upon the return of the sun or the seasons. The white chief says that Big Chief at Washington sends us greetings of friendship and goodwill. This is kind of him for we know he has little need of our friendship in return. His people are many. They are like the grass that covers vast prairies. My people are few. They resemble the scattering trees of a storm–swept plain. The great, and I presume—good, White Chief sends us word that he wishes to buy our land but is willing to allow us enough to live comfortably. This indeed appears just, even generous, for the Red Man no longer has rights that he need respect, and the offer may be wise, also, as we are no longer in need of an extensive country.

There was a time when our people covered the land as the waves of a wind–ruffled sea cover its shell–paved floor, but that time long since passed away with the greatness of tribes that are now but a mournful memory. I will not dwell on, nor mourn over, our untimely decay, nor reproach my paleface brothers with hastening it, as we too may have been somewhat to blame.

Youth is impulsive. When our young men grow angry at some real or imaginary wrong, and disfigure their faces with black paint, it denotes that their
hearts are black, and that they are often cruel and relentless, and our old men and old women are unable to restrain them. Thus it has ever been. Thus it was when the white man began to push our forefathers ever westward. But let us hope that the hostilities between us may never return. We would have everything to lose and nothing to gain. Revenge by young men is considered gain, even at the cost of their own lives, but old men who stay at home in times of war, and mothers who have sons to lose, know better.

Our good father in Washington—for I presume he is now our father as well as yours, since King George has moved his boundaries further north—our great and good father, I say, sends us word that if we do as he desires he will protect us. His brave warriors will be to us a bristling wall of strength, and his wonderful ships of war will fill our harbors, so that our ancient enemies far to the northward—the Haidas and Tsimshians—will cease to frighten our women, children, and old men. Then in reality he will be our father and we his children. But can that ever be? Your God is not our God! Your God loves your people and hates mine! He folds his strong protecting arms lovingly about the paleface and leads him by the hand as a father leads an infant son. But, He has forsaken His Red children, if they really are His. Our God, the Great Spirit, seems also to have forsaken us.

...Day and night cannot dwell together. The Red Man has ever fled the approach of the White Man, as the morning mist flees before the morning sun. However, your proposition seems fair and I think that my people will accept it and will retire to the reservation you offer them. Then we will dwell apart in peace, for the words of the Great White Chief seem to be the words of nature speaking to my people out of dense darkness.

...We will ponder your proposition and when we decide we will let you know. But should we accept it, I here and now make this condition that we will not be denied the privilege without molestation of visiting at any time the tombs of our ancestors, friends, and children. Every part of this soil is sacred in the estimation of my people. Every hillside, every valley, every plain and grove, has been hallowed by some sad or happy event in days long vanished. Even the rocks, which seem to be dumb and dead as the swelter in the sun along the silent shore, thrill with memories of stirring events connected with the lives of my people, and the very dust upon which you now stand responds more lovingly to their footsteps than yours, because it is rich with the blood of our ancestors, and our bare feet are conscious of the sympathetic touch... (Chief Seattle 1854). [See Appendix]

A report from Secretary of Interior Thompson to the House Committee on Indian Affairs in 1859 related that simply giving large amounts of money to be divided per capita had a “deleterious effect upon their morals, and confirmed them in their roving, idle habits” (Cohen [1942] 1971, 16). The secretary advised that gathering tribal members upon small reservations
and allotting each individual member “tracts of land…with all the rights incident to an estate in fee-simple, except the power of alienation” has worked much better (Cohen [1942] 1971, 16).

Early in the Civil War, concern arose when several tribes seemed to betray the United States by signing treaties with the Confederacy. Caleb B. Smith, Secretary of Interior at the time, questioned whether the federal government had made a mistake in making treaties with quasi-independent tribes. He contended they had none of the elements of nationality; were within the limits of the authority of the United States; and were endangered by the rapid progress of a civilization that needed as much land to be cultivated as possible. Further, he asserted, even though tribes have consented to removal in treaties, everyone knows that many only did so because they had no genuine choice. Smith argued for an end to the concept of independent nations, and instead, regard tribes as “wards of the government, entitled to its fostering care and protection.” He suggested land suitable for use should be given them for their homes, along with necessary supplies until they can be trained in self-sustenance (Cohen [1942] 1971, 16).

A report from the Secretary of Interior to the Committee on Indian Affairs in 1862 suggested it would be in everyone’s best interest if the states were allowed a working relationship with the tribes as well, with “state legislation leading to intimate citizenship the goal to be pursued” (Cohen [1942] 1971, 16):

Very much of the evil attendant upon the location of Indians within the limits of States might be obviated if some plan could be devised whereby a more hearty cooperation with government on the part of the States might he secured. It being a demonstrated fact that Indians are capable of attaining a high degree of civilization it follows that the time will arrive, as in the case of some of the tribes it has doubtless now arrived, when the peculiar relations existing between them and the federal government may cease, without detriment to their interests or those of the community or State in which they are located: in other words, that the time will come when in justice to them and to ourselves, their relations to the general government should be identical with those of the citizens of the various States. In this view, a more generous legislation on the part of most of the States within whose limits Indians are located, looking to a gradual removal of the disabilities under
which they labor, and their ultimate admission to all the rights of citizenship, as from time to time the improvement and advancement made by a given tribe may warrant, is earnestly to be desired, and would, I doubt not, prove a powerful incentive to exertion on the part of the Indians themselves (Cohen [1942] 1971, 16).

On April 9, 1866, the Civil Rights Act was passed, protecting the constitutional rights of all citizens...except for “Indians non-taxed”. The rationale was that tribal members had allegiance to a pre-constitutional self-government. However, tribal members who chose to live as taxed citizens were choosing to live under the United States’ jurisdiction and Constitution.

In 1868, the Fourteenth amendment was passed, allowing birthright citizenship. Now all people born in the U.S. were to have citizenship and their civil rights protected, without regard to race, color, or previous condition ...except “Indians non-taxed.”

The last treaty signed between the United States and a tribe was with the Nez Perce in 1868. “Over a span of approximately 100 years, nearly 400 treaties were negotiated between dozens of Indian tribes and the U.S. government, most during the westward expansion of the mid-1800s. Nearly a third were treaties of peace. The rest were treaties ceding Indian land to the U.S. government and establishing reservations. During this period, the United States paid more than $800 million for the lands it purchased from tribes” (Lawrence 2002, 393). The Indian Claims Commission concurred, stating in 1978 in its final report that the United States had purchased 95 percent of its public land for a stated $800 million. The report stated this was done through treaties and agreements with the tribes:

This figure and the treaties mitigate the myth of rude conquest and dispossession. Jefferson observed … that the lands of this country were not taken from the Indians by conquest as is 'so generally supposed. "I find in our historians and records, repeated proofs of purchase, which cover a considerable part of the lower country; and many more would doubtless be found on further search. The upper country, we know, has been acquired altogether by purchase made in the most unexceptional form." Thus the treaties were made and obligations incurred by the United States Government (ICC 1978, 1).
There were no treaties made with residents of what had been known as “Russia America” – as the indigenous population had been under Russian rule until 1867, when the United States purchased the land. There was no need to organize the groups onto reservations. The Alaskan natives were classified “as ‘identifiable Indian groups,’ not ‘tribes’ in the Indian Reorganization Act of 1936 and the later Indian Claims Commission Act of 1946” (Marston, 1984, pp. 384-385). They were later identified as "Native Governmental Entities,” which “allowed them to receive certain federal benefits but didn’t bestow a sovereign status” (Marston, 1984, p. 386).

The Indian Appropriations Act of 1871: Treaties Statute

According to the Final Report of the Indian Claims Commission in 1978:

Historical precedent and national policy called for the United States to acquire this land by the legal forum of treaty-making and legislation rather than the simpler method of conquest and confiscation. The separate Indian tribes were considered as sovereign nations during the treaty-making period and in 370 treaties they negotiated away nearly two billion acres of North America, leaving themselves 140 million acres at the end of that period in 1868. (The last treaty was made and ratified in 1868, but the process was not formally ended until 1871, after which Congressional and Executive "agreements" continued the procedure)(ICC 1978, 1).

The Indian Appropriations Act of 1871 brought an end to recognition of tribes as independent, sovereign nations and with that, an end to making treaties with tribes. Stipulating that no current treaties ratified prior to March 3, 1871, would be reversed, the Act stated:

…hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe (1871).

Poore notes, “…tribes were no longer separate states as found in Cherokee Nation v. Georgia. This obviously was a substantial diminishment of retained sovereignty” (1998, 66).
Chief Joseph of the Nez Perce said in 1879 of the diminishments:

Treat all men alike. Give them all the same law. Give them all an even chance to live and grow. All men were made by the same Great Spirit Chief. They are all brothers. The mother Earth is the Mother of all people, and people should have equal rights upon it. We only ask an even chance to live as other men live (1877).

Chief Joseph echoed Frederick Douglass, who had similarly said in an 1865 speech concerning newly emancipated slaves:

Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! I am not for tying or fastening them on the tree in any way, except by nature's plan, and if they will not stay there, let them fall. And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own legs! Let him alone!’ (Meyers 2011, 11)

While the tribes were no longer considered independent, sovereign nations, the federal government allowed tribal leaders to have limited local jurisdiction. However, according to Poore, this was not due to recognition of or a restoration of retained sovereignty. This type of jurisdictional power was no different than that which Congress gave territories. As early as 1819 in *McCulloch v. Maryland*, the Court had found that Congress gave the tribes very limited powers that were entirely subject to the United States constitution (1998, footnote 66, at 63). The extent of their jurisdiction was also subject to change upon decision of Congress.

For example, in 1881, in the case *Ex parte Crow Dog*, the U.S. Supreme Court found the federal government did not have jurisdiction over a tribal member who murdered another tribal member. Indian on Indian crime was considered the jurisdiction of tribal leaders. As a result, Congress passed the *Major Crimes Act of 1885*, which removed tribal jurisdiction over seven felony crimes. Since then, the list of crimes subject to federal jurisdiction has grown to include:

…murder, manslaughter, kidnapping, maiming, a felony under chapter 109A [aggravated sexual abuse, sexual abuse, sexual abuse of a minor or ward, abusive
sexual contact], incest, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery and a felony under section 661 of Title 18 [within special maritime and territorial jurisdiction of the United States, the taking away with the intent to steal the personal property of another] \(^{32}\) (FOCSE 2005, 36).

Along with the *Major Crimes Act*, Congress has over the years passed various Trade and Intercourse Acts that have increasingly called into question tribal sovereignty. “As time passed, the allowable intrusion into Indian country and affairs increased” (J. A. Poore 1998, 66).

In 1886, *United States v. Kagama* upheld the *Major Crimes Act*, the 1871 *Appropriations Act*, and Congress’ plenary power over tribes. The Court made clear that the power the federal government had over the tribes was based on their location within U.S. boundaries, not due to the commerce clause. According to the Court, the federal and state governments were the only sovereigns (J. A. Poore 1995/1999, 20). The Court wrote:

> But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the states of the Union. There exists within the broad domain of sovereignty but these two (Kagama, 118 U.S. at 379).

### Moving Off the Reservation

The General Allotment (or Dawes) Act of 1887

Almost four decades after creating the reservation system, Senator Henry Laurens Dawes sponsored the *General Allotment Act*,\(^ {33}\) a bill fulfilling the intent of many treaties to provide

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\(^{33}\) *General Allotment Act* 24 Stat 388
land and tools necessary for people to gradually adapt to the prevailing economy. The Act gave permission for reservation land to be surveyed and divided into equal parcels so titled portions could be given to individual tribal members. The head of a household would receive 160 acres, a single adult or an orphan under the age 18 would receive 80 acres, and all others under the age of 18 who were born prior to the date of the President directing an allotment on their

34 ARTICLE VI of the Laramie Treaty (1868): “If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "Land Book" as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it. Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed” (United States 1868)

35 ARTICLE 2 of the Treaty with the Chippewa (1855): “And at such time or times as the President may deem it advisable for the interests and welfare of said Indians, or any of them, he shall cause the said reservation… to be surveyed; and assign to each head of a family, or single person over twenty-one years of age, a reasonable quantity of land, in one body, not to exceed eighty acres in any case, for his or their separate use; and he may, at his discretion, as the occupants thereof become capable of managing their business and affairs, issue patents to them for the tracts so assigned to them, respectively; said tracts to be exempt from taxation, levy, sale, or forfeiture; and not to be aliened or leased for a longer period than two years, at one time, until otherwise provided by the legislature of the State in which they may be situate, with the assent of Congress. They shall not be sold, or alienated, in fee, for a period of five years after the date of the patents; and not then without the assent of the President of the United States being first obtained. Prior to the issue of the patents, the President shall make such rules and regulations as he may deem necessary and expedient, respecting the disposition of any of said tracts in case of the death of the person or persons to whom they may be assigned, so that the same shall be secured to the families of such deceased person; and should any of the Indians to whom tracts may be assigned thereafter abandon them, the President may make such rules and regulations, in relation to such abandoned tracts, as in his judgment may be necessary and proper” (United States 1855).

36 ARTICLE 8 of the Treaty with the Sioux – Sisseton and Wahpeton Bands (1867) “All expenditures under the provisions of this treaty shall be made for the agricultural improvement and civilization of the members of said bands authorized to locate upon the respective reservations, as hereinbefore specified, in such manner as may be directed by law; but no goods, provisions, groceries, or other articles—except materials for the erection of houses and articles to facilitate the operations of agriculture—shall be issued to Indians or mixed-bloods on either reservation unless it be in payment for labor performed or for produce delivered: Provided, That when persons located on either reservation, by reason of age, sickness, or deformity, are unable to labor, the agent may issue clothing and subsistence to such persons from such supplies as may be provided for said bands.” (United States 1867) and:

ARTICLE 9: “The withdrawal of the Indians from all dependence upon the chase as a means of subsistence being necessary to the adoption of civilized habits among them, it is desirable that no encouragement be afforded them to continue their hunting operations as means of support, and, therefore, it is agreed that no person will be authorized to trade for furs or peltries within the limits of the land claimed by said bands, as specified in the second article of this treaty, it being contemplated that the Indians will rely solely upon agricultural and mechanical labor for subsistence…” (United States 1867)
reservation, would receive 40 acres. Further, as some treaties had stipulated, land that was left over after the allotment would be available to non-tribal members (Congress 1886).

Dawes and Senator Richard Coke, who had preceded Dawes as Chair of the Indian Affairs subcommittee, both believed this law would “make Indians part of the nation, bringing them under the "shelter" of the Constitution”

The Supreme Court in Montana v. United States agreed that the intent of the Act was to foster assimilation. The Court stated:

…The policy of the [Allotment] Acts was the eventual assimilation of the Indian population…throughout the congressional debates…it was assumed that the ‘civilization’ of the Indian population was to be accomplished, in part, by the dissolution of tribal [political] relations… (1981, at 559, n. 9).

Further, the Court stressed in Montana that Congress never intended for tribes to have regulatory authority over non-tribal members who purchased the former reservation land (J. A. Poore 1998, 62). The court stated, “It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government” (Montana v. United States 1981).

37 Ninth proposal of the Agreement with the Sisseton and Wahpeton Bands of Sioux Indians, Appendix (1872): “At the expiration of ten (10) years, the President of the United States shall sell or dispose of all the remaining or unoccupied lands in the lake Traverse reservation, (excepting that which may hereafter be set apart for school purposes;) the proceeds of the sale of such lands to be expended for the benefit of the members of said bands located on said lake Traverse reservation; and, at the expiration of fifteen (15) years, the President shall sell or dispose of all the remaining unoccupied lands (excepting that which may be hereafter set apart for school purposes) in the Devil’s Lake reservation; the proceeds of the sale of such land shall be expended for the benefit of all members of said bands who may be located on the said Devil’s Lake reservation” (United States 1872).

38 ARTICLE 6 Treaty with the Omaha (1854): “And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States” (United States 1854).

39 See Bordewich, supra note 5, at 119 (J. A. Poore 1998, 63).

40 Montana, 450 U.S. at 559 n.9.
That said – dicta elsewhere in the *Montana* opinion states that tribal governments have retained a certain amount of sovereignty and can exert limited jurisdiction over non-members, even on non-Indian fee lands. This jurisdiction would apply only when the non-tribal member had voluntarily consented to a contract relationship or when the non-member was a clear danger to the community (J. A. Poore 1998, footnote 63, at 62).

Poore also notes that in *Hagen v. Utah*, the Supreme Court held that Congress had diminished the Uintah Indian Reservation when unallotted land was removed from tribal control. The Court stated, “In light of our precedents, we hold that restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with continuation of reservation status” (1998, 64). Not all tribes were subject to the Dawes Act, however. Due to terms within several treaties, a few tribes were initially exempted from the allotment process. Section Eight of the Dawes Act exempted what were known as the “Five Civilized Tribes,” among a few others. Section Eight stipulates:

That the provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order (US Govt 2008).

On March 3, 1893, in effort to set the five tribes on the same path to individual self-sufficiency most other tribes were on, Congress appointed a commission to investigate rumored troubles in Oklahoma Indian Country and assist them in the allotment process. The Commission became known as the Dawes Commission, after Senator Dawes, its first chairman (NARA 2017). The Commission later reported to Congress that the state of affairs on the reservations was tragic and irreparable. The U.S. Supreme Court quoted from the Commission reports:

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41 *Hagen*, 510 U.S. at 414. (1994)
It is apparent to all who are conversant with the present condition in the Indian territory that their system of government cannot continue. It is not only non-American, but it is radically wrong, and a change is imperatively demanded in the interest of the Indian and whites alike, and such change cannot be much longer delayed. The situation grows worse and will continue to grow worse. There can be no modification of the system. It cannot be reformed. It must be abandoned and a better one substituted. That it will be difficult to do your committee freely admit, but because it is a difficult task is no reason why Congress should not at the earliest possible moment address itself to this question (Dawes Commission 1895) (Stephens v. Cherokee Nation 1899, at 451).

The Commission also warned Congress that there was a danger of violence between settlers and tribes if the situation continued:

…It cannot be possible that in any portion of this country, government, no matter what its origin, can remain peaceably for any length of time in the hands of one fifth of the people subject to its laws. Sooner or later violence, if nothing else, will put an end to a state of affairs so abhorrent to the spirit of our institutions. But these governments are of our own creation, and rest for their very being on authority granted by the United States, who are therefore responsible for their character. It is bound by constitutional obligations to see to it that government everywhere within this jurisdiction rests on the consent of the governed. There is already painful evidence that in some parts of the territory this attempt of a fraction to dictate terms to the whole has already reached its limit, and, if left without interference, will break up in revolution (Dawes Commission 1895) (Stephens v. Cherokee Nation 1899, 451-452).

The Curtis Act of 1898 invalidated the treaties that interfered with the allotment. The Dawes Commission was now tasked with dividing the land of the Five Civilized Tribes into parcels for individual members. While some saw the sinister motivation for the Allotment Act, others saw it as the only possible path for a functioning society. Historian D. S. Otis wrote concerning a hearing on the Dawes Act:

It makes understandable the entire subsequent working out of the allotment program. It was apparent that the Indian system was being smashed by the white economy and culture. Friends of the Indian, therefore, saw his one chance for survival in his adapting himself to the white civilization. He must be taught industry and acquisitiveness to fit him for his ‘ultimate absorption into the great body of American citizenship.’ Making him a citizen and a voter would guarantee to him the protection of the rules under which the competitive game of life was played (Otis 1973).
Indian Citizenship Act of 1924

Congress had chosen to grant citizenship to tribal members who received allotments or who voluntarily moved away from Indian Country because it did not intend Indian Reservations or tribal governments to be permanent. Poore notes that “Citizenship of Indians diminished or eliminated tribal sovereignty that was inconsistent with the Constitutional rights of citizens” (J. A. Poore 1998, 58). Poore explains:

The Acts themselves provided that the Indian citizens could not be deprived of equal protection by either the state or territory in which they resided. The dicta in Duro42 notwithstanding, traditional constitutional law principles, including equal protection, would require that when Congress granted citizenship to all Indians, it eliminated any power or retained sovereignty of tribes inconsistent with the Constitution (J. A. Poore 1998, 61).

Further evidence of the diminishment of the reservation system is found in In re Heff (1905).43 Citing the 14th Amendment, the Supreme Court found in Heff that Congress intended that when tribal members became United States citizens, they become citizens of the states and territories where they reside (J. A. Poore 1998, footnote 71, at 64). The 14th Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Secondly, section 6 of the Dawes Act also pronounces:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member …to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom

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43 In Re Heff 197 U.S. 488 (1905)
allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe…is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner affecting the right of any such Indian to tribal or other property (US Congress 1887).

Even before tribal members were given citizenship, the Supreme Court indicated all citizens have the same rights. (J. A. Poore 1998, 60). In 1824, Chief Justice Marshall stated, “A citizen…becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights” (Osborn v. Bank of the United States 1824).

Nevertheless, tribal members were treated as though they were not covered by the Constitution. Consequently, in 1924, Congress passed the Indian Citizenship Act of 1924, which granted citizenship to all resident “Indians” who up to that point had not been citizens. Congress also removed the ground that had made clear their lack of citizenship. The parallel Revenue Act of 1924 affirmed there was no longer any “Indians, non-taxed.” The Indian Citizenship Act, also known as the “Snyder Act,” read:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all noncitizen Native Americans born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Native American to tribal or other property (United States 1924).

Poore notes that Congress had granted Citizenship to some tribal members prior to 1924 with an understanding that the Constitution protections would apply to them. "Congress clearly

44 43 Stat. 253, Ch. 233 (1924)
did not intend for Indians to be subject to unconstitutional actions of tribes when it began granting citizenship to Indians” (J. A. Poore 1998, 60-61). Unfortunately, passing of the citizenship act did not ensure Constitutional protections for all tribal members. Further, despite the allotment, restrictions on trust property remained. Lawrence wrote:

In 1924, the Indian Citizenship Act extended national and state citizenship to all Indians born within the territorial limits of the United States who were not already citizens and granted them the right to vote. This Act should have made Indians equal to all other citizens of the United States, with the same Constitutional protections, rights, and responsibilities. But the federal government has continued to treat Indians separately from other citizens, especially if they live on reservations (Lawrence 2002, 395).

According to Allen, International law and the origin of ‘title’ to North America are now moot issues. Dr. Allen explains:

Technically, none of the titles apply today. They provide historical explanation, but legal status now traces to the legislative grant of citizenship in 1924. Accordingly, the discourse about treaty rights is mis-leading. The treaty commitments describe moral commitments more than legal commitments and the sovereignty claims are no stronger than the sovereignty recognized in the states (W. B. Allen 2018).

The Meriam Report of 1928

The Meriam Report was a comprehensive study on the economic and social conditions within tribal communities in the first quarter of the twentieth century. The Institute for Government Research (now known as the Brookings Institution) was asked to conduct the study in 1926 (NAU 2005) by Secretary of the Interior Hubert Work (The Institute for Government Research 1928, vii).

Technical Director, primary editor, and the man whom the report was nicknamed after, Lewis Meriam, began work on the project on June 12, 1926 and additional staff began work in October 1926. Field work began shortly after, in November 1926, and continued almost nonstop for seven months. In that time, the staff visited ninety-five tribal jurisdictions including
“reservations, agencies, hospitals, schools,” and many of the communities that tribal members had migrated to. Almost all Western States with significant tribal populations were included. Following the field survey, compilation of the report began in June 1927 (The Institute for Government Research 1928, vii). Areas of interest to the survey staff included:

1) A General Policy for Indian Affairs
2) Health
3) Education
4) General Economic Conditions
5) Family and Community Life and the Activities of Women
6) The Migrated Indians
7) The Legal Aspects of the Indian Problem

While it is said that Commissioner of Indian Affairs John Collier used the findings of this report as foundation for the Indian Reorganization Act of 1934 (NAU 2005), it is interesting to note aspects of the report that do not conform to Collier’s views concerning Indian Country. For example, the Meriam report fully supported missionary work within the reservation system. The report stressed the need for cooperation between the federal government, churches and missionaries, noting that positive aspects of cooperation depend on spiritual qualities such as “charity, fairmindedness, tolerance, forbearance, and a willingness to ignore minor differences for the sake of achieving common ends” (The Institute for Government Research 1928, 812).

According to the report, adequate cooperation brings together different groups for the purpose of discussing common ends and assists in avoiding misunderstanding of each other’s point of view. For this reason, the report stated that missionaries facilitated cooperation and understanding. The survey staff reported that many of the missionaries “were of noble blood and had renounced titles and estates to engage in the work” (The Institute for Government Research 1928, 812). Further, they reported:
…nearly all were of such exceptional ability as to have commanded attention in any community and to have possessed themselves of wealth and reputation, has they so chosen; yet they deliberately faced poverty and sufferings, exile and oblivion, ingratitude, torture, and death itself in the hope that some portion of a darkened world might be made better through their effort (1928, 812).

The survey staff found the missionary activity dominated by “a high spirit of service, sacrifice and devotion.” The report admitted that “isolated instances” of human traits such as selfishness were bound to exist even in missionaries, but those instances were rare and “never should be accepted as indicting missionaries as a class. The group as a whole is earnest, devoted and self-sacrificing” (The Institute for Government Research 1928, 823). The activities the missionaries engaged in were also said to be of an “extremely high order” and at times, their work and equipment exceeded that of the government. The Ursuline Sister’s school in St. Ignatius, Montana, is mentioned as a prime example, as well as Bloomfield, Oklahoma (1928, 823). The report notes that “Good lives are the most effective sermons. Indians, like all other human beings, are more influenced by deeds than words.” Missionaries are “rich in a varied expression of Christian love in the form of good works” (The Institute for Government Research 1928, 834).

The survey staff also interviewed “migrated Indians” and recorded their responses. The report states that although most of those interviewed believed that the dishonesty and cheating by Indian service officers was now - for the most part - a thing of the past, they remain wary due to the exploitation in the past. This wariness was true even in those who had left the reservation system to live in the city. Media attention concerning dishonest federal and state personnel and the “failure of the courts to punish those in high positions” are cited as reason for the despair of tribal members. Still, some tribal members who moved to the city told survey staff that some in the Indian agency had tried to prevent them from giving a tribal point of view to the Indian
office, even though they had been asked to by other tribal members. Interestingly, despite the
wariness, the report noted that both city-dwelling tribal members and their reservation
counterparts are often preyed upon by “glib talkers” who want them to make statements to
“magazines, newspapers, or the League of Nations” concerning the rights of tribal members”
(The Institute for Government Research 1928, 740). They are at “the mercy of all kinds of
attorneys who assure them of the validity of various apparently fantastic claims.” One tribal
member stated the Indians have confidence in those who damn the people they damn, and the
people the Indians damn are those in the Indian Bureau” (The Institute for Government Research
1928, 740). The report notes concerning those who were manipulating tribal members:

> Because they play upon past wrongs in the handling of Indian affairs and can cite
> present instances of injustice, unscrupulous persons without intention to deal with
> present problems, or incompetent persons who can get no further than talk and
> agitation have practically as much chance to secure leadership as have intelligent,
> interested Indians and whites with the intention, ability, and resources for the study
> and prosecution of legitimate claims through proper channels (1928, 741).

> While some tribal members who are “spiritually tied to their people back on the
> reservation” have seen the fallacy of giving everyone their fee patents and hoping for the best,
> others “impatient of the initial delay for a well thought-out program, urge the compulsory
> removal of children from reservation life so the next generation may go forward with less strain.”

When asked what effect that would have on the family, one tribal member stated and others
inferred, “The homes that are broken up are either unfit or practically non-existent…there is no
alternative to ruthless breaking away, although the Indian who successfully makes the break
should feel no obligation to help those left behind” (1928, 741).

Others mentioned that while Congress designated portions of the Indian appropriations
for “civilization purposes,” bureaucrats decide priorities and how that goal will be met. But
survey staff found the tribal members most often asked that federal government simply:
1) Set aside the present denial of the Indian's right to a dignified means of presenting to the agency or department his views and problems on matters affecting his welfare.
2) Prevent the very general discourtesy, harshness, and unsympathetic attitude on the part of agency employees.
3) Break down the refusal to explain to Indians the uncomprehended procedures and inconsistent policies subject to arbitrary reversal.
4) Secure a determination of general or individual enrollment rights, without Indians being saddled with court costs, and with such decisiveness that the arbitrary charges and reversals of the government in the past may not reoccur, and this by some other means than the government's present proposal that Indians incur the expense of legal counsel so that the government may ascertain the Indian's legal status and the accuracy of government solicitors' opinions heretofore accepted by the government and sometimes later set aside.
5) Do away with the present practice of forcing the Indians to lease land they desire to farm; or at least prevent leases and grazing permits at less than current rates in the same locality.
6) Demand reliable bondsmen of lessors and provide for adequate procedures to collect bond for breach of contract.
7) Secure the restriction of non-Indian cattle to the designated leased area so as to prevent devastation of Indian ranges, and authorize the sale of predatory horses that consume Indian ranges (The Institute for Government Research 1928, 742).

These requests aside, the survey staff found that federal Indian policy, including the loss of individually allotted property, to this point had caused harm to tribal members and changes were necessary. To this the report recommended immediate financial expansion in the activities of the Indian office, including:

1) To improve the quantity, quality, and variety of diet available for Indian children in boarding schools, seek from Congress at the earliest possible moment an additional appropriation of one million dollars, to be immediately available.
2) For the directing, developmental, and planning work of the Service, seek from Congress at the earliest possible moment, to be immediately available, appropriations for the following purposes:
   a. The establishment of the recommended Division of Planning and Development, $250,000.
   b. The employment of six medical specialists to aid the director of medical work and for their necessary expenses, $50,000.
   c. The employment of a senior personnel officer and an assistant personnel officer and for their necessary expenses, $15,000.
   d. The employment of a senior statistician and of statistical clerks and for the purchase of statistical equipment, $20,000.
3) For the general improvement of the Indian Service, seek from Congress for the next fiscal year an emergency lump sum appropriation of $5,000,000, to be available for:

a. Classification and salary standardization of existing positions in the Indian Service according to the Classification Act of 1923, such classification and salary standardization to be subject to the approval of the Federal Personnel Classification Board and to be based on the duties and qualifications which will be required to bring the positions up to a reasonable standard.

b. The creation of new positions in the fields of health, economic advancement, education, and social development at salaries to be fixed according to the new Indian Service classification, as approved by the Federal Personnel Classification Board.

c. Bringing institutions already authorized by law which are to be kept as permanent to a reasonable standard with respect to state of repair and equipment.

d. Establishing public health clinics.

e. Adding additional grades to existing Indian day schools, opening new day schools and providing school transportation for day school pupils, with a provision that not to exceed $300,000 may be spent for necessary construction.

f. Hiring additional labor force at the boarding schools to reduce the amount of purely productive labor required of Indian children with the provision that not more than $200,000 may be expended for the purchase of labor-saving machinery.

4) Take up with the United States Civil Service Commission the matter of securing promptly an adequate supply of properly qualified employees for the positions as reclassified with the new salaries:

a. Doctors

b. Dentists

c. Public health nurses

d. Graduate general nurses

e. Dental hygienists

f. Agricultural demonstration workers

g. Employment agents

h. Home demonstration workers

i. Social caseworkers

j. Recreation workers

k. Schoolteachers

  i. School supervisors

l. Industrial teachers of various types

m. Director of boys' activities in boarding schools

n. Director of girls' activities in boarding schools.

(The Institute for Government Research 1928, 53-55)
Nevertheless, in strong contest to Collier’s view, the general recommendations of the report also proposed an end to federal administration of tribal concerns, gradually replacing it with state administration. The report states:

That it is in general highly desirable that the states should as rapidly as possible assume responsibility for the administration of activities which they can effectively perform alike for whites and for the Indians with a single organization, with the exception of activities that are directly concerned with Indian property. Experience tends to demonstrate that national control and supervision of property must be about the last of the activities transferred to the states. To avoid any possibility of misunderstanding regarding the position taken with respect to the taxation of Indians, it should be clearly stated that it is regarded as highly desirable that the Indians be educated to pay taxes and to assume all the responsibilities of citizenship. The survey staff by no means advocates the permanent existence of any body of tax-exempt citizens or a policy of indefinitely doing for people what they should be trained to do for themselves. The matter of taxation, however, like other problems in the Indian Service, should be approached from the educational standpoint. In the first lessons in taxation the relationship between the tax and the benefit derived from it by the Indians should be direct and obvious. The form of the tax should be one that has real regard for the capacity of the Indian to pay. The old general property tax has many defects as a system for well-established white communities; it is often ruinous as a first lesson in taxation for an Indian just stepping from the status of an incompetent ward of the government to one of full competency. His chief asset is land which bears the full brunt of his tax, and he has relatively small income from which to meet it. An income tax would be far better for the Indian just emerging from the status of incompetency than the general property tax. What is advocated is not that the Indian be exempt from taxation, but that he be taxed in a way that does not submerge him.

A few words should also be added to prevent misunderstanding with respect to the position taken in the matter of cooperation with the states. Such cooperation is highly desirable. Ultimately most of the Indians will merge with the other citizens and will secure government service mainly from the state and local governments. The sooner the states and counties can be brought to the point where they will render this service and the Indians to the point where they will look to the government of the community in which they live, the better (The Institute for Government Research 1928, 99).

The Meriam Report concluded that the basic weakness of federal Indian policy, or “Indian Administration,” was that the past emphasis had usually been on “the Indian's property rather than on the Indian himself.” (NAU 2005). According to the American Indian Policy Review Commission (AIPRC) a few decades later, “…the Meriam Report recommended that ‘no
effort be devoted toward building up an independent organization in such cities for migrated Indians, but rather toward establishing cooperative relations with existing agencies which serve the population as a whole’ (AIPRC 1977, 431).

The Institute published its findings and submitted its report, officially called “The Problem of Indian Administration,” to Secretary Work on February 21, 1928.

Following the Meriam Report, the Senate Committee on Indian Affairs presented Resolution 79 to conduct a general survey of tribes and tribal members across the United States to assess their condition and needs. This survey, which lasted over a decade, resulted in an extensive report, which later informed the Indian Reorganization Act of 1934. “This 41-part report to the U.S. Senate Committee on Indian Affairs details the conditions of life and the effects of policies enacted by the Bureau of Indian Affairs on Native Americans. It provide insights into many major tribes: Sioux, Navaho, Quapaw, Chickasaw, Apache, Pueblo, Ute, Cherokee, Cheyenne, Arapaho, Kickapoo, Klamath, and many others” (US Congress. Senate 1929). This survey will be explored more deeply in a later paper.

**Assimilation Stopped: The Reservation System Reinforced**

**Indian Reorganization Act (IRA) of 1934**

According to former Montana State Representative Rick Jore, many officials today believe Indian treaties were intended to create "permanent homelands" for the tribes. However, Jore maintains this is incorrect. He asserts:

They were intended to transition the tribes away from a ‘tribal’ and ‘nomadic’ culture into a ‘private property, agrarian’ culture so as to ‘assimilate’ them into the dominant culture/law system. This effort culminated in the 1924 *Indian Citizenship*
Act but was then reversed somewhat by the 1934 Indian Reorganization Act\(^45\) when ‘severability’ (allotment) was stopped and the ‘remaining surplus lands’ within reservations was ‘restored’ to tribal ownership (Jore 2016).

Allen comments that “The 1924 blanket grant of citizenship to all American Indians proved to be the gift of an ‘Indian giver,’ for in 1934 Congress passed the IRA …and …reasserted authority over tribes as wards of the federal government” (2010, 21).

While under the premise of increasing tribal self-government, Congress and tribal leaders knew 85 years ago that the IRA – the ‘Indian New Deal’ under Franklin Roosevelt – would re-renew and re-extend federal “guardianship” control over tribal members. A 1934 fact sheet put out by the Mission Indian Agency in Riverside, California, stated:

This bill specifically provides, in section 11 of title 1, that Federal guardianship of Indians and tax exemption of Indian lands shall be continued. It does offer a way in which Indians may, if they wish, bring an end to objectionable features of the present Federal guardianship by gradually assuming local control over matters which the Indian Office now handles (Mission Indian Agency 1934).

Attorney, professor of Philosophy, and later author of the *Handbook of Federal Indian Law*, Felix S. Cohen was primary drafter of the IRA. Collier, using the Meriam Report as basis, wanted assimilation to be abandoned. Cohen was brought in to help do that.

According to Kingfisher, the IRA “was drafted without any direct input from, let alone in consultation with, Native People.” He states Cohen, Collier, and Solicitor Nathan Margold “saw Native involvement as unnecessary when drafting this important piece of legislation.” Tribal governments only learned of it after the bill had already been submitted to the Indian Affairs Committees; amended and passed. It was only after everything was finished that tribes were able to weigh in (Kingfisher, 2016, pp. 92-93).

\(^{45}\)Indian Reorganization Act, 48 Stat. 984 (1934), also known as the Wheeler-Howard Bill
Brett W. Curry, a reviewer of historian Dalia Tsuk Mitchell’s Cohen biography relates, “Aided by Cohen’s pragmatism and determination, Congress passed and President Roosevelt signed the IRA into law in 1934. However, in the wake of contentious congressional hearings …a number of Cohen’s most radical proposals were excised from the final bill” (Curry 2007).

Attorney Donald C. Mitchell explains that Section 2 of Title 1 originally authorized the Secretary of Interior to allow charters granting “such powers of government…as may seem fitting in the light of the experience, capacities, and desires of the Indians concerned.” Section 3 of Title 1 then authorized the charter to “‘prescribe a form of government adapted to the [Indians’] needs, traditions, and experience,’ ‘specify the powers of self-government to be exercised by the chartered community,’ and ‘provide for the planned extension of these powers as the community offers evidence of capacity to administer them’” (Mitchell 2016, 18). Senator Wheeler objected to these sections as well as several others. The bill that was eventually signed into law was not the extension of power what Collier had wanted.

However, Section 16, authorizing the adoption of tribal constitutions, had remained in the bill. The Constitution was permitted to vest three “inconsequential powers” to the tribe. Four months later, the DOI published a legal opinion concerning the “Powers of Indian Tribes.” The opinion, written by Cohen, purported to analyze what Congress had meant by the term “existing law” in section 16 (Mitchell 2016, 18-19). In doing this, according to Mitchell, Cohen “intentionally misconstrued” the intent of Senator Wheeler and the other members of the Senate and House Committees on Indian Affairs “…to give Indian tribes the legal authority” that Wheeler and the other members “intentionally withheld” (Mitchell 2016, 19). Cohen wrote:

…those powers which are lawfully vested in an Indian tribe are not, in general delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished…What is not expressly limited remains within the domain of tribal sovereignty… (Mitchell 2016, 19).
According to Mitchell, the retained inherent tribal sovereignty did not come through Congress, courts or historical record. It was an opinion written by a lone bureaucrat in 1934.

A report by the Department of Interior ten years after implementation of the IRA noted its purpose was “to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes” (Haas 1947). The National Congress of American Indians describes it this way: “The principal goal of the Indian Reorganization Act of 1934 was to halt and reverse the abrupt decline in the economic, cultural, governmental, and social well-being of Indian tribes caused by the disastrous federal policy of ‘allotment’ and sale of reservation lands” (NCAI 2017).

At this point, many tribal members had already taken their families and left the reservation system, never to return. Nonetheless, Lawrence contends the IRA “moved away from assimilation, again made Indians wards of the federal government, and provided for placing previously allotted land back into federal trust, with the federal government, not Indian people, holding the title.” According to Lawrence, it also established a process for landless tribes to become federally recognized and obtain land that would then be put under federal control. With the help of the IRA, “reservations expanded an estimated 7.6 million acres between 1933 and 1950” but at the same time, “BIA authority, programs, and staff were also expanded. Today, there are approximately 53 million acres of land in federal trust status for Indian tribes” (Lawrence 2002, 395-396).

The federal government’s tenth year study also cautioned that Tribal policies and powers are limited within the IRA, and tribal constitutions, by-laws and charters do not give tribal
councils power to control tribal members except in certain matters agreed upon by the tribal members:

They do not interfere with the pursuit by the members of their own private objectives except in such ways and to such an extent as the members themselves have agreed. They do not interfere with allotment rights or shares in tribal benefits. The property with which the Tribal Council may deal is only the property of the tribe as a whole, not that of the individual members (Haas 1947).

While the Supreme Court recognized that the policy of allotment was repudiated in 1934 by the IRA (Montana v. United States 1981, at 559, n. 9), Poore argues, Cohen notwithstanding, that the ‘repudiation’ did not result in reinstatement of any ‘retained inherent sovereign’ power.” Poore contends that Congress, through the IRA, merely offered new, limited power to tribes along with possibility of restoring the reservation systems (J. A. Poore 1998, 63).

The question of power and jurisdiction is pressing. According to Kingfisher, the same month that Cohen took his position as head of the Department of Justice’s Indian Law Survey in 1939, Collier’s office received notice of a court case “that was not covered by the 1885 Major Crimes Act.” The question posed was under which jurisdiction may a tribal member wife obtain a divorce from a non-tribal member husband. The situation was further complicated by the fact the husband had already “abandoned his wife and left the reservation.” The tribal courts did not have jurisdiction under current statutes (Kingfisher 2016, 168-169). Kingfisher writes:

Despite the long history of intermarriage between Natives and non-Natives of various tribes, especially among members of the Five Civilized Tribes, or the status Freedmen who married other African Americans, the Indian Reorganization Act, did not consider, let alone address the issue of …jurisdiction …regarding marriage to non-tribal members. This in turn impacted other issues such as determining tribal enrollment and heirship issues, especially in those instances when a non-Native or male from another tribe married into a previously matriarchal society where membership was traced through female family members. Instead…Cohen … imposed a patrilineal family structure on tribes who might not have such rigid concepts (2016, 169).
Further, by the time the IRA was passed, many non-tribal members had become established landowners within reservation boundaries. According to Tim Malone, Washington State’s Assistant Attorney General in the 1980’s, the IRA stopped erosion of the “Indian land base,” but it did not “restore the status quo…The non-Indians who were invited onto the reservations stayed there” (Malone 1988, 5). This, according to Malone, presented the first of the two major constitutional problems:

Do these tribal governments, revitalized as they are under the new federal policy adopted in the 1930’s, have governmental power over the non-Indians who remain on the reservations? That problem, I suggest, is becoming more acute each year, as Tribes claim the power to tax these non-Indians, to regulate their lands, to regulate and even take over their water supplies, and to make these non-Indians subject to tribal courts (Malone 1988, 5).

Tribal laws, regulations and courts grew in strength and number under the provisions of the IRA, but with this, concern that the civil rights of non-tribal members might not be protected. The IRA had also brought employment preferences into the reservation system, generating concerns of job discrimination against non-tribal members who were also low-income and in need of jobs. The preferences, however, were to ensure tribal members had opportunity for positions in local administration, allowing input into policies that would affect them. It also provided opportunities for income and economic growth within businesses located on tribal land.

Nevertheless, the BIA initially ignored IRA preferences in hiring, so tribal members brought suit in the 70’s. Law Professor Sarah Krakoff wrote that this forced the BIA to adopt a new policy:

To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe.” The Supreme Court in Mancari (1974)\textsuperscript{46} unanimously upheld this preference because it relied on a political distinction—membership in a federally recognized tribe—rather than a racial one (Krakoff 2017, 503).

\textsuperscript{46} Morton v. Mancari, 417 U.S. 535(1974)
The second constitutional issue noted by Malone was a “growing industry targeting off-reservation, non-tribal customers. State environmental protections can be ignored, and cigarettes and alcohol have been sold tax-free to non-Indians” (Malone 1988, 6).

Malone also predicted in 1988 that tribal governments, with their competitive advantage in the casino industry, would essentially set state policy in relation to gambling. This would be because the protections many treaties had established preventing white people from owning land or doing business within reservation boundaries were now broken down. Tribal governments were now increasingly pushing for jurisdiction over non-tribal members, as well as the ability to be legal havens for non-tribal businesses wanting to avoid state taxes or regulations (Malone 1988, 7).

Malone suggested businesses such as Kaiser Aluminum and Chemical, St. Regis Paper, U.S. Oil and Refining, Cavenham Industries, and Chemical Processors, Ltd. All seemed to have located within reservation boundaries to avoid state environmental regulations (Malone 1988, 18). Casinos have also enjoyed a certain amount of freedom from state taxes and regulations when locating within tribal boundaries.

Between non-tribal members who were already homesteaded and new businesses moving in, tribal governments needed to make clear within their constitutions who was a member and who was not. The IRA had established that each tribal government could now independently determine who was eligible for enrollment. Most tribes decided that at least ¼ blood quantum was necessary for membership. The Northern Ute tribe had the strictest criteria, requiring 5/8 blood quantum. Their membership numbers in 2013 were around 3000. Other tribes determined there would be no blood quantum at all – only the requirement that one’s blood line be traceable back to a historical membership roll. For example, the Cherokee tribe requires that heritage be
directly traced to the Dawes Roll. With that requirement, their membership has grown from 40,000 to well over 300,000 in 15 years (Cherokee Nation 2019) and currently includes thousands of children with as little as 1% heritage. Their membership already primarily consists of citizens with dominant European heritage, and in years to come, the percentage of actual tribal heritage will be even less. Several families with no living memory of relationship with the tribe have found their children or grandchildren suddenly subject to the jurisdiction of the Cherokee tribe when those children were in need of social services care, or if the parents considered giving a newborn up for adoption (CAICW 2014).

Cohen’s Handbook of Federal Indian Law (1942)

Almost every agency of federal government has departments working to ensure their programs meet the legal requirements for Indian Country. Having a manual that list treaties, statutes and regulations is essential. Just a few of the government agencies whose policies and decisions affect Indian Country are “the U.S. Department of Justice, Department of Commerce, Department of the Interior, Department of Agriculture, Department of Health and Human Services, Department of Energy and many others, including, of course, the Bureau of Indian Affairs” (Tribal Court Clearinghouse, 2014).

Cohen’s *Handbook of Federal Indian Law* has come to be known as the “bible” of federal Indian law. According to Malone, “…the Marshall-Cohen view, as accepted in modern times…decides or directly implicates each of the following central issues” (Malone 1988, 8):

- First, tribal powers are defined initially by looking to the entire store of authority possessed by any nation, not by searching for federal statutes establishing tribal prerogatives.
- Second, Indian tribes possess sovereign immunity.
- Third, tribes can exert regulatory authority over landowners with tribal territory because tribes are governments, not just proprietors.
• Fourth, limits on the powers of states and the United States in the Constitution do not restrict Indian tribes.
• Fifth, tribal existence depends on the tribes’ own will, not on recognition by the United States.
• Sixth, since tribes are separate sovereigns, general grants of federal jurisdiction do not allow for judicial review of tribal actions.
• Seventh, tribes possess the inherent authority to adopt regulatory laws without the approval of the Department of the Interior.
• Eighth, tribal courts, as the judicial arms of the local sovereigns in Indian country, are the proper courts to develop the factual records in the first instance when the extent of tribal authority is challenged in federal court.
• Ninth, tribal resource rights are measured in part by looking to the intent of the tribes— as inherent sovereigns possessing such rights before relations with the United States—at the time treaties of agreements were negotiated with the United States.
• Last, the fact of independent governmental authority allows courts to draw analogies between tribes and cities, states, and even the United States in order to justify exercises of tribal powers” (C. Wilkinson 1967, 62-63) (Malone 1988, 8) Bulleting added).

Felix S. Cohen had an incredibly quick mind - graduating from New York City College “magna cum laude, just before his nineteenth birthday” (Cohen [1942] 1971, viii). From there he went on to receive his Master of Philosophy at Cambridge by age of 20, completed his PhD residence at age of 21, his PhD from Harvard at age 22, and his Law degree from Columbia Law School two years later.

Kingfisher notes that it was while studying philosophy at Harvard that Cohen became interested in legal realism and legal pluralism. “Legal realism,” according to Cornell’s Wex Dictionary, is the “A theory that all law derives from prevailing social interests and public policy. According to this theory, judges consider not only abstract rules, but also social interests and public policy when deciding a case” (Legal Inf Inst 2019). “Legal pluralism,” according to Kingfisher, is the perspective that “society contained and should contain multiple centers of self-

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government,” combining experiences and viewpoints for the benefit of society as a whole (Kingfisher, 2016, p. 43). In law school, Cohen began incorporating legal pluralism into his writing.

Curry contends it would be good to know the “sequence of events that led a man with no policy specialization to Interior and, specifically, to a position of responsibility over Indian affairs” (Curry 2007). As a proponent of legal pluralism, Cohen was in the company of several of the most progressive individuals of his time. He was acquainted with the founder of the American Civil Liberties Union, Roger Baldwin; was influenced by a leading American socialist, Norman Thomas; and had met Oliver Wendell Holmes, who sought to rid jurisprudence of the principles of natural law and natural rights (Curry 2007). Cohen served a brief season as a law apprentice for a Justice on the New York Supreme Court and about a year in private practice before he was asked to assist with the ‘New Deal’ and work for the Department of Interior under the new Roosevelt administration ([1942] 1971, viii-ix):

The tremendous variety of administrative and legal problems that came within the jurisdiction of the Interior Department, and in which Felix Cohen had an important part, included territorial problems… Puerto Rico … Alaska, the Virgin Islands, martial law in Hawaii…the Philippines; problems of the conservation of our natural resources…; atomic energy legislation; problems involving immigration, minorities, fair employment practices; …and the many problems of Indian administration involving our first Americans – problems of law and order, of self-government, of eco-nomic welfare, of Indian land titles and treaty rights, and of the final disposition of tribal claims against the Government.

In 1939 he became a Special Assistant to the Attorney General on loan for one year to head the Indian Law Survey of the Department of Justice. With the assistance of a colleague and friend of long standing, Theodore H. Haas…he compiled a 46-volume collection of Federal laws and treaties, and on the basis of this special study prepared a Handbook of Federal Indian Laws which has since become a standard source book in Indian law.

At the Interior Department, Felix Cohen achieved a measure of renown not only as a lawyer and legal draftsman, but also as an administrator of one of the largest legal staffs in the government about 250 lawyers with one of the most successful litigation records of any Department.
…He resigned from the Department of the Interior on January 2, 1948, to re-enter the private practice of law, and was given the distinguished service award, Interior's largest honor, by the Secretary of Interior on March 16, 1949.

The first case he argued in court as a private attorney was one of which he was justly proud, the test case which secured for Indians the right to vote in the two states that still denied them their constitutional right as late as July 1948...He became general counsel to several Indian tribes and to the Association on American Indian Affairs. In that capacity he argued cases which won not only the right to vote, but also to participate in social security programs in states where such rights had been denied (Cohen [1942] 1971, ix).

Cohen enjoyed 15 years working for the Department of Interior as a major architect for both the IRA and legislation concerning the Indian Claims Commission of 1946. However, his brief stint as head the Indian Law Survey with the Department of Justice had not ended well. Mitchell contends that Cohen, while compiling documents for the Justice Department’s Indian Law Survey in 1939, had again played sleight of hand (Mitchell 2016, 20).

Cohen had been asked by the DOJ to organize the vast number of treaties, statutes, regulations and legal opinions that made up “Indian Law” into a manual that the department could use as a functional resource. As Secretary of Interior Harold L. Ickes later explained in the forward to Cohen’s Handbook:

Such...is the complexity of the body of Indian law, based upon more than 4,000 treaties and statutes and upon thousands of judicial decisions and administrative rulings, rendered during a century and a half, that one can well understand the vast ignorance of the subject that prevails even in ordinarily well-informed quarters. For more than a century, commissioners of Indian affairs have appealed for aid in reducing this unmanageable mass of materials to some orderly form. Yet during that period none of the attempts to compile a simple manual of the subject was carried to completion (Cohen [1942] 1971, 16).

Yet, Kingfisher states, despite the complexity, Cohen did not ask for help from historians or make extensive use of the Library of Congress (Kingfisher 2016, 187). In April of 1939, Norman Littell had come on as a new Assistant Attorney General and head of the DOJ Land’s Division, which oversaw Cohen’s work. Littell initially supported the creation of the manual,
stating, “[T]he present confusion of the law invites litigation, and a clarifying manual currently maintained would seem to be an essential instrument…” (Mitchell 2016, 20). But instead of compiling an objective tool for the use of the Land Division, Cohen, who, “according to historian Dr. Christian W. McMillian, ‘had never given the “Indian Problem” a shred of thought, much less met an Indian before he came to work for the government’” (Kingfisher, 2016, p. 3) told Littell:

…he was writing was a book that ‘would primarily fulfill for Indian law the function of a textbook in other branches of law, such as evidence or contracts.’ Even more important, rather than describing what Indian law was, Cohen wanted his book to describe what he thought Indian law should be (Mitchell 2016, 20).

After having read a draft of the chapters Cohen and his team had written, an aide tasked with monitoring the work told Littell:

All the material submitted gives evidence of inadequate research and lack of experience in the preparation of a law book designed to serve as a complete and accurate handbook for lawyers engaged in actual litigation. Difficult and complex problems are casually answered in the handbook by cursory paragraphs. General propositions of law are stated repeatedly without citation of authority. Citations that are made do not support the propositions for which they are cited (Mitchell 2016, 21).

Kingfisher, having examined Cohen’s personal papers, notes a certain amount of disorder in Cohen’s office. In an undated memorandum to Margold, Cohen admits “actual expenditures of the Survey were consistently under… budget estimations since various legal and clerical positions… were unfilled for substantial periods of time” (Kingfisher 2016, 138). Little’s assistant noted:

…the difficulties inherent on a project of this magnitude would seem impossible to treat the subject matter adequately within the time contemplated by a staff such as has been assigned this Survey. Indeed, many persons familiar with the problems have expressed the view that the subject matter is so vast – it cuts through the entire

48 Kingfisher notes at 138: Box 12 Folder 169 of the Legal Career: Indian Law Survey of Cohen’s personal papers.
field of law – that no staff could ever reduce it to an adequate handbook of usable proportions (2016, 163).

Littell terminated the project. Cohen returned to the DOI with all his materials, and his “Handbook of Federal Indian Law,” was subsequently published under the DOI instead of the DOJ. This treatise, which reiterated his assertion that the powers of tribal government were not “delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished,” was disseminated to each of the Supreme Court justices and was quickly embraced as a valuable reference (Mitchell 2016, 21). It was a unique and welcome resource, despite having only two citations of authority for his assertion on retained sovereignty: the legal opinion he himself had written following enacting of the IRA in 1934, and an article he had written 1940 for the Minnesota Law Review (Mitchell 2016, 21). Nevertheless, Margold cautioned:

This handbook does not purport to be a cyclopedia. It does not attempt to say the last word on the varied legal problems which it treats. If one who seeks to track down a point of federal Indian law finds in this volume relevant background, general perspective, and useful leads to authorities, the handbook will have served the purpose for which it was written (Kingfisher 2016, 136).

Having had this apparent success, Cohen supervised another pluralist vision for the DOI – the Alaska Development Plan. However, this effort was not successful, and Cohen began to “recalibrate his pluralist vision.” Further, President Truman’s Interior Department was not as welcoming of Cohen’s focus, instead “opting to view all groups through a single prism” (Curry 2007). Consequently:

Cohen became increasingly cynical, “no longer trust[ing] policymakers to create a plural polity” (p.264) He left Interior in 1948, convinced that his efforts to promote pluralism there could no longer be successful. Moreover, informed by his experiences, Cohen abandoned the belief that economic and political self-reliance among groups would, by itself, promote political tolerance (Curry 2007).
Curry explains that with the Warren Court’s “increasing emphasis on civil liberties and rights at home and a growing international emphasis on the protection of individual human rights,” Cohen’s focus on pluralist “group-centeredness” was no longer popular. With American law becoming more individualistic, Cohen shifted focus to figuring out why law and society were unable to “accommodate diverse interests and values” and how to accommodate the values of diverse groups when society and the legal system are focused on individual rights (2007).

The increasing emphasis on individual rights drove Cohen’s handbook out of print within 15 years. In its place, published 5 years after Cohen had passed away with lung cancer, was a 1958 edition written by others but still called “Cohen’s” handbook. This did not sit well with those who fully supported Cohen’s version of Indian law. Permission was obtained by the Law University of New Mexico to reprint the 1942 version. Robert L. Bennett, Director of the American Indian Law Center at the University of New Mexico and Frederick M. Hart, Professor of Law at the University wrote a forward for the reprint:

… For a forward-looking book to be lost or neglected is not only a loss to its author but to society. Such a book is Felix Cohen’s Handbook of Federal Indian Law, which has all but disappeared. First published in 1942, it has overcome a far too modest title, a difficult birth caused by war time shortages, and a bureaucratic attempt to discredit it. For those who know the book, it is an out-standing scholarly work by a truly significant American legal scholar… It required realization that any domain of law, but particularly the intricacies and peculiarities of Indian Law, demanded an appreciation of history and understanding of the economic, social, political and moral problems in which the more immediate problems of that law are entwined.

Felix Cohen's book is written as much for today as for 1942 since the problems that faced the Indian community in 1942 and the choices needed to solve them have changed little. Partly because of Cohen's many years of labor for the Indian, the dominant society is more willing to face these problems today. Unfortunately, the wisdom with which Cohen approached the recurrent questions has been largely unavailable for two reasons: (1) his Handbook of Federal Indian Law went out-of-print and (2) it is frequently confused with another, less significant volume.

In the early fifties, both the executive and the legislative branches of the Federal Government determined to follow a new policy concerning Indians: a
policy of terminating all tribes and ending Federal services to Indians. Cohen's book, which had been originally published under the auspices of the Department of the Interior, then proved embarrassing. Based on his painstaking studies and drawn from his rich background in law, philosophy, anthropology, and international affairs, it presented legal and moral arguments demonstrating that the American Indian was possessed of certain rights, among them self-governance and self-determination. The response of the Department of the Interior was simple: rewrite Cohen's book and discredit the original under the guise of a revision. The argument was that the Cohen work was outdated and failed to take into account the substantial changes that were claimed to have taken place during the intervening decade. But the introduction to the vulgate version clarifies the main purpose of the re- vision. It claims that one of the reasons for the rewriting was "for the purpose of foreclosing, if possible, further uncritical use of the earlier edition by judges, lawyers and laymen."

Soon the 1958 "edition of what was once Felix Cohen's work was the only book available on Federal Indian Law, and after the Government Printing Office's supply of this edition was exhausted, it was reissued by two other publishers. It became confused with the original work and is now often referred to as "Felix Cohen's Book" on Indian Law. But it is not. Many of the carefully considered arguments that were made by Cohen were omitted, and the theme of this 1958 edition is entirely different. From a well-reasoned, balanced discussion of the countless undecided questions (most of which are still unresolved), the book deteriorated into a volume with a new and constant theme: The Federal Government's power over Indian Affairs is plenary.

The 1958 edition is not Felix Cohen's work. Most people interested in Indian Affairs have not had access to his outstanding analysis of the applicable law and of the basic questions. The Indian policy of the early fifties has now been discredited and both major political parties disclaim it. With hope and confidence that Felix Cohen's work will benefit this and later generations, the American Indian Law Center has joined with the University of New Mexico Press in bringing back into print this volume, Felix Cohen's Handbook of Federal Indian Law, exactly as he wrote it (Cohen [1942] 1971, v-vi).

The Publisher's note to this edition reads:

Long out of print since it was originally published in 1942 by the U.S. Government Printing Office, this classic work on Federal Indian law, and the whole legal history of Indian-white relations, is here republished in a facsimile edition. It is, as Felix Frankfurter observed, the only book that has ever made sense and order from "the vast hodgepodge of treaties, statutes, judicial and administrative rulings, and unrecorded practice in which the intricacies and perplexities, confusions and injustices of the law governing Indians lay concealed."

Felix Cohen [1907-1953] wrote this monumental book when he was serving under Harold L. Ickes in the Department of the Interior as chairman of its board of appeals. His Handbook, Ickes pointed out in the foreword, "should give to Indians useful weapons in the continual struggle that every minority must wage to maintain
its liberties, and...it should [also] give to those who deal with Indians, whether on behalf of the federal or state governments or as private individuals, the understanding which may prevent oppression.”

This Handbook should not be confused with the vulgate version issued by the Government Printing Office in 1958, and since then reprinted by two other publishers. That expurgated edition was rewritten, according to its introduction, “for the purpose of foreclosing, if possible, further uncritical use of the earlier [1942] edition by judges, lawyers, and laymen.” As Philip S. Deloria of the Yale Law School observes comparing these editions, in the current 1958 book, “Tribal power and tribal abilities are downgraded; a preoccupation with federal power over the tribes is evident; Cohen's description of history is mitigated without specific disagreement or citation to opposing authorities. Where Cohen sees the tribes as sovereign peoples, entitled to self-government and responsible for their own destinies, the 1958 edition tends to see them as thorns in the side of the American system of government.”

The difficult problems and choices facing Indians and whites alike have changed little since 1942. What has changed is the willingness of the dominant society to accept responsibility for the situation and for working out with the Indians just and effective solutions to their problems. For such cooperation Felix Cohen's Handbook is as needed and useful a guide today as it was when written.

With the hope that Cohen's work will live again to benefit this and later generations, the American Indian Law Center of the University of New Mexico, directed by Robert L. Bennett and Frederick M. Hart, has joined with the University of New Mexico Press in reprinting the Handbook of Federal Indian Law exactly as Felix S. Cohen wrote it (Cohen [1942] 1971, xviii, Publisher's Note).

Cohen’s work did live on. The focus of the Handbook, just as the history of federal Indian policy itself, seemed to fluctuate with the waves of new administrations. Cohen’s last name or name in full were added to various later editions as indication of adherence to his original teachings (Kingfisher 2016, 137). The editors of the 1982 edition lamented “how beginning with the 1958 edition, “rich, well documented historical discussions were discarded”’” (Kingfisher 2016, 137, 203). The result of adding his name created impression “that Cohen’s work is a source document and that anyone doing research on Native law or policy will need to consult and cite it” (Kingfisher 2016, 203). What remains unclear is which version of the Handbook - the 1942 version, the corrected version in 1958, or the reverted corrected version of 1982 - is the ‘Bible.’
In 1995, the chair of the Legal Studies program at Connecticut’s Quinnipiac University, Professor Jill E. Martin, wrote an article entitled “A Year and a Spring of My Existence: Felix S. Cohen and The Handbook of Federal Indian Law.” In it, Martin examines the background of Cohen’s Handbook and discusses obstacles that Cohen potentially faced. Kingfisher notes that while Martin’s descriptions of historic events in her article “are, for the most part, factual,… her work is like so many others in that she is still convinced that the Handbook is ‘the bible of Indian law.’…that Cohen ‘analyzes all issues of American-Indian Law’ and that his conclusions are sound” (2016, 137).

Nonetheless, Martin’s article was reprinted in the forward of the 2012 edition of the Handbook and has been a source for scholars concerning the genesis of the Handbook (2016, 137). Editors of the 2012 edition also cite Cohen’s “Spanish Origins” article six times in the first chapter concerning “History & Background of Federal Indian Policy” and, like Cohen, claimed Marshall relied on Vitoria and Suarez for “their views on Native rights.” However:

…aside from his acknowledgement of the “Doctrine of Discovery,” Marshall never referenced either of these theologians in his written opinion in this case or in any of his opinions among the “Trilogy Rulings” cases. In fact, the historical narrative Marshall gives in his 1823 Johnson v. M’Intosh focuses on land patents given by the English monarchy and not Spanish law or policy, instead he wrote that “as a first principle in colonial law, that all titles must be derived from the crown” and cites jure belli claiming that Native People’s legal status is as “a conquered people” (Kingfisher 2016, 203-204).

Further, Cohen excluded the work of established Latin American historians, such as C. H. Haring and Lewis Hanke, “…whose work did show a stark difference between Spanish Native law and policy and that practiced or applied by the Americans to Native People” (Kingfisher 2016, 207). Nevertheless, Kingfisher states, “…this has not prevented legal scholars and even historians from continuing to cite Cohen’s work, despite the abundance of published work that
give a fuller and more accurate view of …origins for American Native law and policy” (2016, 204). Kingfisher writes:

Evidence of the dominance of Cohen’s historical perspective can be found in the 1990 book, *The American Indian in Western Legal Though: The Discourses of Conquest*, written by law professor Robert A. Williams Jr. Professor Williams, who was also an editor of the *Federal Indian Law* textbook, claims that because [of] Cohen’s “Spanish model thesis” law journal article that the writings of Vitoria has been “cemented permanently in the minds of United States Indian law scholars” and as Cohen originally claimed is proof of a “humane and rational basis for an American law of Indian affairs” (2016, 204-205).

References like Williams’ continue the unreasoned “acceptance of Cohen’s historical narratives” and the perception that he is “the leading twentieth century scholar on Indian rights” and law. (Kingfisher 2016, 205). However, Kingfisher contends that Cohen depicts Native People “as one, monolithic group” and questions why Cohen, with his “academic background and experience,” would do this. Rollings affirms that to understand tribal members, one must understand the cultural diversity between the tribes. He states:

> These tribal distinctions are intensified by the unique and special relationship Indian tribes have with the federal government, which is defined by 367 ratified treaties, 73 ratified agreements, and over 100 individual statutes. These individual tribal treaties with the federal government have defined their unique position, and linked their tribal identity with their individualized rights and privileges as defined by treaty (Rollings, 2004, p. 128).

Kingfisher speculates that “when given a writing assignment” by either Margold or Collier, “Cohen researched and wrote not as an intelligent and capable academic, but rather as a lawyer who purposely excluded evidence that did not support the argument he was told to make” (Kingfisher 2016, 206-207). It has now been said Cohen was admonished by superiors for going against the grain and writing the truth, and it has been said he was hired by superiors to go against the grain and write a specific narrative, truth or not.
Kingfisher hopes that “by presenting information supplied by Cohen’s papers, the reader is convinced that most of these recently published works simply regurgitate the same historical narrative regarding Cohen and his work and that it is time that scholars consider who supplied the historical narratives they use” (Kingfisher 2016, 138-139). He writes:

… [E]ven with the emergence of specialized fields within the discipline of history such as ethnohistory, and more recently the advent of New West historians, the academic community still appears to gravitate to one historical narrative when it concerns the origins of American Native policy and jurisprudence. The unfortunate result of this is that despite claims to be operating under a supposed scientific methodology and its accompanying claim of a more expansive and inclusive historical outlook, the majority of historians and scholars from other disciplines still appear to accept a single individual’s historical interpretation and narrative, that of Felix Solomon Cohen, as espoused in his seminal work The Handbook of Federal Indian Law. The problem with Cohen’s historical narrative is that it … is based on flawed or unsubstantiated claims from its inception, yet it is blindly perceived by a majority of scholars as both legitimate and credible. The result of this questionable historical narrative … is that all subsequent scholarship that cites this narrative has become contaminated with what amounts to little more than intellectual dogma (Kingfisher, 2016, pp. 1-2).

Nevertheless, while indeed a monumental and useful resource for documents related to Indian law, a there is a growing acknowledgment that Cohen’s work was not researched thoroughly enough to have adequately informed his conclusions. Allen notes:

The opacity of presumed “plenary power” law in the 20th century was silently revealed by Cohen, showing the entire idea to be a cruel hoax perpetuated by lawyers and jurists. At p. 42 Cohen defers discussion of Congress’ power to legislate over Indian affairs to Chapter 5, sec. 2.49 But in chapter 5, sec. 2, he observed that “all the scope of the obligations assumed and powers conferred has been discussed in chap. 3 (where the original reference to chapter 5, sec. 2 is found!) and need not be reexamined at this point (W. B. Allen 1990, 10).

Allen contends “a critical reading of Cohen’s work reveals that there is no fundamental basis for the claim” that Cohen’s Handbook is an authority on Federal government’s “plenary power.” Instead, the source of such power appears to result from merely the positive assertion of

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Justice Pursued

Indian Claims Commission Act of 1946

Prior to 1946, tribal property claims had to be handled on a case-by-case basis by the Federal Court of Claims, using “special jurisdictional acts” passed by Congress that allowed federal sovereign immunity to be waived for each separate case. One example is the Sioux Tribe’s initial filing for the “Fifth Amendment taking of the Black Hills” in 1920 (DOJ 2015).

According to the final report of the Indian Claims Commission, “The process of securing a jurisdictional act from Congress to grant access to the Court of Claims was an arduous one”:

From 1881 to 1890 the tribes filed 11 claims and secured awards on two, but 73 contracts, representing 61 more claims, were approved or pending with the Secretary of Interior. In the years following, to World War I, 20 more claims were filed with the Court and 12 resulted in recoveries totaling $13 million (1978, 3).

By 1946, there had been 200 such cases, and only 29 of those claims had been resolved for the tribes. Others had been thrown out on technical grounds. It became clear another method of dealing with the claims was necessary (ICC 1978, 3). Collier, as early as the 1930’s, had proposed a special tribunal to handle Indian claims (IHS 2019, 4). Members of Congress became particularly concerned after the case *Northwestern Bands of Shoshone Indians v. United States* (1945), which was thrown out for technical reasons. Many felt the tribe deserved a rehearing (Cohen, Original Indian Title 1947, 57).

Therefore, on August 6, 1946, Congress established the Indian Claims Commission\(^5\) and ensured the Act allowed re-hearings “in all cases heretofore dismissed for jurisdictional reasons”

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(Cohen, Original Indian Title 1947, 57). The Commission was further intended to resolve with finality “all existing tribal claims against the Government” (Cohen, Original Indian Title 1947, 43). President Truman stated while signing the Indian Claims Act on August 13, 1946:

This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights. Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 per cent of our public domain, paying them approximately 800 million dollars in the process. It would be a miracle if in the course of these dealings - the largest real estate transaction in history - we had not made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements with some 200 tribes. But we stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made (1947, 58-59).

All claims that existed as of August 13, 1946 were to be considered. Any tribe that had not yet filed a claim – whether a legal claim or moral - was encouraged to do so. The tribes had five years, until August 13, 1951, in which to make their filings. Any suit not brought during that time was to be forever forbidden by law. The Commission then had until April 10, 1957, to finish its work (US Congress. Senate 1973). According to the Department of Justice, “The Act was essentially remedial in nature and constituted a broad waiver of the United States’ sovereign immunity” (DOJ 2015). Along with lawsuits concerning damages for violation of the Fifth Amendment by taking titled lands from unwilling owners or for claims of inadequate compensation, two new types of claims were to be considered: claims for "unconscionable consideration,” and claims for breach of "fair and honorable dealings that are not recognized by any existing rule of law or equity" (DOJ 2015).

The DOJ notes that the Supreme Court held in United States v. Dann 51 that the main purpose of the Act was to resolve the Indian lawsuits “with finality” and that the "payment of

51 470 U.S. 39, 45 (1985)
any claim”…“occurs when the monies appropriated by Congress to pay a final judgment in favor of a plaintiff tribe are deposited in a special account in the Treasury to the credit of the tribe” (DOJ 2015). No further federal claims were to be considered after the Commission dissolved. The tribe’s acceptance of the funds awarded them was an acceptance of the final judgment and an admission of the Commission’s authority under the United States government. The Act stated, "The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters in the controversy” (DOJ 2015).

Aware of this deadline, tribal governments quickly hired attorneys to look through their history and documents for all possible causes of action. According to the final report, the total number of petitions filed during the five-year window was 370, which were separated into 617 dockets, resulting in “43 volumes of opinions and orders” (DOJ 2015). The average award was $2.4 million. Lawrence notes:

The federal Indian Claims Commission, which existed from 1946 to 1977, paid $880 million to a number of tribes as compensation for instances in which tribes had not received fair compensation for lands they sold to the United States in the nineteenth century. Tribes made over 500 claims before the Indian Claims Commission and won awards in 60 percent of them. Most were property rights claims (Lawrence 2002, 396).

The initial commission consisted of three men. In trying to give thorough consideration to all the complex claims, the process of researching documents and coming to a judgement was much slower than Congress had anticipated. Further, the ICC final report states:

It appears now that many of the Indian attorneys held off on filing to await the outcome of the early decisions. Also, many tribes had difficulty securing legal representation. And, as always in these claims, the case work-up was tedious and time consuming. The result was that in the last weeks of the 5-year filing period the activity increased tremendously. As this rush developed, congressional friends of the Indian made an attempt to extend the filing period for 1 year but failed. The flurry of claims filing intensified in the last month and a half of the filing period,
which saw double the number filed in the 4:6 years before. With all the claims in, the total came to 370 petitions that were divided eventually into more than 600 dockets. The Commission was confronted with a massive job. Almost all the 176 known tribes or bands filed one or more claims on old grievances. Only 17 tribes (as of July 1951) were undecided as to their desire to file claims and several said they had none (ICC 1978, 5).

By 1957, most of the claims remained unresolved. Thus, Congress extended the deadline by five years again, and again…and again, and finally expanded the Commission to five members in 1972 (US Congress. Senate 1973, 2). At that point, 208 claims had been settled for a total of $423,926,883.92, and 227 were still pending (US Congress. Senate 1973, 4).

The Commission was reauthorized for another five years but needed to request funding annually. When it came time for the 1977 appropriation, the bill passed both the Senate and House committees on Interior and Insular Affairs but was stopped on the House floor. A majority of the House balked and struck the wording that would have reauthorized the Commission. In its place, the House inserted wording to dissolve the Commission and transfer remaining dockets back to the Court of Claims. At this point, about 140 claims remained. The Senate and House were forced to go to conference and deliberate an agreement (US Congress. Conference 1976, 4).

The subsequent debate over renewal of the Commission lasted for 18 months (ICC 1978, 20). The Committee of Conference was “adamantly opposed to any further extensions of the Commission beyond the September 30, 1978 dissolution date” (US Congress. Conference 1976, 4). The eventual compromise was an administration bill with the 18-month extension to the end of September 1978. “Public Law 94-46.5 was passed on October 8, 1976” (ICC 1978, 20).

As of January 1, 1978, there were 102 dockets remaining. The Court of Claims had prepared for the transfer of unfinished cases by securing P.L. 9.5-69 in July of 1977 (P.L.), which more clearly defined how the transfer would be handled. “Less than 68 dockets remained
undisposed by September 1978, and the prospect for their final resolution by the Court of Claims within the hoped for 5 years seemed good” (ICC 1978, 20).

In their final report, the Commission noted that while the “process of Indian claims resolution has been a lengthy one and the Indian Claims Commission was simply an element of that process,” tribal communities did, indeed, have "their day in court":

The Commission was a court, complete with appellate [sp] review. And it was unique among courts in its jurisdiction over "moral claims” and having no statute of limitations except the requirement that the claims must have accrued prior to 1946. The tribes, represented by some of the best legal talent in the country, litigated more than .500 claims and won awards on over 60 percent of them (ICC 1978, 21).

Most of tribal governments that had submitted themselves to the judgement of this tribunal accepted its rulings and monetary awards. Tribal leaders signed papers and accepted funds knowing without doubt that the agreement entailed a forfeiture of rights over the land. The fact that not every tribe signed on the dotted line and accepted the funds is evidence that decisions to sign were made with clear understanding and ability to choose.

The final report of the Commission, summarizing the work of the Commission from August 13, 1946 through September 30, 1978, stated that it had “it succeeded in mitigating many of the problems which arose as a result of settlement and westward expansion in this country” (ICC 1978, ii). The last of the resolved cases was completed in the Court of Claims in October 2006 (DOJ 2015).

What the Indian Claims Commission revealed was not only that land had been ruthlessly taken from tribal governments and immediate compensation was required, but it indirectly revealed that tribal governments have willingly submitted to the sovereign authority of the federal government. It also indirectly revealed that, just as Vattel had premised, not all the land within North America in the early centuries was being used by tribal members. Tribal
governments as a group did not claim ownership or jurisdiction over every foot of the North American continent. Each tribe came to the tribunal with a claim over only the portions of land they felt were theirs - and this was with their own attorneys frantically searching for every possible claim, no matter how large or small. In some cases, two or more tribes came to the tribunal seeking compensation for the same portions of land. If it was found that the land was used by more than one tribe, sometime more than one tribe was paid.

The Claims Commission, therefore, has to the extent possible verified and mapped the land that was actually used by tribal governments. Nevertheless, in their final report, over 30 years after they began, the Commission noted:

Very few of the legal issues of Indian history have progressed to a point where a conclusion can be written to them. The legal history of Indian claims is certainly not one of these few. The Commission may terminate but, in spite of the Congressional mandate that Indian claims arising prior to 1946 also terminate, they will persist. The future of the debate on land claims rests now in a more searching examination of the treaties and the intent of both participants. It also lies in how far the Indians are able to push their claims for land and how far the United States is willing to acknowledge them. Between these contending positions the treaties will be interpreted or reinterpreted, or even revoked, as the ripening climate of American opinion allows it to happen (ICC 1978, 20).

Yet, it was the job of the Commission, by Congressional directive, to settle the issues with finality. If they could not answer all questions in their 30 years of research, then it is possible those questions will not ever be answered.


We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed... (General Congress 1776).
The United States’ Declaration of Independence states in its very first sentence that all men are created equal and are gifted with certain rights that no one can remove. Later, Supreme Court Justice James Wilson affirmed in his writings that the purpose of the United States Constitution was not to invent new rights, but to secure and enlarge the rights everyone already had by nature (Wilson 1790-91).

Nonetheless, not everyone fully understood what those natural rights were. Blackstone said in his commentaries, “The law which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind” (Blackstone 1803, 125,126). Arkes explains that what Blackstone was saying was that we give up our unrestricted natural rights when we enter society, including the ‘liberty to do mischief;’ exchanging those wild, natural rights for civilized rights, also known as ‘civil’ rights, which are enforced by government (2013, 961-962).

Wilson responded to Blackstone by asking incredulously, “Is it a part of natural liberty to do mischief to anyone?” (Wilson 1790-91). Arkes elaborates on Wilson’s rebuff:

When did we ever have a ‘liberty to do mischief”? When did we ever have, as Lincoln would say, a ‘right to do a wrong”? The laws that restrained us from raping and murdering deprived us of nothing we ever had a ‘right’ to do. And so when the question was asked as to what rights we give up in entering into this government, the answer tendered by the Federalists was, ‘none”52 (2013, 961-962).

In the mind of Wilson and many others, the constitution of the new United States did not impair or eliminate the God-given natural rights inherent to every human being, so it was unnecessary to craft a special “Bill of Rights” to bestow these fundamental liberties. Wilson asked, “How could we do that without implying that, in fact, we had given up the corpus of our natural rights in coming under this Constitution?” (2013, 961-962). They were concerned that by contending a

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52 Alexander Hamilton had said in Federalist paper No. 84, ‘Here…the people surrender nothing’ (Publius 1787).
Bill of Rights was necessary, it would be assumed that civil rights did not exist without it. Others saw the addendum as a clarification that the rights existed and a protection against them being ignored or forgotten. Still others assumed the rights needed to be bestowed.

When the Founding Fathers finally agreed on the wording of the bill – they did not state that these rights were for American citizens alone. In fact, the Bill of Rights does not use the word “citizen” at all, preferring instead the term “the People” (Bickel 1973, 370). Interestingly, the original names of many North American tribes were their own native word for “the People.”

Nevertheless, it did not take long following the birth of United States for the concept of basic human rights being intrinsic to all humans to be diminished. It was said that tribal members were not covered by the Constitution and therefore did not have basic rights – as if the rights were not inherent but through citizenship. Blacks, because they were deemed ‘slave property,’ were also denied civil rights. However, on April 9, 1866, following the Civil War, the Civil Rights Act was passed, promising citizens of all heritages the cover of natural civil rights. Except if they were “Indians non-taxed.”

In 1968, Congress finally passed the Indian Civil Rights Act (ICRA). Washington University professor Judy Lynch writes that this was in response to concerns that despite the new tribal constitutions created through the IRA, tribal governments themselves were abusing the rights of tribal members. Further, federal courts viewed these abuses as “internal controversies” under the jurisdiction of the tribes and refused to intervene (Lynch 1979, 908). Cohen’s 1942 edition of his Handbook of Federal Indian Law explains:

It is…always pertinent to ask whether an ordinance of a tribe conflicts with the Constitution of the United States. Where, however, the United States Constitution levies particular restraints upon federal courts or upon Congress, these restraints do not apply to the courts or legislatures of the Indian tribes. Likewise, particular restraints upon the states are inapplicable to Indian tribes ([1942] 1971, 124).
Lynch further notes that according to the 1958 edition of the *Handbook*, if an Indian desires constitutional protection – such as religious protection, for example - members of the Indian tribe must write the guarantees they desire into tribal constitutions. In fact, in 1958, many tribes had written such guarantees into tribal constitutions that were then in force. The *Handbook* notes this is important, because absent “such provisions, an Indian reservation may be, in some respects, a civil rights no-man's land where there is no relief against tribal oppressions because of the failure of Congress to make federal civil rights provisions…applicable” (DOI 1958) (Lynch 1979, 908).

Lynch reports that for seven years prior to the adoption of the ICRA, Congressional hearings inquired about the status of Indian rights. The Senate Subcommittee on Constitutional Rights heard testimony that of 247 tribes organized under the 1934 IRA, “117 had adopted constitutions protecting individual civil rights and 130 had not. The rights provided by the tribal constitutions, however, were found to be inadequate. 188 other tribes operated with no constitution at all (Lynch 1979, 909).

Examples of civil rights abuses included tribal courts that did not allow attorneys to represent the accused or only allowed other tribal members to represent the defendant. Some tribes did not allow an accused to remain silent. Some tribes did not allow for jury trials, and those that did sometimes struggled to motivate tribal members to serve jury duty. Juries also did not have to come to a unanimous decision – just a majority vote (Lynch 1979, 909). Following years of hearings, the Senate Subcommittee on Constitutional Rights urged Congress in 1968 to guarantee tribal members select portions of the Bill of Rights (Lynch 1979, 910). Section 1302(a) of the Act lists its general protections:

No Indian tribe in exercising powers of self-government shall—
1) make or enforce any law prohibiting the free exercise of religion or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
3) subject any person for the same offense to be twice put in jeopardy;
4) compel any person in any criminal case to be a witness against himself;
5) take any private property for a public use without just compensation;
6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have assistance of counsel for his defense (except as provided in subsection (b));
7) (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;
   (B) except as provided in subparagraph (C), impose for conviction of any offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of $5,000, or both;
   (C) subject to subsection (b), impose for conviction of any offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of $15,000, or both; or
   (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;
8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
9) pass any bill of attainder or ex post facto law; or
10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons. (1968).

While the ICRA is similar to the Bill of Rights in several respects, certain provisions were left out. For example, while guaranteeing freedom of religion, the ICRA does not prohibit establishment of a state religion. The Act also guarantees a right to counsel only at the defendant’s own expense (if the sentence will be under a year) and does not carry provision for a grand jury (Lynch 1979, 911). Additionally, the Act mandates equal protection under the Tribe’s laws, not federal or state laws. Note that 1302 (8) reads “No Indian tribe in exercising powers of self-government shall: (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;” (25 U.S Code
1968, § 1302(8)) (emphasis added). The laws of the tribe can be different than those of the state or federal government. Thus, Congress made a conscious decision not to provide tribal members - U.S. citizens - with the same protections guaranteed citizens in state and federal courts (Lynch 1979, 911). Metropoulos explains:

…the ICRA amendments, leaving aside for the moment their racially discriminatory aspect, clearly, knowingly subject U/S. citizens to the power of sovereigns unconstrained by the Constitution. This power is real. Tribes may fine a convicted defendant for up to $5000 and imprison him for up to a year in tribal jail for each offence. [In contrast,] [e]ven the power of Congress over Indians is limited by their rights as U.S. citizens (Brief for Amicus Curiae of TM. EM & RM 2003, 23).

Ominously, some tribes objected to the Indian Civil Rights Act – not because of the omission of civil rights and protections, but to inclusion of certain protections. They objected that the language was too similar to the federal Bill of Rights (Lynch 1979, 911). Senator Sam J. Ervin responded to criticism saying:

I realize that the all [sic] Indian Pueblo Council of New Mexico has voiced serious objections to the provisions of the proposed act which employs language taken from the First and Fourth through Eighth amendments and has asked to be exempt from that Title. In all sincerity, I do not believe that [their fears] can be justified. The Pueblo Indians have a rich, colorful form of government founded on tradition and wise experience. In no conceivable way was it my intention, through the provisions of the [ICRA] to hamper, weaken or destroy the Pueblo tribal traditions or any Indian tribal governments in this Nation (Lynch 1979, 911).

Referring to “hundreds of treaties, statutes, and regulations that support” tribal self-determination, Krakoff notes, “As stated in Morton v. Mancari, ‘If these laws…were deemed invidious racial discrimination, an entire Title of the United States Code…would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized’ (Morton v. Mancari 1974, 552)” (Krakoff 2017, 494). According to Krakoff:

Native nations’ governmental status situates them differently from other minority groups for many legal purposes, including equal protection analysis. Under current equal protection doctrine, classifications that further the federal government’s
unique relationship with American Indians are not subject to heightened scrutiny. The Supreme Court held in Morton v. Mancari that such classifications are political distinctions rather than acts of “invidious racial discrimination” and therefore are not subject to the Court’s most exacting review (Krakoff 2017, 494).

Krakoff maintains that the constitution does not apply at all to United States citizens who have tribal heritage. Krakoff wraps this disturbing notion in a rationalization made to sound as if racial division is a good thing, stating:

…using equal protection doctrine to demand a highly formalized and acontextual race neutrality with respect to tribes and their members today would, ironically, perpetuate the settler/colonial project of elimination. Used in this way, colorblindness could threaten tribes’ separate political status just as they are beginning to break free from the historical legacies of tribal racialization (Krakoff 2017, 496).

In 1973, the National Tribal Chairman Association stated the ICRA violated “the principle of self-government associated with Indian tribes” because the Act grants federal courts jurisdiction “over issues such as the right to membership in a tribe, the operation of tribal elections, the selection of tribal officials, and the right to conduct tribal governmental business.” Tribal governments also objected to ICRA imposing federal constitutional law on tribal governments and claimed the Act was an infringement on their sovereignty because tribal consent was not required prior to its application. They proposed an amendment to section 1301(1) of the Act, redefining "Indian tribe" for the purposes of the Act as:

…any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government which has consented to the provisions of this subchapter by an affirmative vote of the adult members of the tribe, band, or other group of Indians in an election called by the Secretary of the Interior for that purpose (Lynch 1979, 912).

Congress did not adopt their amendment (Lynch 1979, 912).
Resolute Members of Tribal Communities vs. Dissidents

An established American Indian Movement (AIM) began in July 1968 as an urban group offering encouragement and support for tribal members suffering crime and poverty in Minneapolis, Minnesota. Their goal was to “fight mistreatment by police and to improve prospects for jobs, education, and housing” (Durham, 1974). For the first few months, they were successful in cutting down on police harassment by monitoring police radio and arriving to an event before the police did. This resulted in a dramatic decrease in incarcerations for tribal members, and AIM members were widely accepted by the grateful community. Nevertheless, from the beginning, AIM had political goals. In 1968, AIM identified jurisdiction over children as a primary goal, stating, “A major objective of the movement is to regain the young. Once the BIA is eliminated and individual tribal states are created schools will not be a major problem” (AIM 1968). From that start, AIM quickly developed into a national organization focused on tribal rights and sovereignty and encouraging tribal governments to take a stronger political stand.

According to Tribal Judge B.J. Jones, the Association of American Indian Affairs (AAIA) conducted a nationwide study from 1969 through 1974 at the behest of the Spirit Lake Tribe (Devil’s Lake Sioux) and the Sisseton-Wahpeton Oyate. The study concerned “the impact of state child welfare practices toward American Indian children.” Through this study, the AAIA determined that “25-35% of all Indian children were placed in either foster homes, adoptive homes, or institutions… (Hollinger, 1992; U.S. House Report 1978)” (B. Jones 2006).

Jones reports that the results of the survey troubled tribal leaders for two major reasons. “First, the placement of so many Indian children in non-Indian homes threatened the extinction of the tribes. In short, tribes were losing the most basic necessity for survival - a next
generation.” The second reason was a contention that separation from the tribe results in “development of maladaptive behaviors such as antisocial behavior, depression and suicide among alarming numbers of Indian children” (B. Jones 2006).

Nevertheless, others maintain that “our children were never a treaty promise” (CAICW 2004). They are not the property of tribal government and not responsible for ensuring the hollow, perfunctory survival of the tribe as an entity. Arbitrary tribal jurisdiction over children of non-tribal members is not found in any treaty promise. Mandatory jurisdiction over the children is debatable. Even if treaties had promised tribal governments the right to claim jurisdiction over children of their choosing, it is a legitimate function of federal government to revisit and address matters that prove to violate the inherent rights of United States citizens.

While tribal leaders and Congress have maintained that the membership drain was due to social services removing children at an alarming rate, little attention has been given the number of parents who have consciously and deliberately taken their children and left the reservation system and urban Indian centers. Whether through the various assimilation programs, inter-marriage with non-natives, job searches or other interests, some families have simply left Indian Country, sometimes decades ago. Of those who left more recently, some left the reservation system to escape increasing tribal government corruption and crime rates (CAICW 2014).

Roland J. Morris Sr., a member of the Leech Lake tribe and a co-founder of the Christian Alliance for Indian Child Welfare in 2004, testified at a Senate hearing in 1998 that “many tribal governments have become corrupt with unchecked power and money. Because of corruption and unwillingness to let go of power and money; tribal government themselves, in some cases, are keeping their people in the bondage of poverty and oppression” (R. J. Morris 1998). Morris further stated:
It cannot be denied that current federal policy is such that tribal governments financially benefit from the general membership’s poverty level staying just as it is. The plight of the average Native American is what keeps money flowing into the coffers of those in charge of Tribal government. Thus, tribal government needs to keep in control of its members, even to the extent of demanding from this Congress that the "tribe shall retain exclusive jurisdiction over any ...Indian child...", as is written in the Indian Child Welfare Act, which states further that tribal interests are "independent of the interests of the birth parents". The Indian Civil Rights Act mandates that no Indian tribe in exercising powers of self-government shall violate various basic civil rights. However, when there is no separation of powers within tribal governments and tribal sovereign immunity protects tribal government from civil rights claims, tribal members are left without recourse.

But many tribal members say nothing publicly. Cronyism, nepotism and ballot box rigging are all part of political reality on many reservations. Everyone seems to accept it as a given and because tribal government controls tribal jobs, HUD housing, tribal loans and land leases, many members are reluctant to speak out. Tribal government controls most everyone's strings, not to mention the judicial system. Getting on the bad side of the government can mean the loss of one’s job or home. Some have even been threatened that their family members would lose their jobs.

Further disabling to membership outcry is the manipulation used to keep control. I have seen tribal governments pressure members to rally to their cause and political goals through misinformation, bullying, and even bribes. At a political rally two years ago, in order to portray a good show of force for the media, a tribal government gave its employees the day off and told the employees they were expected to attend the rally. In order to ensure the attendance, the tribal government offered transportation to the rally, free food, and distribution of the employees' pay checks.

At the recent Montana gatherings held by Senator Conrad Burns in reference to tribal jurisdiction, the tribal governments transported students from the colleges and high schools, offered free food and dance before the hearings, and inflamed the large group with speeches about genocide. Prior to the busses leaving one of the schools on its way to the hearing, a student was told that unless he planned to speak at the hearing, he wouldn't be allowed on the bus. Again, a show of angry force was important for this media event, and it was highly unlikely that under those conditions many tribal members would get up and say anything in opposition to tribal government dogma.

Actual bullying usually occurs on more of a one-on-one scale. In one case, a tribal member had been essentially share-cropping with a white neighbor. The tribal member shared his tribally leased land; the neighbor shared his tractors and other heavy equipment. Together, they both benefited. However, this arrangement angered the tribal government, which without warning revoked the tribal member's lease on the land in question, threatened to revoke other land he leased, and threatened him with forced eviction from his HUD home. The government eventually allowed him to keep his home and other land, but permanently revoked the land he had shared with a non-member. This tribal member, having a large
family, has no intention of taking another chance of losing his home by speaking out.

In another case, a person running for office in a recent tribal election was denied, by the tribal council, the right to advertise in the local tribal paper.

I have had many tribal members come to me in confidence and relate their concerns and fears. I have even had a former tribal council member come to me to discuss these issues. I see true elders feeling defeated. Many of those within tribal government won't listen to the elders. Seeing this disrespect is hurtful to me and it pains many other tribal members that this is the way things are.

It can be no wonder that Indian people are tired and depressed. Not only do many feel alienated from the United States Government and the rest of society, but many tribal governments can't be trusted either. This situation, having become a hopeless fact of life, along with poverty and other factors, has bred depression and loss of trust (R. J. Morris 1998).

Krakoff, in directing her focus solely toward “Non-Indians” and their objection to “ICWA’s distinctive treatment of Indian children” (Krakoff 2017, 506), ignores the reality of dissident tribal members. In ignoring directly affected dissident tribal members who have called for equal protection, Krakoff herself is stereotyping and discriminating against tribal members. Further, when defending ICWA and claiming Mancari was correct in finding federal Indian policy is based upon political classification and membership rather than race, (2017, 506), Krakoff ignores that ICWA mandates jurisdiction over children who are not political members of a tribe, but merely “eligible for membership in an Indian tribe” (United States 1978).

It is also interesting to note that Krakoff uses the racial term “Indians” 423 times in her paper (albeit including quotes from others and official names) but uses the political term “tribal member” only 31 times. She refers racially to “non-Indians” 33 times, but never uses the term “non-tribal member.” This consistent terminology reflects a focus on heritage, not political affiliation.

While Morris distanced himself from his home reservation primarily for political reasons as well as his concern over violence and drug abuse, others tribal members left the reservation system because they wanted economic freedom. A member of the Colville Reservation in
Washington State, Alfred Aubertin testified at a House hearing in 1965 concerning the desire of many Colville members to terminate the reservation. He stated:

I am an enrolled member of the Colville Confederated Tribe. I am a log cutter and have been gainfully employed for a number of years. Most of my life I have been living on or near the reservation, have been making my own living and have never been on welfare. I do not feel that my home is substandard, and I am for termination of the Colville Indian Reservation. I feel that I know what is best for me and my family and I am competent to handle my own affairs.

Through the years I have seen through personal experience in my own family how the affairs of the Indian have been managed by the Bureau of Indian Affairs. My grandmother, Lenore Banning, owned over a million feet of timber on her trust land and the county had to bury her. She lived in poverty all her life and was barely existing on an old age pension. Yet it was impossible for her to sell any of her timber, even though she owned it. She could have lived in comfort and had no worries if her property had not been tied up in trust (Scofield 1992, 9).

It would seem the view of tribal members as being so fundamentally different from other U.S. citizens that protections, rights and responsibilities afforded others are anathema to tribal members was first elucidated by Cohen.

Roland J Morris reminisced about family and community camping near the lakes during ricing season in the 1950’s. He said the joy and togetherness “was like Christmas.” He recounted that with the season changes, he and his father would fish, set traps, harvest wild rice and tap maple syrup to support the family. Morris cut lumber for money to buy a car. They were poor and there was not much in the way of welfare assistance – but to him, life seemed cleaner, happier, and healthier than it was 45 years later. Hard work felt good and, according to Morris, dependence on federal funds and welfare programs ruined the community.

If the Handbook was an attempt to fashion a socialist ideal for the sake of tribes, the utopian vision of Collier and Cohen has yet to come to pass. While tribal governments and holdings have gotten more powerful, lucrative and wealthy – the health, standard of living, and social welfare of many members living within the reservation system has gotten worse.
Chapter 4

The Indian Child Welfare Act

American Indian Policy Review Commission

The American Indian Policy Review Commission\(^{53}\) was established by act of Congress on January 2, 1975 (Fineday 2012) to exhaustively examine federal Indian policy. The law specified “the Commission's organizational structures, areas of Indian affairs to be investigated, and reporting requirements” along with $2.5 million and a completion date of June 30, 1977. An additional appropriation\(^{54}\) of $100,000 was approved on February 17, 1977 (GAO 1977, 1) to fund the compilation of the final report, with a May 18, 1977 deadline (GAO 1977, 3).

The Commission organizational structure included six commissioners appointed by Congress--three each from the House and Senate. Those six selected five citizens of tribal heritage to also serve as commissioners. From these five, three were from federally recognized tribes, one from an unrecognized group, and one represented urban Indians (GAO 1977, 1).

Chaired by South Dakota Senator Abourezk, the Commissioners then composed the task forces. Each task force was also to have three members, most of whom with tribal heritage (GAO 1977, 2). The Commission launched 11 task forces to investigate the following matters:

1. Trust responsibility and Federal-Indian relationship
2. Tribal government
3. Federal administration and structure of Indian affairs
4. Federal, State, and tribal jurisdiction
5. Indian education
6. Indian health
7. Reservation and resource development and protection
8. Urban and rural non-reservation Indians
9. Indian law revision, consolidation, and codification
10. Terminated and non-federally recognized tribes

\(^{53}\) Public Law 93-580, 88 Stat. 1910
\(^{54}\) Public Law 95-5
11. Alcohol and drug abuse” (GAO 1977, 2)

The original 33 task force members included 31 with tribal heritage representing 27
different tribes (GAO 1977, 2). Each task force was to submit its final report within 1 year from
the appointment of its members (GAO 1977, 3).

Having learned from Cohen’s experience, the statute also authorized the hire of six staff
members for the Commissioners as well as administrative and clerical staff for the task forces.
An amendment further allowed the use of volunteers, the “services, information, facilities, and
personnel of the Government's executive departments and agencies with or without
reimbursement”, and the “services of consultants, experts, or organizations on a temporary or
intermittent basis” (GAO 1977, 3). In March 1975, the Director and General Counsel began their
work and four other staff positions were filled by June of 1975. 140 staff members, about 100
intermittent consultants, and numerous volunteers subsequently worked for the Commission
between June 1975 and December 31, 1976 (GAO 1977, 3). “The Committee on House
Administration provided free office space, furnishings, equipment, and utilities” (GAO 1977, 3).

Upon completion of their work, the Commission prepared a draft report and sent 1,000
copies to tribal, federal and state agencies, congressional members, ‘Indian’ advocacy
organizations, and other tribal government supporters for review. After considering their
responses, the Commission submitted its final report in to the President of the Senate and the

Chapter nine of the final report of the AIPRC states that in the 1970’s, “almost half of the
United States Indian population lived outside the boundaries of Indian reservations.” According
to their report, “340,000 lived in cities and six cities had Indian populations which are larger than
those of any reservation except the Navajo Reservation” (AIPRC 1977, 429). Many had been
encouraged by federal policies to move to the cities (1977, 429). The increasing number of tribal members living off-reservation was noted “in two Indian policy studies in the 1920's.”

Erroneously, the AIPRC claimed the Senate Subcommittee on Indian Affairs’ *Survey of the Conditions of the Indians of the United States* was first, “followed by the well-known Meriam Report” (AIPRC 1977, 431).

According to the AIPRC, “The Subcommittee conducted and published hearings across the United States, and largely provided the data base for the more concise Meriam Report” (AIPRC 1977, 431). However, while the Subcommittee's hearings continued for almost 15 years into 1943 and gathered a large amount of necessary data, the Meriam Report had been initiated and completed prior to the subcommittee hearings. Of interest to the Subcommittee in 1943 was the number of tribal members now living in urban areas. However, the 1977 AIPRC Report erroneously relates, “Whatever insights might have been gained from hearing testimony were lost when the Mariam Report published its chapter on ‘Migrated Indians’, and relied on the material presented by Indians' employers rather than the Indians themselves” (AIPRC 1977, 431). Again, the Meriam Report was published prior to the Subcommittee’s report.

The AIPRC wrote, “Many of these people moved to cities because of Federal policies. The earliest movements of tribal people away from tribal lands were often the indirect result of policies which diminished the reservation land base…” (AIPRC 1977, 429). While true that many left the reservation system in the last century and a half at the encouragement of federal policies, it was not an “indirect” result. Assimilation was a clear and unhidden goal. Some would say it was the only honest and responsible path forward and had no malicious intent. Yet, the AIPRC goes on to refer to this stated policy as if it was secretive and malevolent:

The continuing assumption on the part of the Federal Government was that assimilation was the Indian's fate. Legislation was based on this assumption. One
of the most obvious examples of Federal action which broke up reservations, strained tribal cohesion, and encouraged subsequent migration of thousands of Indians to other areas was the General Allotment Act of 1887. Indeed, it is not inaccurate to say that the migration of the Indians was a calculated result of this legislation (AIPRC 1977, 430).

Indeed, self-sufficiency was the calculated and well-known intention. Tribal members, in common with other U.S. citizens, were being allowed the freedom to decide what they wanted to do with their personal assets. But the AIPRC went further with accusations concerning motivation for federal policy, stating:

Federal policies have …forced or encouraged Indians to move away from reservations in an effort to end the "Indian problem." …In the late 19th-century…the policies of neglect, dependency, and assimilation were established. …Reservations were often viewed as camps where assimilative tools would be provided prior to the Indian's dispersal among the white population…Even reservations, however, posed a threat among the Federal Government because they provided a place where Indian people could not be effectively kept from maintaining their identity and culture. So attempts were made to parcel out tribal lands to Indian individuals in an effort to destroy the communal cohesiveness of tribal society (AIPRC 1977, 430).

The AIPRC complained that the intent of the Allotment Act was to encourage a new, self-sufficient way of life, provided only the skills for upward employment, and did not provide ongoing programs of dependency once people had moved. The AIPRC appeared to believe that citizens with tribal heritage were incapable of anything other than a life of dependence. The Commission then stated that “Local, State and county welfare programs often refuse to serve Indians on the grounds that they are the responsibility of the Federal Government” (AIPRC 1977, 429).

Nevertheless, the AIPRC concedes that after World War II, “Indian perceptions of reservations and cities began to change” (AIPRC 1977, 431). According to the AIPRC:

The war showed many Indians a world they had never seen and seldom heard of. There were opportunities for achievement in the military service which they had never found on reservations. They proved themselves capable of using those
opportunities... Many Indians...decided that low quality subsistence was the only future for the reservations and setoff for the cities to find work. By 1951, more than 17,000 Navajos worked away from the reservation, primarily on railroads and agriculture (AIPRC 1977, 431-432).

Today, the vast majority of citizens with tribal heritage live away from the reservation system (US Census Bureau 2010) - many of whom have mainstreamed into the larger society and disconnected themselves from tribal benefits and programs. This indicates that ‘assimilation’ in the last century did have at least some success. Citizens of tribal heritage, not unlike other U.S. citizens, appear to be individuals with an array of skills and preferences.

Assigning malicious intent where there may have been little or none feeds a blood thirst for blame. While persons of ill intent exist in every community and have throughout history, the tone of this commission fed a rationalization for a reverse policy that forced citizens into a situation that they did not necessarily want to be in.

The AIPRC report included, among other things, recommendations for the placement of children in need of care who have tribal heritage. Those recommendations were that Congress, “by comprehensive legislation, directly address the problems of Indian child placement and the legislation adhere to the following principles:”

Section 153
a) The issue of custody of an Indian child domiciled on a reservation is the subject of the exclusive jurisdiction of the tribal court where such exists.
b) Where an Indian ‘Child is not domiciled on a reservation and subject to the jurisdiction of non-Indian authorities, the tribe of origin of the child be given reasonable notice before any action affecting his/her custody is taken.
c) The tribe of origin have the right to intervene as a party in interest in child placement proceedings.
d) Non-Indian social service agencies, as a condition to the Federal funding they receive, have an affirmative obligation - by specific programs - to:
   i. provide training concerning Indian culture and traditions to all its staff;
   ii. establish a preference for placement of Indian children in Indian homes:
iii. evaluate and change all economically and culturally inappropriate placement criteria:
iv. consult with Indian tribes in establishing (i), (ii), and (iii).
e) Significant Federal financial resources be appropriated for the enhancement or development and maintenance of mechanisms to handle child custody issues, including but not limited to Indian operated foster care homes and institutions in reservation areas, such resources be made directly available to the tribe (AIPRC 1977, 35).

The American Indian Policy Review Commission further quoted Cohen as saying:

If we fight for civil liberties for our side, we show that we believe not in civil liberties but in our side. But when those of us who never were Indians and never expect to be Indians fight for the Indian cause of self-government, we are fighting for something that is not limited by accidents of race and creed and birth: we are fighting for what Las Casas, Vitoria and Pope Paul III called ‘the integrity or salvation of our own souls. We are fighting for what Jefferson called the basic rights of man. We are fighting for the last best hope of earth. And these are causes which should carry us through many defeats (AIPRC 1977, 9).

However, the Commissioners overlooked that civil liberties are for individuals – not for corporate entities attempting to place controls over individuals. It is true the fight for recognition of the inherent basic rights of all men is, indeed, the best hope on earth. But neither basic rights nor “the last best hope on earth” should be confabulated to mean support of a “self-government” that mandates children with lineage be members against their will or the will of their immediate families. That, in fact, is the opposite of liberty and is more appropriately associated with tyranny. The AIPRC then asks, “From the misdirected present, can the United States Government redirect its relations with the American Indians to enable them to determine their own lives now and in the future?” (AIPRC 1977, 9). While the Commission is asking this in relationship to tribal governments as a corporate entity, the better question is can the United States Government redirect its relations with “the [individual] American Indians” to enable them to [individually] determine their own lives now, and in the future…even if it means declining involvement with the reservation system?”
A review by the General Accounting Office was requested by Senator James Abourezk (D-SD), Chairman of the AIPRC and a major supporter of the American Indian Movement\textsuperscript{55} (Abourezk 1972), on August 5, 1976. The GAO was tasked to “review the organization, operation, management, accounting, and control of the American Indian Policy Review Commission” (GAO 1977). Their audit “was directed toward ascertaining whether the Commission carried out its activities in accordance to the provisions of its authorizing legislation and whether these activities were properly managed and controlled” (GAO 1977). The GAO report was submitted less than a year later, on June 29, 1977. While financial discrepancies such as double payments for air travel, improperly documented payments to consultants and members, and payments for air travel that had no official purpose were found on audit, the work was completed within its amended time and budget (GAO 1977, 4).

**Legislative History of the Indian Child Welfare Act (ICWA)**

From the beginning, much of the discussion involving the Indian Child Welfare Act\textsuperscript{56} focused not so much on the needs of individual tribal members as it did what is best for “the tribe.” According to Jones, Representative Morris Udall (D-NM) stated during a congressional floor debate that "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy. " Representative Robert Lagomarsino (R-CA) agreed, stating, "This bill is directed at conditions which…threaten…the future of American Indian tribes" (B. Jones 2006). The Tribal Chief of the Mississippi Band of

\textsuperscript{55} According to AIM leader Russell Means, Senator Abourezk hired Means as a Congressional staff person while Means was still in prison. Means was at that point the only convict in history to work for a Senator while serving prison time (Russell Means: About, 2014).

\textsuperscript{56} PUBLIC LAW 95-608, 25 USC Chapter 21 (United States 1978)
Choctaw Indians and representative of the National Tribal Chairmen's Association, Mr. Calvin
Isaac, stated:

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships (B. Jones 2006).

The Act itself reiterates that a prominent reason for the legislation was to protect the political existence of the tribe, asserting that:

1901(3) there is no resource that is more vital to the continued existence and integrity of American Indian tribes than their children… (4) an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and (5) the states…have often failed to recognize the essential tribal relations of Indian people and the culture and social standards prevailing in Indian communities and families. (1902) …it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes… (United States 1978).

The Senate Subcommittee on Indian Affairs held an oversight hearing concerning the placement of children with tribal heritage in 1974. With the hearing testimony consisting of the statements by chosen tribal officials and their advocates, the premise of child abduction, racism, and that “serious emotional problems often occur as a result of placing Indian children in homes which do not reflect their 'special cultural needs” was supported (US Congress: House 1978, 31).

The Indian Child Welfare Act was first introduced by Abourezk in 1976 as Senate Bill 3777. When that bill failed to get out of committee, Abourezk introduced it again in 1977 as Senate Bill 1214. Senator Hubert Humphrey (D-MN), Senator George McGovern (D-SD), and two others cosponsored the bill. With its four titles, it was considered a “multipurpose piece of legislation.” The first title was designed to clarify jurisdiction over and establish procedure for
the placement of children who had tribal heritage. According to the bill, the purpose of this was to ensure that parents of tribal heritage would receive fair hearings” (US Congress. Senate 1977). Title II authorized financial grants directly to tribal governments and organizations. Title III authorized the collection of all records concerning the placement of children who have tribal heritage and set up timetables for this to be implemented. Title IV required the Secretary of Interior to conduct a study concerning the lack of local schools on some reservations and the impact that has on children (US Congress. Senate 1977).

The Senate-Select Committee on Indian Affairs held a public hearing on SB 1214 on August 4, 1977. Testimony revealed that Federal, State and local agencies continually failed to develop understanding and sensitivity to the cultural needs of Indian children” and had an “abysmally poor record for returning Indian children to their natural parents” (US Congress: House 1978, 32). The hearings also heard testimony that the Quinault Nation in Washington had a substantial decrease in number of children in placement since the inception of their child and family development programs. The Subcommittee found a need for special legislation concerning children because of “the extreme poverty which exists on reservation areas and among Indian families near the reservations and because of the unique cultural differences” (US Congress: House 1978, 33). The Subcommittee also noted that “Assimilation has been tried, but the continual educational under achievement of Indian children contradicts the validity of that approach. Indian tribes have indicated a strong desire and ability to plan for and operate their own directly funded programs in a number of areas including child welfare” (US Congress: House 1978, 33).

Senate Bill 1214 was then debated on the floor of the Senate, amended and passed on November 4, 1977. One of the disturbing aspects of the bill that received little attention or
debate was section 1901 (3) (3), that stated “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children” and “the United States has a direct interest, as trustee, in protecting Indian children who are members or are eligible for membership in an Indian tribe” (United States 1978). What is disturbing about this statement is the final part of the sentence, “or are eligible for membership,” meaning a child does not need to already have political affiliation with the tribe in order to be affected by the ICWA.

The bill was then transferred to the House of Representatives on November 8, 1977. The committee on Indian Affairs and Public Lands, which was a subcommittee to the House Committee on Interior and Insular Affairs, held hearings in February and March of 1978 (US Congress: House 1978). The Subcommittee heard testimony from the following:

Administration for Children, Youth and Families; Department of the Interior; National Tribal Chairmen's Association; National Congress of American Indians; Association of American Indian Affairs; Rosebud Sioux Tribe; Yakima Tribe; Puyallup Tribe of Washington; American Academy of Child Psychiatry; National Conference of Catholic Charities; AL-IND-ESK-A Corporation; Tacoma Urban Indian Center; and Central Maine Indian Association. Other representatives who provided statements were: Church of Jesus Christ of Latter-day Saints; Great Lakes Inter-Tribal Council; Boston Indian Council; Minnesota Chippewa Tribe; AH-BE-NO-GEE Center for Urban and Regional Affairs; Native American Family and Children Services; Urban Indian Child Resource Center; and Department of Justice (US Congress: House 1978).

Most of the witnesses represented tribal entities, adoption interests, and federal agencies and supported the bill. While some adoption agencies and attorneys voiced civil rights concerns early on and varied Congressmen and the DOJ testified concerning constitutional issues, no one was specifically asked to testify concerning the reasons families choose not to be involved in the reservation system – families who were essentially dissidents. Among those concerned about constitutional and privacy issues was Mary Jane Fales, Director of an Adoption organization called the ARENA Project. She stated:
We have close to 1,000 youngsters who are legally free for adoption registered with us from all over North America, Canada, and the United States and a small, but significant percentage of those youngsters have some portion of their culture Indian related. Most of the youngsters do not and have not lived on a reservation. Many of .those youngsters are not infants; we are talking about older children and we are very concerned that many of these children…would be prevented from having a permanent home instead of helped to having one. …we see many children lingering in foster care all over the country, black, Chicano, Puerto Rican, and white and we hope to knock down these barriers, not build them up. …one of the major questions we had, was the constitutional question which seemed to have been addressed by a number of groups and we are pleased to see the waiver clause may be put in… But I think we get to real questions of jurisdiction and how that would be handled …

Many of the youngsters we-are talking about have significant amounts of other heritages, like this year we placed some black Indian youngsters in a black home. There….they will be more comfortable. Their identity problems will be less in the black culture than they will be in the Indian culture…) (1978, 43).

…We are concerned about the biological relationship that some of these youngsters have with their non-Indian biological parents and what does this mean if they have for example, a child who is half Caucasian and has lived with a grandparent on the Caucasian side and has some ties. The way the law is written in title 1, there may be real restrictions to these youngsters being able to maintain those biological ties and contacts (1978, 43).

[We also have concerns] …that if the parent chooses to move off the reservation and make some determination over the future of their child…if the parent has the right to waiver notification and chooses to go into the State court sometimes that seems more fair to the privacy or rights of that parent. I am thinking if you can say if you choose to move to California or say your daughter chose to move to California and have a child out of wedlock, that your own council back in your hometown wouldn't have to be notified of the interests of that child or what is happening with that child and have a right to determine the future of that child (1978, 43).

Department of Justice Attorney Larry Sims also questioned the constitutionality and advocated for the parent right to refuse tribal jurisdiction. Chairman Teno Roncalio, not wanting to muddy the process, told a tribal member who wanted the wording of the bill strengthened:

What we will not want to do is make amendments to this bill that might not be readily accepted by the Senate on reconsideration on tile bill and end up going to conference… We are trying to avoid amendments on all legislation that will do no more than effectively kill bills… So, if we can get the right kind of amendment on this bill that would be acceptable to the Senate, we might do that, but it would otherwise create dissension (US Congress: House 1978, 82).
On April 18, 1978, the House committee marked-up the bill and substituted it as H.R. 12533, sponsored by Udall and Representative Roncalio (D-Wy), and was eventually co-sponsored by 14 other Democrats. Many of the recommendations presented in the final report of the American Indian Policy Review Commission, submitted on May 17 1977, were included in the subsequent House bill, H.R. 12533, establishing the Indian Child Welfare Act (Fineday 2012). The Committee approved the bill, then sent it to the House floor where it was debated and amended on October 14, 1978. That same day, the House substituted the text of H.R. 12533 for the text of S. 1214 and passed S. 1214. The Senate concurred on the amendments the next day, October 15. The bill, signed by President Carter (US Congress 1978), assured “tribal governments the opportunity to raise Indian children in a manner reflecting ‘the unique values of Indian culture’” (25 U.S.C. § 1902).

The bill had been amended, not out of concern for the civil liberties of individuals with tribal heritage, but out of concern for jurisdictional conflicts with the states. The wording of 1911(a) that both the Department of Interior and the Department of Justice were concerned about read, “An Indian tribe shall have jurisdiction exclusive as to any State over any placement of an Indian child who resides on or is domiciled within the reservation of such tribe.” Assistant Secretary of Interior Forrest J. Gerard explained in his letter, “We believe that reservations located in States subject to Public Law 83-280 should be specifically excluded from section 101(a)…” (Gerard 1978). Assistant Attorney General Patricia Wald agreed:

… [S]ection 101(a) of the House draft, if read literally, would appear to displace any existing State court jurisdiction over these matters based on Public Law 83-280. We doubt that is the intent of the draft because, inter alia, there may not be in existence tribal courts to assume such State-court jurisdiction as would apparently be obliterated by this provision (Wald 1978).
After these letters were received, Congress amended the legislation to include the “existing Federal law” proviso that became law. On November 8, 1978, the Indian Child Welfare Act (ICWA) became law. Congress declared:

…that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs (25 U.S.C. § 1902).

The new law, 25 USC Chapter 21§1903(4), defined an “Indian child” as any unmarried person who is under age eighteen and is either

- member of an Indian tribe or
- is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe

It is important to note that Congress has not passed welfare legislation concerning the children of South Africa, China, England, France, Ireland or any other country. These foreign nations have never asked for such legislation because they have not needed to. Their authority is inherent and no one argues it. Yet tribal leaders have gone to both federal and state governments to request help – because they had to. Jurisdiction over children who are U.S. citizens and state residents has not been clear, which begs the question as to whether it is inherent to tribal entities.

Ten Years Later: ICWA Hearings

On November 10, 1987, the Select Senate Committee on Indian Affairs held an oversight hearing on the Indian Child Welfare Act. Chairman Daniel Inouye opened the hearing stating:

It has been nearly 10 years since this act was enacted. An ample period of time has now passed to determine whether this act and the courts and agencies which administer it are meeting the expectations of the Congress when the act was enacted… This act is premised on the concept that the primary authority in matters
involving the relationship of an Indian child to his parents or extended family should be the tribe, not the state or federal government. ...The act is not limited to reservation-based tribes...the makes specific provisions for transfers of cases from State to tribal courts and it requires that States give full faith and credit to the public acts of an Indian tribe.

With respect to cases over which the State retains jurisdiction, it authorizes tribes to intervene in the proceedings and participate in the litigation. It imposes certain evidentiary burdens in State court proceedings, and it establishes placement preferences to guide State placements. He child will best be served by recognizing and strengthening the capacity of the tribe to be involved in any legal matters dealing with the parent-child relationship.

The fundamental premise of the act is that the interest of the child will best be served by recognizing and strengthening the capacity of the tribe to be involved in any legal matters dealing with the parent-child relationship.

The clear understanding of the Congress when this act was enacted was that failure to give due regard to the cultural and social standards of the Indian people and failure to recognize essential tribal relations is detrimental to the best interests of the Indian child. ...the act is founded on the proposition that there is a trust responsibility of the United States to provide protection and assistance... (US Congress. Senate 1987, 1-2).

Those called to testify included:

Tribal officials from the chairman of the ICWA Task Force at the Orange County Indian Center, the director of Portland’s Indian Legal Services Program Task Force on ICWA, a spokesperson from the Alaskan Federation of Natives, the director of Native Services of the Tanana Chiefs Conference, the ICWA Committee Chairman of the Affiliated Tribes of the Northwest, director of the Division of Social Services for the Navajo Nation, a council member with the Fort Peck Reservation, a staff attorney with the Association of American Indian Affairs, a representative of Three Feathers Associates, and a representative of an Indian Association in Alberta, Canada; State officials including a representative from the Washington State Governor’s office on Indian Affairs, and a Commissioner of Juneau’s Department of Health and Human Services; and federal officials including a Deputy to the Assistant Secretary for the BIA’s Tribal Services and the Associate Commissioner for the Health and Human Service’s Division of Children, Youth and Families (US Congress. Senate 1987, III).

Caleb Shields of the Fort Peck Executive Board testified they had recently negotiated an agreement with the State of Montana that allowed the tribal government to receive title IV(E) funds while requiring the state to provide protective services. The state also recognizes Fort
Peck’s tribal court jurisdiction over children from other tribes, and Fort Peck’s own foster care standards for purposes of federal foster care funds (US Congress. Senate 1987, 3).

Alfred Ketzler, Sr, Director of Native Services of Fairbanks, AK also testified for more funds going straight to tribes without being “subject to State veto” and accused States of engaging in “moral blackmail” when they advocate for the best interest of the child (US Congress. Senate 1987, 10-11). Hazel Elbert, of the BIA, however, testified that up to 89% of homes were involved in alcohol or abuse programs, and the placement of children needs to be done on a “case-by-case” basis in order to keep from placing children into a worse situation than they already are (US Congress. Senate 1987, 24).

Julie Kitka of the Alaskan Federation of Natives stated that voluntary proceedings were a “loophole in the Indian Child Welfare Act” (US Congress. Senate 1987, 12). No one was listed who was not testifying on behalf of tribal, federal, or state interests. No one was asked to represent citizens of tribal heritage who were purposeful dissidents of tribal government or who had experienced harmful consequences of tribal government involvement.

On May 11, 1988, a hearing was held to address S. 1976, an amendment to the Indian Child Welfare Act. In that hearing, the Assistant Secretary for Indian Affairs and Cherokee tribal member, Ross Swimmer, presented a letter from the Secretary of the Interior, Donald P. Hodel (US Congress. Senate 1988, 46). In that letter, Secretary Hodel states:

I am extremely alarmed over the provisions of S. 1976… this bill fails the test of reasonable balance. It would skew the balance in a manner which is wholly unacceptable to the Department of the Interior and should be unacceptable to any persons who are concerned about human rights issues, especially including the human rights of children.

Although there are multiple flaws in the bill, we call your attention to three fundamental objections:

First, the bill is anathema to the salutary constitutional principle that legislation cannot stand if it makes classifications and distinctions based on race. If enacted, this bill would subject certain Indian children to the claim of jurisdiction
of an Indian tribe solely by reason of the children’s race. For example, under section 101(b) of the bill, if a tribe seeks transfer of a child custody or adoption case from State court to the tribe, the parents’ objection to such transfer will be unavailing unless the objection is “determined to be consistent with the best interests of the child as an Indian.” The provision ignores all other aspects of the child’s status as a human being. That, in my view, is pure racism…

Second, the bill is contrary to what I believe is sound prevailing public policy in this country…This bill subordinates the best interests of the child to that of the tribe. While we all can agree that a child’s knowledge of an exposure to his or her cultural heritage can be a vital and valuable aspect of the child’s personality and value system, it is wrong to elevate that concept to a point where it overrides virtually every other concern bearing on the fundamental well-being of the child.

Third, at least the current act limits the jurisdictional claim of the tribe to the children of tribal members. Such membership typically is obtained by voluntary enrollment or at least can be terminated by the Indian’s voluntary act, thereby creating a situation where the tribal members arguably may be said to have consented to application of tribal law.

This bill, however, extends the jurisdictional reach of the tribe to children whose parents need not be tribal members. Indeed, the parents and other ancestors of the child may have had no connection with the tribe perhaps for years or even generations…

The bill does substantial violence to important constitutional principles and to sound public policy…The bill should not be enacted (US Congress. Senate 1988, 46-47).

Swimmer agreed with the Secretary and asserted that the bill endangered children who were tri-racial, forcing children with distinctive non-native features to live in a reservation community where those features become a stumbling block (US Congress. Senate 1988, 47).

Swimmer offered an example of an over-reach by his own tribe, the Cherokee Nation, and went on to state:

We are subjecting Indian children who may have no interest nor their parents ever have any interest in being Indian or being on or near a reservation of being sent to a reservation or sent to an Indian environment in which they did not grow up and do not want their children raised in…saying that, in effect, the natural mother is not capable of determining what the best interests of the child are (US Congress. Senate 1988, 48).

…There are other provisions in the act that are, I think, just as onerous. One of them is the removal of alcohol abuse and nonconforming social behavior as a reason to remove a child from a home…We see cases on a regular basis of child abuse in Indian country and particularly those of alcoholic families I don’t think we
can justify it and simply say because alcohol in certain cases is prevalent in an area that should be removed as an excuse.

...we need to address what is going on the reservation. We need more social workers out there. We project the possible cost of just the amendments is going to be $7 or $8 million. I would take that money and add social providers out there and people who could work directly with families, who could help remove some of the problems that we see out there on a regular basis with families (1988, 49).

The bill went no further.

Nevertheless, the Supreme Court later affirmed ICWA’s purpose, maintaining that the law was in response to “rising concern ... over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption and foster care placements” (Mississippi Choctaw Indians v. Holyfield 1989). The Court then went further, and placed protection of the tribe as a body above the rights of individual parents and even the children when it said:

Congress determined to subject such placements to the ICWA’s jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents. As the 1977 Final Report of the congressionally established American Indian Policy Review Commission stated, in summarizing these two concerns, “[r]emoval of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.” Senate Report, at 52. [490 U.S. 30, 51] (Mississippi Choctaw Indians v. Holyfield 1989).

_Holyfield_ contends in footnote 24 that children of heritage who have been raised in white homes suffer “developmental problems” and ““[t]he Act is based on the fundamental assumption that it is in the Indian child’s best interest that its relationship to the tribe be protected” (1989).

The ICWA had found its way to the Supreme Court within the decade because many individuals who had heritage fought back in court, citing constitutional issues. Not all families or children wanted tribal governments to have legal jurisdiction over them.
Some State courts, in support of the civil rights of individuals, ruled that children with no genuine connection to Indian Country should not be involuntarily forced into a legal relationship with tribal governments. The initial case explaining this "Existing Indian Family Doctrine" or “Existing Indian Family Exception” was In re Adoption of Baby Boy L. (1982), involving an out-of-wedlock child of a non-Indian mother and an Indian father (Adoption of Baby Boy L. 1982).

The Kansas Supreme Court stated:

A careful study of the legislative history behind the Act and the Act itself discloses that the overriding concern of Congress and the proponents of the Act was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother (Adoption of Baby Boy L. 1982, 175).

Another often-cited case was In re Bridget R. (1996),57 where birth parents had not wanted the tribe to be involved in their adoption process, and which states, "It is almost too obvious to require articulation that the unique values of Indian culture will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture" (In re Bridget R. 1996, 1507). It was also stated in Bridget R.:

If tribal determinations are indeed conclusive for purposes of applying ICWA, and if...a particular tribe recognizes as members all persons who are biologically descended from historic tribal members, then children who are related by blood to such a tribe may be claimed by the tribe, and thus made subject to the provisions of ICWA, solely on the basis of their biological heritage. Only children who are racially Indians face this possibility (In re Bridget R. 1996).

Other citations used in support of the EIF doctrine include:

a) In re Santos Y.,58 the court found “Application of the ICWA to a child whose only connection with an Indian tribe is a one-quarter genetic contribution does not serve the purpose for which the ICWA was enacted...” Santos

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57 In re Bridget R. 41 Cal. App. 4th 1483 [49 Cal. Rptr. 2d 507]
quoted from *Bridget R*’s due process and equal protection analysis at length. *Santos* also notes that “Congress considered amending the ICWA to preclude application of the ‘existing Indian family doctrine’ but did not do so” (In re Santos Y. 2001).

b) *In re Alexandria Y.* (1996), the court held that “recognition of the existing Indian family doctrine [was] necessary to avoid serious constitutional flaws in the ICWA” and held that the trial court had acted properly in refusing to apply ICWA “because neither [child] nor [mother] had any significant social, cultural, or political relationship with Indian life; thus, there was no existing Indian family to preserve” (In re Alexandria Y. 1996).

c) *In Bridget R.*, the court stated, “if the Act applies to children whose families have no significant relationship with Indian tribal culture, such application runs afoul of the Constitution in three ways:

- it impermissibly intrudes upon a power ordinarily reserved to the states
- it improperly interferes with Indian children’s fundamental due process rights respecting family relationships; and
- on the sole basis of race, it deprives them of equal opportunities to be adopted that are available to non-Indian children and exposes them…to having an existing non-Indian family torn apart through an after the fact assertion of tribal and Indian-parent rights under ICWA” (In re Bridget R. 1996)

Jones disagrees with the EIF doctrine and points out that although some courts hold that “the Act should not apply to an otherwise qualified Indian child who has not lived with an Indian family or with an Indian family with few or no ties to an Indian tribe” (B. Jones 2006), those court have been wrong:

The language of the Act does not support such an exception, but these Courts have asserted that such an exception is consistent with the legislative history of the Act. Other courts and commentators have strongly criticized this exception and some state legislatures have taken action to repeal the judicially-created exception (2006).

Jones states further that if there is even a small hint the child has Indian heritage, the corresponding tribe must be notified – whether the child has been connected to the tribe or not, “In any child custody proceeding in state court where a party believes or has reason to believe that the child involved is an Indian child there is an affirmative obligation on the part of all

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parties, and their attorneys, to report such to the Court so that notice may be given to the Indian child’s tribe” (B. Jones 2006).

Problems grew as tribal governments insisted that Congress, the White House, the Courts, the State legislatures and all social services do their part to strengthen the ICWA and prevent individuals from using “loopholes” to thwart “the law.”

Allen was Chairman of the U.S. Commission on Civil Rights when it was investigating abuses of the Indian Civil Rights Act in 1988. He states that federal Indian law, distinct from that of other citizens, “implicates the rights of citizens.” He writes that the ICWA, in particular, “is a case study of rights imperiled by the process of legislating for tribes without regard to citizens.”

Citing the 1988 “Final Report of the Survey of Indian Child Welfare,” 60 Allen further contends that the ICWA “produces institutional child neglect and abuse without recourse to fundamental due process protections” (W. B. Allen 1990, 16). Stating that abuses he had “personally documented, received innumerable complaints about, and seen reflected in official testimony and reports” are the “natural concomitants of the systemics liabilities of this approach to cultural preservation,” he cited “five leading consequences of the ICWA:”

1. Fewer adoptions, coupled with increasing resistance to termination of parental rights.
2. Concerns about a lack of tribal accountability which undermines even potentially positive enforcement of the act.
3. A not insignificant absence of tribal courts in many places and, hence, adequate due process.
4. Federal-level efforts to communicate performance standards and to monitor or enforce compliance have been limited.
5. No reduction in the flow of Indian children into substitute care has resulted, coupled with a dramatic shortage of Indian foster homes, and a decline in adoption rates spells disaster for Indian youths (1990, 16).

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The Fight to Protect Civil Rights

US Commission on Civil Rights:

The U.S. Commission on Civil Rights began looking into breaches of the Indian Civil Rights Act in 1985 after adopting a written project proposal. The Commission’s subcommittee subsequently conducted the most extensive study of the ICRA ever accomplished. 178 people testified, including tribal judges, council members, U.S. Attorneys, private citizens, scholars, attorneys, and even Ross Swimmer – the Assistant Secretary for Indian Affairs. Most essential was the testimony of private citizens who had suffered violation of their civil rights at the hands out of a tribal government (W. B. Allen 1990, 7).

Hearing locations were chosen purposefully. “Rapid City was chosen for its proximity to the Rosebud, Cheyenne River, and Oglala Sioux Tribes, all of which were generally perceived to be experiencing difficulty properly enforcing the ICRA. Flagstaff…was selected for its proximity to the Navajo and Zuni Pueblo Tribes, and because the Navajo judicial system was reputedly the best in Indian Country’ (W. B. Allen 1990, 7).

Later, hearings were added in Portland because tribal judges in the Northwest had asked to be heard, Washington DC to hear from Bureaucrats charged with enforcing ICRA; Phoenix, to hear from three members of the Navajo judiciary concerning their inability to be an independent branch; and a second hearing in Flagstaff for four reasons: recent reports of civil rights violations; issues with the ICWA; “allegations of threats to the independence of the Navajo judiciary, and recent amendments to the Navajo Tribe’s sovereign immunity act” (W. B. Allen 1990, 7).
As Chairman of the U. S. Commission on Civil Rights during the ICRA hearings in Phoenix, Arizona on September 29, 1988, Dr. Allen made the opening statement. Observing that in *Santa Clara Pueblo v. Martinez*, the Court held that except for writs of habeas corpus, “the Indian Civil Rights Act was enforced only in tribal forums and was no longer enforceable…in the Federal courts,” Allen asserted:

> It is important to note that the Court in [*Martinez*] predicated its holding upon the finding, and I quote, that ‘tribal forums are available to vindicate rights created by the ICRA.’ If not, the Court said, Congress has authority to provide other recourse.

> It is significant also that the Supreme Court thought that aggrieved Indians could press their ICRA claims with the Secretary of the Interior in those situations where tribal constitutions require secretarial approval of any changes. The Secretary of the Interior could simply withhold approval of those changes pending resolution of the alleged ICRA enforcement problem. This subcommittee has found, however, that what the Supreme Court in [*Martinez*] thought was the case simply is not the case; The Department of Interior is doing nothing to enforce the ICRA, nor even to monitor its enforcement.

> Have we found problems with regard to the civil rights of American Indians and with their governments? Certainly, we have heard much about such problems. Some of these problems appear to be systemic, such as tribal council members’ interference with tribal judges’ decision making; sovereign immunity claims to block ICRA enforcement, thereby rending the ICRA unenforceable; and thirdly, inadequate training and funding for tribal courts.

> Other problems we have found concerned not systemic problems but particular problems or, in other words, violations of the various provisions of the ICRA. Examples include verbal search warrants, *ex parte* hearings, incarceration without being apprised of the charges, inadequate representation by counsel, and the dismissal of a tribal prosecutor on eight occasions by the tribal council over politically based disagreements with her prosecution of the law (United States Commission on Civil Rights 1988, 2).

> Individual tribal members had little protection or recourse through the Department of Justice. According to Tracy Toulou, Director of Tribal Justice at the DOJ, legislation directed at tribal members is not discriminatory because it is based on a political distinction, not a racial distinction. Further, the DOJ has no obligation to represent justice for individual tribal members

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as their mandate is to defend tribal governments and tribal sovereignty – even if it meant defending tribal governments against individual members (CAICW 2004).

Having served as both a member and Chair of the U.S. Commission on Civil Rights during the investigation of violations of the Indian Civil Rights Act, in 1990 Dr. Allen submitted a public statement following the publication of the Commission’s final report. His statement begins:

The temptation to approve this report is great despite its manifest errors of legal and historical interpretation. The reason for this is that the Commission’s study has finally been freed from its unhealthy and collusive connection with the Department of Justice’s efforts to build a case for legislation previously introduced as S. 517. During that earlier phase the Commission actually had less control over its own study than did certain staff from the Department of Justice. The sheer scope and importance of the inquiry, however, had the effect of producing a record of far greater weight than the collusion intended. Despite the passage of time and changes in staff, the record remains to support a broader effort, and the Commission’s study is now free from those prior suspicions. Nevertheless, some aspects of the prior analysis remain in the final product (to be expected, since the whole work could not be redone), and these convey erroneous conclusions even while no longer supporting their pre-determined end. I write, now, therefore, largely to clarify these errors of legal and historical analysis and also to take full advantage of the rich record this six-year study produced.

Moreover, I cannot concur in a report that claimed fewer than ninety seconds of substantive Commission deliberation after more than six years study and six-hundred thousand dollars of resources invested in it. The report is far briefer than such an extensive record would seem to justify. Furthermore, the direction of its recommendations, contrary to the recommendations of the very worthwhile “Final Report and Legislative Recommendations” of the Special Committee on Investigations of the Select Committee on Indian Affairs of the United States Senate, is to infuse the federal government even deeper into custodial care of Indians, while the gravamen of our findings is that that is the very source of most of the problems we uncovered.

This abbreviated version seems to suggest far less importance for the ultimate product than I believe it in fact merits. Indeed, I am persuaded that the hearing and study record behind this report make it possible, for the first time in our history, for the Government of the United States to be completely honest rather than merely apologetic about its failures in treating with American Indians. The approved Commission “Report” fails to live up to this high expectation. Accordingly, I add now my own brief statement about the meaning of this extensive record (W. B. Allen 1990, 1).
Allen states that what the Commission factually found was:

I. There is no foundation for Congress’ and the Court’s assertion of a “plenary power” over Indian tribes taken as independent and sovereign governments. Such a “plenary power” neither has been nor can be acquired by conquest, treaty, or constitutional stipulation.

   A. Whatever may be the rule in international law, the assertion of complete and arbitrary power over non-citizens by the Government of the United States is incompatible with the Constitution of the United States, which is superior to every positive determination by the Government.

   B. Even if complete and arbitrary power over non-citizens were possible for the Government of the United States, such unlimited power could not be extended over citizens who, as such, are parties to the Constitution that limits the power of government.

      1. Nor can citizens be placed outside of the protection of the Constitution by means of the fiction of “government to government relations,” where the “government” with which the United States deals is not in fact independent and sovereign (including control of its own territory).

         a) Therefore, insofar as the ICRA applies to U. S. citizens, it exceeds the power of Congress to enact.

   C. The Congress of the United States can legitimately exercise no power over tribes whose members are citizens of the United States which power is not in fact a power over the citizens themselves and therefore subject to the relevant constitutional limitations.

      1. With respect to special protections afforded against lawfully subordinate governments, the United States has no power whatever to make exceptions, for any purpose whatever.

         a) With respect to special protections afforded against lawfully subordinate governments, the United States may not apply a lesser standard of protection against itself.

   D. Not one federal dollar has been spent on the enforcement of fundamental civil rights of American citizens domiciled on reservations since the 1978 Supreme Court decision, Santa Clara Pueblo v. Martinez.

II. The Government of the United States has failed to provide for Indians living on reservations guarantees of those fundamental rights it is obliged to secure for all U. S. citizens living on territory controlled by the United States and under the laws of the United States.

   A. In abandoning by act of Congress individual U. S. citizens to the indeterminate control of tribal governments without recourse to federal courts of judicature the United States thereby fails to provide the just constitutional claims for which all citizens may pray (W. B. Allen 1990, 2).
B. Federal legislation for tribes, as distinct from citizens, implicates the rights of citizens in other areas.
1. The Indian Child Welfare Act (ICWA) is a case study of rights imperiled by the process of legislating for tribes without regard to citizens.
   a) ICWA produces institutional child neglect and abuse without recourse to fundamental due process protections
2. Congress established the Legal Services Corporation to provide legal representation for indigent clients in civil cases. An exception to a general prohibition against uses of Corporation funds in criminal cases is provided where persons are charged with a criminal misdemeanor or less in a tribal court, 42 U.S.C. §2996f(b)(2); 45 C.F.R. §1613.4. In 1988, Corporation staff advised the Commission that the Corporation had allocated $7 million for all Native American legal services programs, of which 10 were reservation based and were located near reservations. Discussions with Corporation staff indicated that many of these programs are overseen by boards of directors that include tribal council members, and that these programs frequently represent tribal governments in relation to state governments or the Bureau of Indian Affairs. The use of tribal council members as directors of the programs ostensibly set up to provide representation of indigent American Indians in litigation against tribal governments calls into question the integrity of these programs

III. Enforcement of ICRA by tribal governments: The record of hearings and studies justifies the conclusion that tribal enforcement of ICRA has been at best uneven; sometimes reaching to customary levels of expectation among Anglo-American jurisdictions, often lacking altogether.
A. Among the explanations for, and examples of, the failures are a number of individual and systemic factors.
   1. Claims of sovereign immunity.
   2. Lack of autonomy in judicial offices.
   3. Woeful lack of funding of tribal courts.
   4. The Secretary of the Interior has failed to use statutory means (§450m of Public Law 93-638) to enforce the ICRA.
   5. General allegations of illegal searches and seizures.
   6. Widespread denial of the right to counsel.
   7. Ex parte hearings.
   8. Restriction of right to a jury trial.
   10. Violations of due process and equal protection of the laws.
   11. Cruel and unusual punishments.
      (W. B. Allen 1990, 2-3)
Allen further notes that the official report of the U. S. Commission on Civil Rights concerning civil rights for tribal members argued that the Constitution does not apply to Indian tribes (W. Allen 2010, 20). “Plenary power” is “exclusive jurisdiction” for the federal government – to the exclusion of jurisdiction of the states the tribes are located in, as well as the exclusion of not only Constitutional rights for tribal members, but of the truths the Founding Fathers knew as self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. “That is why it has proved impossible to found federal concern for the civil rights of Indians on ‘plenary power’” (W. Allen 2010, 19). This error “falls to the responsibility of the United States government, which has operated with respect to the Indian outside the limits of the Constitution (W. B. Allen 1990, 10).

Duro v. Reina

In Duro, the United States Supreme Court found another area of potential unconstitutional authority. The Court ruled that “Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States” (Duro v. Reina 1990). The Court elaborated:

We hesitate to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them. As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe’s additional authority comes from

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62 Duro v. Reina, 495 U.S. 676 110 S. Ct. 2053 (1990)
the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority (Duro v. Reina 1990, 693).

Poore reasons that it would come as a great surprise to the 1924 Congress and to many tribal members that by "consenting" to tribal membership they are “waiving their constitutional rights vis-a-vis the tribe. Such a concept is contrary to the rest of constitutional law.” Rather, Poore maintains that the 1924 Congress believed it had abolished tribal government – and never imagined this type of jurisdictional issue would rise up (J. A. Poore 1998, 60)

Indicating concern for how non-members would be treated in tribal court, the Supreme Court cited Cohen 334-335 as reference when asserting that tribal courts are “often ‘subordinate to the political branches of tribal governments’ and their legal methods may depend on ‘unspoken practices and norms.’” The Court then cited Talton v. Mayes (1896)63 when noting that the Bill of Rights does not apply to Indian tribal governments. “The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts.” (1990, 693). In their Holdings, the Court ruled that when it comes to criminal enforcement, “tribal power does not extend beyond internal relations among members” (1990, 688). The Court noted:

…the tribes are not mere fungible groups of homogeneous persons among whom any Indian would feel at home. On the contrary, wide variations in customs, art, language, and physical characteristics separate the tribes, and their history has been marked by both intertribal alliances and animosities (1990 at 695).

Poore contends that dicta in Duro “suggested that Indians who are tribal members are second-class citizens, in that they may not have the same rights, vis-à-vis their own tribes, that other citizens – even Indians who are not member of that tribe “ (J. A. Poore 1998, 60). The Court stated, “…criminal jurisdiction over members is accepted by our precedents and justified

by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent” (1990, 694).

The Court cited some of its cases from over a century earlier that had maintained that principle, including that “a non-Indian could not, through his adoption into the Cherokee Tribe, bring himself within the federal definition of ‘Indian’ for purposes of an exemption to a federal jurisdictional provision.” The Court noted that despite this, tribes enjoy a broad legal freedom over their members that is “not enjoyed by any other governmental authority in this country.” The Court ruled:

…the Bill of Rights is inapplicable to tribes, and… the Indian Civil Rights Act of 1968… does not give rise to a federal cause of action against the tribe for violations of its provisions. This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 455 U.S. 172-173 (1982) (STEVENS, J., dissenting) (Duro v. Reina 1990, 694).

According to Metropoulos, while not making the actual ruling on Constitutional grounds, the Court did not say or imply “that in fashioning a remedy Congress could act without regard to constitutional constraints, specifically equal protection and due process guarantees” (Brief for Amicus Curiae of TM. EM & RM 2003, 9).

The Push to Prevent Civil Rights

‘Duro Fix’ (1991)

Metropoulos had said the Court did not say or imply “that in fashioning a remedy Congress could act without regard to constitutional constraints, specifically equal protection and due process guarantees” (2003, 9). And yet they did.
According to Metropoulos, a year later, a few members of the Senate Committee on Indian Affairs “fixed” the damage done by the Supreme Court by “slapping a rider64 amending the Indian Civil Rights Act onto a defense bill.” The amendment, based on tribal sovereignty rather than a federal delegation of power, is said to have again violated the civil rights of individual tribal members:

…it cannot be said the ICRA amendments endured congressional scrutiny prior to enactment…they were attached as a rider to the 1991 Defense Appropriations Act, Pub. L. No. 101-511, §8077(b)-(d), 104 Stat. 1856, 1802-93(1990), with the promise of “comprehensive legislation” to follow. Ex post facto hearings took place the following summer at which not a single witness spoke for individual nonmember Indians. Moreover, no “comprehensive legislation” was considered much less enacted. Instead, the emergency language enacted... in 1990 was simply made permanent. Pub. L. No. 102-137, 105 Stat 646 (1991) (Brief for Amicus Curiae of TM. EM & RM 2003, 9).

The Supreme Court case United States v. Billy Jo Lara65 gave opportunity for the ‘Duro Fix’ to be argued. According to Metropoulos, when Congress enacted these amendments to the ICRA, it was because a small number of Congressmen wanted to “‘recognize and affirm’ pre-constitutional inherent sovereign power in Indian tribes that the Court had ruled they do not possess” (Brief for Amicus Curiae of TM. EM & RM 2003, 12). Metropoulos notes in his Lara brief that the 2000 Census reported 4,119,301 “Indians” in the United States, of which 1,698,483 were enrolled in a tribe. The U.S. Census Bureau’s definition of “American Indian” includes people who have native heritage and “maintain tribal affiliation or community attachment.”66 Metropoulos explains, “…this means 1.7 million U.S. citizens are subject to criminal prosecution in tribal courts of which they are not members first and foremost because of their race.” He notes further, however, that despite controlling federal law that says one can be an Indian without

being a tribal member, “Petitioner’s analysis” as to who is an “Indian” for purposes of the ICRA amendments consigns “in excess of 4 million U.S. citizens, because of their race, to non-constitutional prosecution and punishment” (2003, 11).

Metropoulos further notes that the amendments are clearly based on a racial classification, not a ‘political’ classification. Those who are being swept under the tribal court are all those with racial heritage – not just those who are voluntary members of the tribe. “No compelling federal interest justifies this, and the amendments are not narrowly tailored.” Metropoulos points out there are viable alternatives that would not require racial profiling. “Congress could either expressly empower states to prosecute misdemeanor crimes allegedly committed by all nonmembers or require federal authorities to do so.” He then suggests that although those remedies might seem “unpalatable to the politically powerful forces that pushed for the ICRA amendments… the goal of prosecuting misdemeanor crimes cannot justify the deprivation of rights… that results from subjecting certain citizens, solely because of their race, to non-constitutional criminal tribunals” (2003, 12-13).

Attorney, Choctaw tribal member, and president of Native American Women for Justice, Scott Kayla Morrison identified several constitutional and other rights infringed upon by tribal governments, including freedom of speech and press, equal protection, parental rights, limited right to dissolve "membership" or disenroll from political affiliation with the tribe, the right to a fair trial, access to records, the ability to audit one’s council, and the ability to sue the tribal government. She stated, “…[t]he only place in the industrialized world where immunity hasn’t been waived is in tribal governments” (Morrison 2000).

"There is no U.S. Constitution on many reservations," declared Morrison. "We have no free speech, no right to assemble. All of this is in the U.S. Bill of Rights, which we don’t have.”
While the Indian Civil Rights Act was meant to secure basic rights for tribal members, it was not enough. Morrison explained, “We have only a watered-down version of that bill of rights, but it is not enforceable because, where do you go to enforce it? We have to go to the tribal courts, which are in the pocket of the tribal councils, which are often the ones violating the rights” (Morrison 2000). Allen contends in his statement concerning civil rights for tribal members that:

The problem aimed at by the “Duro-fix” did not originate with 1950s self-determination nor even the 1934 “Reorganization Act,” as the [Civil Rights Commission] Report implies. Like so many other evils it originated in the paternalism of the early 19th century. 1 Cohen 2-3 offers a compelling account of its early origins. A primitive version of “self-government” policy was contained in the 1834 Trade and Intercourse Act: “That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian Country: Provided, the same shall not extent to crimes committed by one Indian against the person or property of another Indian” [note omitted]. In short primitive “self-government” was nothing but a federal license for Indians to abuse one another, even if it did convey by implication a kind of racially construed “sole and exclusive jurisdiction” to tribes themselves. Since U. S. jurisdiction must follow the power to punish crimes by whites against Indians and crimes by Indians against whites, clearly the tribes cannot have “sole and exclusive jurisdiction” within their territory however construed. This comports with Cohen’s definition of “Indian Country” at p. 5 as “country within which Indian laws and custom and federal laws relating to Indians are generally applicable.” Thus, they receive the concession to handle crimes of Indians against Indians, meaning that their jurisdiction is as to race alone. That will remain true unless the proposed “Duro-fix” extends a truly general jurisdiction (W. B. Allen 1990, 16).

Metropoulos agrees, adding that it is only in narrowly defined, extraordinary circumstances that the United States may “prosecute citizens of the United States in tribunals not required to accord the defendant all the protections of the Constitution and its amendments. (Reid v. Covert).” 67 (2003, 23):

Yet, the ICRA amendments, leaving aside for the moment their racially discriminatory aspect, clearly, knowingly subject U.S. citizens to the power of sovereigns unconstrained by the Constitution. This power is real. Tribes may fine a convicted defendant for up to $5000 and imprison him for up to a year in tribal

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67 Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 Led.2d 1148 (1957).
jail for each offence. Even the power of Congress over Indians is limited by their rights as U.S. citizens (2003, 23).

Metropoulos states that Congress simply cannot constitutionally authorize a domestic political entity to exercise criminal jurisdiction over U.S. citizens without according them their full constitutional rights. “First among these are the rights of political participation, i.e., consent, from which all other government power flows. See Duro, 110 S.Ct. at 2064, citing Reid v. Covert, 354 U.S. 1 (1957)” (2003, 24).

L. Scott Gould, Associate Professor of Law at Rutgers, agreed on the constitutionality, concluding that the ‘Duro fix,’68 “although conceived by advocates of Indians and supported by Indians themselves, is ill-suited to its purpose, is inherently racist, and should be held unconstitutional” (Gould 1994).

Supreme Court Justice Clarence Thomas, in his concurrence69 in the Lara judgment, stated that it was time to reexamine the “premise and logic” of the Court’s tribal sovereignty cases. He suggests that much of the confusion arises from two “incompatible and doubtful assumptions.” The first questionable assumption is that “Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity.” Thomas cites United States v. Wheeler70 (1978) for reference. The second assumption is that “Indian tribes retain inherent sovereignty to enforce their criminal laws against their own members” (id., at 326). Based on these two assumptions, which are precedent at the moment, Thomas states he is forced to concur in the Lara judgment.

However, he states he wrote separately primarily because “the Court fails to confront these tensions, a result that flows from the Court’s inadequate constitutional analysis:”

I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the “metes and bounds of tribal sovereignty.” *Ante* at 8; see also *ante* at 15 (holding that “the Constitution authorizes Congress” to regulate tribal sovereignty). Unlike the Court, *ante*, at 5–6, I cannot locate such congressional authority in the Treaty Clause, U. S. Const., Art. II, §2, cl. 2, or the Indian Commerce Clause, Art. I, §8, cl. 3. Additionally, I would ascribe much more significance to legislation such as the Act of Mar. 3, 1871, Rev. Stat. §2079, 16 Stat. 566, codified at 25 U. S. C. §71, that purports to terminate the practice of dealing with Indian tribes by treaty. The making of treaties, after all, is the one mechanism that the Constitution clearly provides for the Federal Government to interact with sovereigns other than the States. Yet, if I accept that Congress does have this authority, I believe that the result in *Wheeler* is questionable. In my view, the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously (United States v. Billy Jo Lara 2003).

Thomas notes that in response to *Duro v. Reina*, Congress amended the ICRA. The ‘*Duro fix*’ “amended ICRA’s definition of the tribes’ ‘powers of self-government’ to ‘recogniz[e] and affirm[m]’ the existence of ‘inherent power … to exercise criminal jurisdiction over all Indians’” 25 U. S. C. §1301(2). Yet, Thomas explains, there is “no way to interpret a recognition and affirmation of inherent power as a delegation of federal power, as the Court explains…” Delegated power is the very antithesis of inherent power.” He elaborates:

But even if the statute were less clear, I would not interpret it as a delegation of federal power. The power to bring federal prosecutions, which is part of the putative delegated power, is manifestly and quintessentially executive power. *Morrison v. Olson*,71 (1988). Congress cannot transfer federal executive power to individuals who are beyond “meaningful Presidential control.” *Printz v. United States*,72 (1997). And this means that, at a minimum, the President must have some measure of “the power to appoint and remove” those exercising that power. *Id.*, at 922; see also *Morrison*73 (United States v. Billy Jo Lara 2003).

Thomas, citing a Brief for National Congress of American Indians74, observed that the President does not appear to have control over tribal officials:

Thus, at least until we are prepared to recognize absolutely independent agencies entirely outside of the Executive Branch with the power to bind the Executive

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71 *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *id.*, at 705 (Scalia, J., dissenting)
73 see also *Morrison, supra*, at 706–715 (Scalia, J., dissenting).
74 Cf. Brief for National Congress of American Indians as Amicus Curiae 27–29
Branch (for a tribal prosecution would then bar a subsequent federal prosecution),
the tribes cannot be analogized to administrative agencies, as the dissent suggests, post, at 2 (opinion of Souter, J.). That is, reading the “Duro fix” as a delegation of federal power (without also divining some adequate method of Presidential control) would create grave constitutional difficulties (United States v. Billy Jo Lara 2003).

In addition, citing two cases, Thomas stated the Court “has only two options: Either the “Duro fix” changed the result in Duro or it did nothing at all.” He explained:

… I find it difficult to reconcile the result in Wheeler with Congress’ 1871 prospective prohibition on the making of treaties with the Indian tribes. The Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling “sovereignty” … The Court should admit that it has failed in its quest to find a source of congressional power to adjust tribal sovereignty. Such an acknowledgement might allow the Court to ask the logically antecedent question whether Congress (as opposed to the President) has this power. A cogent answer would serve as the foundation for the analysis of the sovereignty issues posed by this case. We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases (United States v. Billy Jo Lara 2003).

Finally, Thomas concluded that the very enactment of ICRA by Congress was proof that inherent sovereignty did not exist. The “enactment of ICRA through normal legislation conflicts with the notion that tribes possess inherent sovereignty.” An example of the conflict is Title 25 U. S. C. §1302, which requires tribes “in exercising powers of self-government” to afford defendants ‘most’ of their protections of the Bill of Rights. “I doubt whether Congress could, through ordinary legislation, require States (let alone foreign nations) to use grand juries” (United States v. Billy Jo Lara 2003).

In Morris v Tanner, Metropoulos argued that by these amendments, Congress subjected nonmembers who have tribal heritage, but no others, “to trial and punishment, which includes

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imprisonment for up to one year and a fine of up to $5,000 for each offense, 25 U.S.C. § 1302(7).” Further, tribal governments “are only limited, to some extent, by ICRA, 25 U.S.C. §§ 1301, et seq’ (Metropoulos, Morris v. Tanner 2006, 12), and:

‘…the only federal remedy is habeas corpus.’ Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978). Congress explicitly specified only members of one race, American Indians, for such treatment. It left nonmembers of any other race but who are no less or more authorized to be on an Indian reservation free from the threat of criminal prosecution by Indian tribes (2006, 12).

Congress justified the racial favoritism by citing historical distinction by federal government concerning tribal members and calling the former bias “precedence.” The language of the 1990 Duro Amendments referred to “all Indians,” and the House Reports with it confirm Congress’ intent to make the distinctions racial. The Report noted that in U.S. v. Rogers (1846) “The status of non-member Indians…was clarified…where the Supreme Court held that the statute applied to Indians as a class, not as members of a tribe, but as part of the family of Indians” (Metropoulos, Morris v. Tanner 2006, 11). The legislative history also notes:

Courts have repeatedly held that the term ‘Indian’ includes any Indian in Indian Country, without regard to tribal membership. (Citations omitted.) [T]he Committee intends to clarify precisely that the inherent powers of Indian tribes include the authority to exercise criminal misdemeanor jurisdiction over all Indians in Indian country.” (The rationale provided by Congress for doing this is, essentially, that there was a purported “gap” in jurisdiction after Duro to prosecute crimes allegedly committed by nonmember Indians on reservations and that these crimes “are the most tedious crimes with which law enforcement officers deal.” Id. at 373) (Metropoulos, Morris v. Tanner 2006, 11-12).

Metropolous wrote that “if consent to be a member of one Indian tribe is consent to the inherent sovereign power of all Indian tribes – including their power to imprison,” then 4.1 million Americans with Tribal heritage – and their non-tribal relatives – are due an explanation from the

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77 U.S. v. Rogers, 45 U.S. 567 (1846)
Court about what makes the designation of “Indian” just a “political” and not a racial
classification, “even though only American citizens of the Indian race are adversely impacted”

He maintains that if Congress has the constitutional power to “relegate American citizens
to criminal trial and punishment, including potentially imprisonment, by an extraconstitutional
tribunal, unconstrained by the Constitution, for mere misdemeanors” Americans of all heritages
should know the source, reason, location and limit of such power. (Metropoulos, Morris v.
Tanner 2006, 16)

Attempts to Amend the ICWA

On April 23, 1996, Representative Susan Molinari (R-NY) and Representatives Archer,
Bunning, Pryce, Solomon, Shaw and Tiahrt introduced the "Adoption Promotion and Stability
Act of 1996" to the Ways and Means Committee, attaching it to the Small Business Protection
and Minimum Wage Increase Act. The purpose of H.R. 3286 was to help families defray
adoption costs and promote adoption of minority children and had four Titles. Title I and II dealt
with the Adoption Tax Credit and removal of racial barriers to adoption. Title III responded to
the number of families who had been unwillingly subjected to tribal jurisdiction through the
ICWA.

The House Ways and Means Committee and the Committee on Economic and
Educational Opportunities considered Titles I, II, AND IV. The House Resource Committee’s
subcommittee on Indian Affairs considered Title III, which Chairman Young summarized,
stating Title III would:

…amend the Indian Child Welfare Act to exempt from its coverage Indian child
custody proceedings involving Indian children whose parents do not maintain
significant social, cultural, or political affiliation with the tribe of which the parents are members…Title III of H.R. 3286 also adds a new, universal requirement to each tribe’s existing requirements for membership by requiring that “a person who attains the age of 18 years before becoming a member of an Indian tribe may become a member of an Indian tribe only upon the person’s written consent (US Congress. House 1996, 2).

No hearings were held, and the bill was not referred to the Subcommittee on Indian Affairs. However, the Resource Committee received testimony. It reported:

…letters from twenty-two individual tribes, as well as the Intertribal Council of Arizona (representing nineteen Indian tribes), the Bureau of Catholic Missions, the National Congress of American Indians (representing 201 tribes), the Association on American Indian Affairs, the Native American Rights Fund, the National Indian Child Welfare Association, the Indian Child Welfare Law Center, and the United Indians of All Tribes Foundation, all strongly opposing the bill (US Congress. House 1996, 6).

There is no record of testimony from individuals and families negatively affected by the ICWA, nor indication that they, as citizens not represented by an organized group, were given notice or opportunity to testify.


The Senate received the bill on May 13th. Titles I, II AND IV of the bill were heard in the Senate Committee on Finance, and the Senate Committee on Indian Affairs received title III on May 23, 1996 (US Congress. Senate 1996, 7). In response to Title III of H.R. 3286, Secretary of Interior Bruce Babbitt sent a letter to the Chairman John McCain on June 18, 1996, stating:

Dear Mr. Chairman: In a letter to the Speaker, the President has stated his strong support for H.R. 3286 and its purpose of encouraging the adoption of children. However, in our role as trustee for Indians and Indian tribal governments, we would
have serious concerns if an amendment were offered to H.R. 3286 for the purpose of amending the Indian Child Welfare Act … The United States has a government-to-government relationship with Indian tribal governments. Protection of their sovereign status, including preservation of tribal identity and the determination of Indian tribal membership, is fundamental to this relationship. The Congress, after ten years of study, passed the Indian Child Welfare Act (ICWA) of 1978 (P.L. 95-608) as a means to remedy the many years of widespread separation of Indian children and families. The ICWA established a successful dual system that establishes exclusive tribal jurisdiction over Indian Child Welfare cases arising in Indian country, and presumes tribal jurisdiction in other cases involving Indian children…This system, which authorizes tribal involvement and referral to tribal courts, has been successful in protecting the interests of Indian tribal governments, Indian children, and Indian families. The ICWA amendments proposed in Title III of H.R. 3286, as introduced, would effectively dismantle this carefully crafted system by allowing state courts, instead of tribal courts with their specialized expertise, to make final judgments on behalf of tribal members. Such decisions would adversely affect tribal sovereignty over tribal members as envisioned by the ICWA and successfully implemented for the past 18 years. We therefore urge the committee to disallow the reintroduction of Title III into this bill. …Sincerely, BRUCE BABBITT (US Congress. Senate 1996, 8-9).

Assistant Attorney General Andrew Fois of the Office of Legislative Affairs wrote a letter to the Chairman the same day. In it, he states the Justice Department strongly supports H.R. 3286 “without the inclusion of title III” for two primary reasons: The Title interfered with tribal sovereignty, required children to be factually enrolled before the ICWA could take effect, and required that an adult give permission before they can be enrolled. There is no mention of concerning Constitutional rights of individuals within Fois’ letter (US Congress. Senate 1996).

The Assistant Attorney General states:

The proposed amendments interfere with tribal sovereignty and the right of tribal self-government. Among the attributes of Indian tribal sovereignty recognized by the Supreme Court, is the right to determine tribal membership…Section 302 of H.R. 3286 provides that membership in a tribe is effective from the actual date of admission and that it shall not be given retroactive effect. For persons over 18 years of age, section 302 requires written consent for tribal membership. Many tribes do not regard tribal enrollment as coterminous with membership and the Department of Interior, in its guidelines onIndian child custody proceedings, has recognized that “enrollment is the common evidentiary means of establishing Indian status, but is not the only means nor is it necessarily determinative.’’[and] H.R. 3286 would amend the ICWA to require a factual determination of whether an Indian
parent maintains the requisite `significant social, cultural, or political affiliation' with a tribe to warrant the application of the Act. Title III fails to indicate which courts would have jurisdiction to conduct a factual determination into tribal affiliation. To the extent that State courts would make these determinations, H.R. 3286 would undercut tribal court jurisdiction, and essential aspect of tribal sovereignty. ...Reducing tribal court jurisdiction over Indian Child Welfare Act proceedings would conflict directly with the objectives of the ICWA and with prevailing law and policy regarding tribal courts.

The President, in his Memorandum on Government-to-Government Relations with Native American Tribal Governments (April 29, 1994), directed that tribal sovereignty be respected and tribal governments consulted to the greatest extent possible. Congress has found that `tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments, ...Retaining ICWA's regime of presumptive tribal jurisdiction crucial to maintaining harmonious relations with tribal governments, to ensuring that the tribes retain essential features of sovereignty and to guarding against the dangers that Congress identified when it enacted ICWA in 1978. ...Sincerely, Ann M. Harkiss for Andrew Fois, Assistant Attorney General (US Congress. Senate 1996, 9-10).

On June 19, 1996 the Committee on Indian Affairs recommended the bill be passed with one amendment – that amendment being that all of provisions of Title III being struck from H.R. 3286 (US Congress. Senate 1996, 7).

As H.R. 3286 was making its way through Congress, another bill, H.R 3828, was also attempting to rectify the law for families such as those involved in Bridget R.. The House report on H.R. 3828 states that the purpose of the bill was to amend the ICWA “to promote stability in Native American custody proceedings and for other purposes.” Representative Deborah Pryce had originally introduced it a year earlier, on April 6, 1995, as H.R. 1448, which Molinari’s H.R. 3286 had partially incorporated. Hearings were held in 1995 that made clear the multitude of problems and the conflicting views on how to fix them. The Chairman then requested that opposing groups, including the National Indian Child Welfare Association and the American Academy of Adoption Attorneys get together and discuss a workable solution. However, no one
involved in the negotiation represented eligible families and children who consciously and purposefully distanced themselves from the reservation system.

The result of those discussions was H.R. 3828 (US Congress. House 1996, 2-3).

Again, this bill – on the grounds that many individuals affected by ICWA are US citizens who do not want tribal governments to be involved in their family affairs – ceded some decision making to the states. However, at the same time, the bill, introduced by Rep. Don Young, provided “criminal sanctions for fraudulent representation with respect to any proceeding involving an Indian child” (US Congress. House 1996). Although the wording of this provision could have caused grandparents who chose to keep their heritage private to be charged for fraud, the Committee on Resources approved the bill without amendment. Fortunately, it was never considered by the floor prior to Congress’ adjournment.

The companion bill in the Senate for H.R. 3828 was S. 1962. Sponsored by Senator John McCain, the draft language for the bill had its first hearing before the Senate Indian Affairs Committee on June 26th, 1996 (US Congress. Senate 1996). On that day, the Senate Committee on Indian Affairs held a hearing to discuss the proposed amendments to the ICWA. While Senator McCain had the support of Senator Daniel Inouye, Senator Ben Nighthorse Campbell most of the witnesses, it is important to note the testimony of those who disagreed. In a statement to the committee, Representative Peter Green from Texas expressed his concerns about the law. While acknowledging the original need for the ICWA, he stated that “the remedy that has been created by the Indian Child Welfare Act has led to its own abuses and, I believe, injustices” (US Congress. Senate 1996, 8). He testified:

The act, as currently enforced, has created uncertainty and, in many cases, heartbreak in the adoption community. It is unreasonable for the adoption of a child, a child with no cultural ties and with remote Indian ancestry, an adoption that is consented to by the birth parents, approved by lawful State authorities chosen by
the birth parents who are U.S. citizens to be interrupted by any third party, even a sovereign nation such as a Native American or a European nation (US Congress. Senate 1996, 8).

Senator Inouye remarked that “every sovereign country, whether it be South Africa or China or England, France, or Ireland, has very clear and distinct laws affecting membership or citizenship.” He reasoned that if he wanted to adopt a child in France, Chana, or any other country, “it would have to be done subject to the laws of that country” (US Congress. Senate 1996, 13). To this, Representative Peter Geren responded that the difference is that when a Chinese citizen “forsakes Chinese citizenship, moves to the United States, and gets American citizenship, no matter what China tries to dictate to that person who is now an American citizen, we ignore those dictates from China” (US Congress. Senate 1996, 15). He explained:

Once that person becomes a U.S. citizen, he or she has all the protections and the rights of any American citizen. That in no way denigrates the sovereignty of China; it just respects the sovereignty of the United States and the choice of that individual to assume all the responsibilities, privileges and rights of American citizenship (US Congress. Senate 1996, 15).

Representative Deborah Pryce, who had introduced alternative amendments in the House, stated that the current interpretation of ICWA has gone far beyond the original intent. She spoke of children who faced removal from the only homes they had ever known, simply because of their parent’s heritage – including parents who had never been enrolled, never lived on a reservation, and had never had any type of connection to Indian Country. Further, she testified:

I would urge the committee to give due consideration to European Americans, African Americans, Asian Americans, Spanish Americans, Hispanic American heritages, all different heritages of children in addition to their Native American heritage rather than ignoring all other ethnic and racial backgrounds in determining when ICWA should apply, particularly under circumstances where there’s no affiliation with a tribe and in situations where the child’s blood relationship is attenuated. I think a continued disregard for all these other heritages, in my mind, will no doubt lead to the eventual demise of ICWA and with it, all the good things that ICWA is doing (US Congress. Senate 1996, 19).
Nevertheless, W. Ron Allen, President of the National Congress of American Indians, testified that he and the NCAI “absolutely object to any legislation that erodes our sovereignty and our governmental jurisdiction. Our member tribes, 210 to date, are firmly holding that position (US Congress. Senate 1996, 40).

Professor Frank Pommersheim, of the University of South Dakota School of Law, in a letter to Senator McCain, took issue with title III within Adoption Promotion and Stability Act of 1996. In a letter submitted to the committee Pommersheim noted:

…problematical is the attempt in proposed Sec. 302 to limit and set restrictions on a tribe's ability to determine membership requirements (e.g., children 18 or older must consent, tribal membership is strictly prospective in nature). The right to determine membership is essential to tribal sovereignty and ought not be displaced by Congress. As noted by the U. S. Supreme Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978): "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." These proposed amendments, whether advertently or inadvertently, seek to improperly invade tribal sovereignty (US Congress. Senate 1996, 432).

S. 1962 was then introduced on July 16, 1996. Although primarily written by the National Congress of American Indians (NCAI) and containing language including a provision to criminally charge anyone who hid the fact a child had tribal heritage, S. 1962 did not have full support of many tribal governments because it lacked language prohibiting the Existing Indian Family Doctrine (US Congress. House 1996).

In a letter to Senator John McCain on July 23, 1996, Robert Joe, Sr., Chair of the Swinomish Tribal Community of Washington, addressed the EIF, stating, “Tribal families and ultimately Tribal cultures are facing a serious threat of extinction. The "existing Indian family" doctrine being used by certain state courts in adoption proceedings of Indian children will undo the excellent work you and the Committee have done thus far” (US Congress. Senate 1996, 399).
Minneapolis Attorney Mark Fiddler, eight years later, agreed. In 2004, he was the founder and Executive Director of the Indian Child Welfare Law Center in Minneapolis and assisting tribal governments in support of the ICWA. Fiddler wrote in a letter to supporters:

…This legal doctrine, called the "existing Indian family" doctrine, will be tested in Georgia in this case. This doctrine is the most effective means of attacking Indian families and tribes ever dreamed up by adoption attorneys. There is a national campaign of adoption attorneys to push this phony doctrine. It has been adopted in at least four states so far. It must be stopped (Fiddler, Existing Indian Family Doctrine 2004).

The bill passed the Senate by unanimous consent on September 26, 1996 – meaning there was no floor vote. It was decided there was no controversy in passing this bill. However, no action was taken on the bill in the House in the 104th Congress. Congress had opportunity to prohibit application of the Existing Indian Family Doctrine - but did not.

In 1997, Senator McCain tried again. In the 105th Congress, S. 569 and H. 1082, which were nearly identical to S. 1962, were introduced. According to their supporters, the companion bills strengthened ICWA “making it harder for children to slip through the cracks” by making it a crime for anyone other than the parents to ‘hide’ a child’s tribal heritage. With this amendment, grandparents could be charged for wanting to keep their heritage private. Senator Slade Gorton and the National Council for Adoption strongly opposed the bills “out of concern for children and families who did not choose to be part of the reservation system” (US Congress. Senate 1997). H.R. 1082 was introduced March 13, 1997, and S. 569 was introduced on April 14, 1997. The Committees held a joint hearing on both simultaneously on June 18, 1997.

Representative Pryce was one of the initial witnesses. She explained her interest in the issue by sharing the emotional story of an Ohio couple who had adopted twins after the father of the children purposefully withheld his heritage from the adoption paperwork. She testified:
This case is not an anomaly. Since I became involved in this issue, I have heard numerous horror stories from people all over the country who are victims of the ICWA. Much of this stems from a broad and inconstant application of this very well-intentioned law. I won’t dwell on these horror stories today or I won’t have time to continue on with my testimony and we would be here all day. Let me begin by saying that our Constitution protects the rights of individuals against classification based on race, and it protects the rights of parents to control their children’s upbringing. These are fundamental liberties and they are privacy issues. The ICWA excludes all other circumstances to the dole factor of race and denies these basic Constitutional rights to parents who have a child with any Indian blood. …As a former judge and an adoptive mother, I am sorry to testify today that S. 569 and H.R. 1082 do not address the fundamental issues. Instead, these bills take a procedural approach that, in my view, is cumbersome enough to significantly discourage the adoption of Indian children and to make many lawyers rich. The complexity of these requirements almost guarantees an inability to comply (US Congress. Senate 1997, 37).

Thomas Atcitty, Vice President of the Navajo Nation testified that it is “important to remember that ICWA was not only enacted to preserve American Indian tribes’ most precious resources, its members, but also to prevent the type of alienation experienced by Indian children who were adopted by non-Indian families…” (US Congress. Senate 1997, 59). He also requested language added to the bills that would “provide direct title 4-E funding” to tribal governments for foster care and adoption programs. Currently, he stated, tribal governments must enter into agreements with the states in order to obtain the funding. If this is not possible, Atcitty stated, then states should be required by federal legislation to “serve tribes rather than stipulating a tribal-State agreement” with penalties “should discrimination occur” (1997, 59).

Based on the hearing testimony and strong support by tribal governments, an amendment was prepared as a substitute by Senator Campbell, Chair of the committee. On July 30, 1997, by voice vote in an open business session, the Committee adopted the amendment and ordered S. 569 reported to the Senate with the recommendation that it be passed (US Congress. Senate 1997). These bills did not make it out of Committee (US Congress. Senate 1997, 105-156).
Failing to get stronger versions of ICWA through Congress, the National Indian Child Welfare Association, NCAI and other organizations have turned to state legislatures as well as state executive branches to get stronger legislation passed. For example, on February 22, 2007, the State of Minnesota signed a tribal/state agreement with representatives of the seven Minnesota reservations, giving them increased jurisdiction over children of heritage who come before Minnesota courts (MN Dept Human Serv. 2007).

Split-feather Syndrome

In the late 1990’s, in effort to prove the need for children of tribal heritage to stay within tribal communities, Training Director Carol Locust, of the Native American Research and Training Center at the University of Arizona, conducted a pilot study concerning children of tribal heritage who had experienced foster care or adoption in a non-tribal home. After interviewing 20 young adults, Locust concluded that "there are unique factors of Indian children being placed in non-Indian homes that create damaging effects in the later lives of the children." According to Locust, “[E]very Indian child placed in a non-Indian home for either foster care or adoption is placed at great risk of long-term psychological damage as an adult” (Locust 1998).

Sandy White Hawk, a woman of Sioux heritage who was adopted by a non-tribal family in the 1950s, voiced a commonly accepted belief when she said, “We know that the children who grow up outside of their culture suffer greatly… Non-native homes cannot give an adopted Indian child their culture” (Kaplan 2015).

While Locust’s pilot study has not explained whether this inability is physical, emotional or spiritual, the affliction – assumed by many to be present in children of even the smallest heritage - has become known as the “Split-feather Syndrome.”
“Unfortunately,” according to Bonnie Cleaveland, PhD ABPP, the study “was implemented so poorly that we cannot draw conclusions from it.” Despite this, the concept of Split-feather has been used as justification for tribal involvement in the lives of children of primarily non-native heritage who have never had connection to Indian Country. A significant percentage of enrollable children are raised by non-native birth parents and non-native extended family. Broad sweeping claims of inherent psychological connection to Indian Country, based on interviews with twenty young adults, beg the question of motive.

Adoptive Couple v. Baby Girl

In the summer of 2010, a woman emailed the Christian Alliance for Indian Child Welfare to ask for help. The Cherokee Tribe was assisting a man of about 3% tribal heritage to gain custody of his daughter - their adoptive daughter - who was 75% Caucasian, 25% Latina, and only a little over 1% Cherokee. The child had never lived anywhere but the adoptive home. The adoptive couple had, in fact, been present at her birth, cut the cord, and took her home soon after. Baby girl and her birth mother had never lived in Indian Country or had any connection to the tribe. There was also contention that the birth father had never had strong connection to the tribe prior to the court battle (CAICW 2014).

CAICW referred the mother to Minneapolis ICWA attorney Mark Fiddler, and the rest, as they say, is history. On October 28 that same year, CAICW held an ICWA Teach-in79 in the chambers for the Senate Committee on Indian Affairs. The adoptive mother was one of the speakers. In January 2011, a family court judge in South Carolina awarded the birth father

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79 Dr. William Allen was the keynote speaker at the Christian Alliance for Indian Child Welfare’s ICWA Teach-In, titled ‘Indian Children: Citizens, not Cultural Artifacts,’ on October 28, 2011 in the chambers of the Senate Committee on Indian Affairs.
custody based on the ICWA, and the adoptive family had only a couple days in which to say good-bye. The toddler was sent, crying, with a man she had never before met (CAICW 2014).

According to Fiddler, *Adoptive Couple v. Baby Girl*, 80 was a landmark ICWA case involving a 2-yr-old girl and her father, who had made no attempt to support her during her mother’s pregnancy or in the first few months following Baby Girl’s birth in 2009. It was only after he learned of the adoption months after the birth that he decided to become involved and invoked his 3% Cherokee Nation ancestry. Baby Girl’s heritage was 1.12%. In January 2011, the South Carolina Supreme Court, believing it was an ICWA case, gave custody to the father, whom she had never met. She was handed over to him with only a two-hour transition period. Two and a half years later, on June 25, 2013, the United States Supreme Court made the decision that ICWA did not apply. This resulted in Baby Girl being returned to her adoptive parents in September 2014 following a month of family visits. This case had the potential to reshape adoption practice and cast “new doubt on the constitutionality of states’ laws which attempt to expand ICWA beyond its original reach” (Fiddler, Adoptive Couple V. Baby Girl, State ICWA Laws, and Constitutional Avoidance 2014).

Supreme Court Justice Samuel Alito noted in the case *Adoptive Couple v. Baby Girl*, “This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee. Because Baby Girl is classified in this way, the South Carolina Supreme Court held that certain provisions of [ICWA] required her to be taken, at the age of 27 months, from the only parents she had ever known.” He also wrote, “It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law,” and “[U]nder the State Supreme Court’s reading, [ICWA] would put

80 570 U.S. (2013)
certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian” and “raise equal protection concerns” (Adoptive Couple v. Baby Girl 2013).

Nevertheless, Terry Cross, founder of the National Indian Child Welfare Association in Portland, Ore., had called the 2009 lower court decisions in Adoptive Couple v. Baby Girl a victory for the tribe. He remarked, "Tribes cannot continue to exist if children are removed at such rates as were being done in the past." Cross adds, "When you lose someone in that network, it is a trauma to the entire network. Protecting our children and being able to bring them home is part of our healing and recovery” (Bird 2012). Many tribal leaders and their supporters perceived the final 2013 Supreme Court ruling in Adoptive Couple v. Baby Girl to be an attack on tribal sovereignty. Following the Court’s affirmation that a non-Indian, unwed mother has a right to decide the best interest of her child without interference from tribal governments, former Senator James Abourezk responded, “It’s an attack on tribal sovereignty through the children. I can’t believe they did this.” AIM Leader Clyde Bellecourt agreed, saying the Supreme Court decision “is legalizing the kidnapping, theft of children and division of Indian families once again by states and churches” (Harriman, 2013).

The National Indian Child Welfare Association and the Association on American Indian Affairs reiterated the need for “Analysis of the potential for state law to address the issues raised by the United States Supreme Court decision [Adoptive Couple v. Baby Girl], and minimize its negative impact upon tribes and Indian families and children,” and “Information about tribal-state ICWA agreements and the role of such agreements in mitigating the effects of the Court’s decision.’ (NICWA/AAIA 2013).
Tribal governments and organizations have worked with all three branches of Government on both state and federal levels to ensure their jurisdiction over every child a tribal government deems eligible for membership. The BIA reported in 2015 “Last year Cherokee Nation was involved in cases in all 50 states and we saw firsthand the (disproportionate) treatment from state-to-state involving Indian children (BIA 2015, 52). With disproportionate treatment from state-to-state in mind, tribal governments have begun lobbying state governments for increased jurisdiction. However, that’s not the only reason they have begun lobbying state legislatures and Governor’s offices. According to Nimmo:

Because of [Adoptive Couple v. Baby Girl] and because the ICWA is enforced with such erraticism, there has been talk of amending the act … The big legislative fix would be for Congress to amend the ICWA, [but] Tribes are really opposed to that, because if we open it up for amendment, the opposition will come in and demand their changes be addressed as well (Rowley 2015).

But Supreme Court Justice Clarence Thomas, in his Adoptive Couple concurrence, cited Professor Rob Natelson’s white paper concerning the Commerce Clause and the unconstitutionality of the ICWA. Justice Thomas explained he was construing the statute narrowly to avoid opening the door to rule the ICWA unconstitutional. But he noted, “In light of the original understanding of the Indian Commerce Clause, the constitutional problems that would be created by application of the ICWA here are evident. First, the statute deals with “child custody proceedings,” §1903(1), not ‘commerce’” (Adoptive Couple v. Baby Girl 2013).

Indeed, according to Fiddler, the court invoked the ‘doctrine of constitutional avoidance,’ and looked for approaches to the ICWA statute that would allow them to avoid the question of equal protection and due process. The attorneys for the birth father and Cherokee Nation had argued that the constitutional issues did not apply and cited Morton v. Mancari, 417 U.S. 535 (1974), in which the Supreme Court had construed that preferential treatment for Native
Americans was based on their unique political status, not on their heritage. Attorneys for *Adoptive Couple*, however, argued that “differential treatment predicated solely on “ancestral” classification violates equal protection principles” and cited *Rice v. Cayetano*, 528 U.S. 495 at 514, 517 (2000). When unequal treatment is predicated on a status unrelated to social, cultural, or political ties, but rather blood lineage, the ancestry underpinning membership is “a proxy for race.” *Rice*, 528 U.S. at 514. While the court did not address the constitutional issues, Fiddler believes that “…at a minimum, *Adoptive Couple* stands as a clear signal from the Court that the application of ICWA, and perhaps other Indian preference statutes, cannot be based merely upon a person’s lineal or blood connection with a tribe. Something more is required. In *Adoptive Couple*, it was the requirement of parental custody” (Fiddler, *Adoptive Couple V. Baby Girl*, State ICWA Laws, and Constitutional Avoidance 2014, 7-8).

Families and children are not ‘commerce’ with Indian tribes and thus are not legitimately dealt with under the Indian Commerce Clause, yet tribal attorneys continue to claim ICWA is constitutional, and some assert a right to claim any child they choose as a member. In reference to *Baby Girl*, Chrissi Nimmo, Attorney General for the Cherokee Nation stated, “… we repeatedly explained that… tribes can choose members who don’t have any Indian blood” (Rowley 2015).

According to Nimmo, in 2012 the Cherokee Nation alone had over 100 attorneys targeting about 1,100 active ICWA cases involving some 1,500 children across the nation. Most of those children were primarily another heritage and had never lived in Oklahoma, let alone within Indian Country. Nimmo clarified at another point that she had 14 Indian Child Welfare cases assigned to her alone, and “to say one tribe has 1,100 of these cases means there is a lot
more going on. In Oklahoma, we are one of 38 tribes. I think the reason people don't know about the ICWA or hear about child welfare cases is because they are private” (Bird 2012).

Federal Funding Based on Head Counts

Colonial treaties, President George Washington and the first Congress all recognized indigenous tribes as sovereign entities. Tragically, those controlling federal government a few short decades later ignored the Constitution and used both manipulation and horrific abuse to achieve self-seeking ends. But while federal government orchestrated subsequent events, there are various aspects some tribal governments participated in willingly.

As Banner notes, “All human activity is performed under constraints…In deciding whether to enter into employment contracts, for instance, workers are constrained by their need to earn money to obtain food, by the range of jobs within commuting distance… by the educational opportunities they had when they were young, by the state of the economy, and so on. Their decision to sign the contract is voluntary in some sense and involuntary in others” (Banner 2007, 3). But they are decisions we all make – sometimes daily.

For example, tribal governments have repeatedly gone to Washington DC requesting federal funding as well as legislation or executive action for matters unrelated to commerce. For the purpose of obtaining federal funding, various tribal officials, together with various federal officials, have promoted the concept of plenary authority and wardship. As years have gone by, the assumption of “trust relationship” has grown in scale and purpose as much through the request of tribal leaders as through the self-interest of federal government.

According to the U.S. Census Bureau, “The Federal government uses census data to allocate funds to tribal, state, and local governments for a wide range of programs” (US Census
Examples of federal funding tied to population statistics from either tribal membership rolls or the United States census include: “Johnson O’Malley, Headstart, Home Energy Assistance, and Housing and Urban Development programs.” In order to encourage participation in the census, the Census Bureau advises government entities to “Develop separate flyers on the benefits those programs provide to tribal residents. Explain how funding allocations are based, in part, on census information” (US Census Bureau 2001).

Jack C. Jackson, Jr., Director of Governmental Affairs, National Congress of American Indians, submitted a statement to the U.S. Commission on Civil Rights on February 12, 1999 concerning the importance of an accurate census to American Indians and Alaska Natives. He stated:

American Indians and Alaska Natives have a significant stake in the outcome of the 2000 census…A range of programs now exists to help Tribes address and overcome barriers to economic advancement and self-sufficiency. A significant portion of this federal aid is based on the information collected in the census. Federal programs that distribute aid to American Indians and Alaska Natives based in whole or in part on census data include the Job Training Partnership Act, Grants to Local Education Agencies for Indian Education, Special Programs for the Aging, and Family Violence Prevention and Services (J. C. Jackson 1999).

The Child Care Bureau, Office of Family Assistance of the Administration For Children and Families (ACF), an agency within the U.S. Department of Health and Human Services, stated in a publication on May 9, 2007 that grant awards that would become available in FY 2008 for tribal governments would be calculated based on the number of children under age 13. The agency advised tribal officials to “submit a self-certified Child Count Declaration for children under age 13 (not age 13 and under), in order to receive FY 2008 CCDF funds” (ACF 2007).
**Child Abuse**

“In Indian Country children are considered sacred beings—gifts from the Creator and carriers of the tribe’s future” (NICWA 2015, 2).

Responding to increasing pressure concerning the constitutionality of the ICWA, the Native American Rights Foundation published an article by tribal attorney and author Albert Bender which again touched on the perception of harm to the tribal community if state officials continue to enforce the same child protection laws on the reservation as they do off the reservation (Schumacher-Matos 2013):

Genocide is not too strong a term for what is now happening in South Dakota. The huge, shocking violation of legal and human rights being carried out by the state is tantamount to genocide against the Native American nations… It is the abduction and kidnapping by state officials, under the cover of law, of American Indian children…. (Bender 2015).

Others see the opposite occurring. Dr. Michael R. Tilus, Director of Behavior Health at the Spirit Lake Health Center in 2012, reported in a letter to Ms. Sue Settle, Division Chief of the Department of Human Services within the BIA:

- Over the past five years, the BHD has witnessed dozens of cases where TSS [Tribal Social Services] did not follow tribal law: …BHD is aware of parents who have had their children illegally removed for upwards of 12 months or more without filing for tribal temporary legal guardianship.
- TSS has presented many of these cases to BHD, representing themselves as the new temporary legal guardian, requesting BHD services therapy, evaluation, or psychopharmacotherapy. After multiple cases in which the BHD discovered that in fact, no legal documents had been filed with tribal court authorizing TSS as legal guardians… it is clear to me that TSS intentionally misrepresented themselves and lied regarding proper legal and regulatory violations. As these cases involved minors, the ongoing dangerous malpractice violations of TSS directly jeopardized the BHD’s practice guidelines, legal mandates, and professional liability…
- TSS “Child Protection Services” (CPS) investigator, representing herself as the current temporary legal guardian of a minor, attempted to maneuver and then intimidate me into prescribing atypical antipsychotics for a child she had determined needed something to control his “anger.” When I refused…she brought the child to the walk-in at SLHC, again attempting to get this child
medicated without the parents present; without it being a true psychiatric or medical emergency.

- ...I feared TSS behavior could, or would, expose them, and by complicity BHD, to possible FBI investigation for child abduction, child endangerment, and potentially felony neglect.
- ...Since June of 2007, I have yet to receive one paper document from TSS on a formal CPI investigation finding...
- Over the past five years, unfortunately, the majority of TSS staff who has been hired, fired or left have not been licensed or credentialed by any state or national professional behavioral health agency or board...
- ...BIA Superintendent Mr. Rod Cavanaugh failed in his federal BIA administrative and #638 fiscal accountability oversight of the TSS program.
- TSS Director Kevin Daughnais malfeasance is inexcusable with ongoing tragic consequences to many Spirit Lake children...
- As the Director of the BHD, I have no confidence or trust in filing a #960 with TSS that they will operate ethically, legally or with the best interests of all the various parties...
- The #960 document is potentially the most confidential and revealing with allegations of possible child abuse or neglect of a minor. To release #960’s to this department may in fact violate good practice standards for the BHD.
- ...untold #960’s have apparently never been investigated. Child abuse is epidemic in our society and is unfortunately a public health disaster in Indian country. During on fairly recent three-week time period the BHD filed approximately ten #960’s. Shortly after this time, the TSS CPI staff member was fired... After calling TSS to get an update on these #960’s we were told they had no record of them, and no paper trail to refer any new TSS staff too.
- Patients have reported to BHD that TSS have on occasion use them (a minor), while under TSS temporary legal guardianship, to “babysit” TSS children while TSS staff attended a social event-rodeo.
- BHD has several cases where minor children were autonomously removed from successfully placed foster care off the reservation and brought back to an unsafe, substance abusing, violent environment because “the director said all the kids need is here on the rez” (patient’s parents’ words). Subsequent to this forced return, one minor child was raped without legal/police investigator or involvement due to obscure reasons. Minor was previously already a sexual victim and was removed from this environment due to that sexual abuse. Minor’s depression and substance abuse increased, resulting in 2 more substance involved date-rape incidents. Within about six months minor ran away to another state. TSS remained uninvolved.
- The children, elderly and vulnerable populations on Spirit Lake Reservation are at great risk of increased abuse, neglect and harm due to unchecked incompetence.

    I would encourage the BIA to conduct a decisive leadership review of previous Director Mr. Kevin Dauphinais and current BIA Superintendent Mr. Rod Cavanaugh for their gross dereliction of duty and professional misconduct of the TSS program (Michael R. Tilus, 2012). [See Appendix for full text]
The review Tilus requested was never done. Instead, Dr. Tilus was transferred to another state.

Thomas Sullivan, former Regional Administrator of the Administration of Children and Families in Denver, wrote his initial mandated report concerning the child abuse at Spirit Lake on June 14, 2012. While much of the focus in this section of the paper concerns Spirit Lake in North Dakota, Sullivan oversaw Region 8 of the ACF and worked with several tribal governments. While Spirit Lake members had begun contacting him directly concerning child abuse, he was concerned with similar issues on other reservations as well. Spirit Lake was a microcosm of the domestic violence and crime occurring on several reservations.

Concerning Spirit Lake, Sullivan later stated, “…TSS was in disarray then and has not improved its capacity to respond to the child welfare needs of its youngest citizens in the interim despite claims to the contrary by the state, BIA, DOJ and the leadership of ACF” (T. F. Sullivan 2014). In his initial report, he quoted former tribal judge Molly McDonald stating:

I grew up on this reservation and witnessed many acts of violence and abuse. This is normal to us. Our tribe has adopted this as a way of life, violence and hopelessness. When does the cycle end? …The abuse is reported but nothing is done by Social Services or Law Enforcement. Where do we go from there? …Please consider that if an investigation had been done, many children could have been saved from further abuse, and possibly, they would have been alive today…our tribe is attempting to cover up these issues that plagued our reservation for many years…Whatever picture our tribal council or chairman want to paint, it simply is not the case. There is a dire need for professionals …that know their boundaries and will not overlook issues at the request of Tribal Council… (T. F. Sullivan 2014).

In September 2012, following the rape and murder of two children under ten years old, the Spirit Lake tribal government signed a retrocession agreement allowing the BIA, FBI and U.S. Attorney to oversee tribal law enforcement and social services. This was not done by instigation of the agencies, but because anguished tribal members drew media attention to the
unprosecuted and brutal murder of the two children. Yet, despite the retrocession, the abuse of children continued. Sullivan stated in his February 2013, 12th Mandated Report to the ACF office in DC, “In these 8 months I have filed detailed reports concerning all of the following:”

- The almost 40 children returned to on-reservation placements in abusive homes, many headed by known sex offenders, at the direction of the Tribal Chair. These children remain in the full-time care and custody of sexual predators available to be raped on a daily basis. Since I filed my first report noting this situation, nothing has been done by any of you to remove these children to safe placements.
- The 45 children who were placed, at the direction of Tribal Social Services (TSS), BIA social workers, BIA supervised TSS social workers and the BIA funded Tribal Court, in homes where parents were addicted to drugs and/or where they had been credibly accused of abuse or neglect. Since I filed my first report noting these placements, nothing has been done to remove these children to safe placements. I trust the Tribal Court, with the recent resignation of a judge who failed a drug test, will begin to be responsive to the children whose placements they oversee.
- The 25 cases of children most of whom were removed from physically and sexually abusive homes based on confirmed reports of abuse as well as some who still remain in those homes. Neither the BIA nor the FBI have taken any action to investigate or charge the adults in these homes for their criminally abusive acts. Many, of the adults in these homes are related to, or are close associates of, the Tribal Chair or other Council members.

Since I filed my first report detailing these failures to investigate, charge, indict, prosecute those adults, my sources and I have observed nothing to suggest this has changed. Those adults remain protected by the law enforcement which by its inaction is encouraging the predators to keep on hunting for and raping children at Spirit Lake. (Sullivan, 12th Mandated Report 2013)

Two weeks later, on February 27, a tribal town hall meeting was held at the Spirit Lake Casino. One member after another stood up to tell the panel, which consisted of the tribal council, BIA officials, ND Congressional staff, the FBI and U.S. attorney Tim Purdon, tragic stories of violence and abuse, and how they have tried to get tribal police, the BIA, the FBI, and the U.S Attorney to pay attention and do something. For over two hours, one member after another got up and reported horrific child abuse as well as official mismanagement and corruption. Not one tribal member said U.S. agencies were helping children. As they told their
stories of continuing abuse of children, tribal and federal officials on the panel claimed that everything that can be done, has been done. “Investigations take time” Purdon repeated over and over (E. Morris 2013).

Concerning the reports of abuse Sullivan had written to his superiors, U.S. Attorney Purdon, ignoring that it was the very people in front of him who had informed Sullivan of the abuse, told those gathered at the town hall meeting that Sullivan had “misrepresented” the facts (E. Morris 2013). Yet, former Spirit Lake Tribal Judge Molly McDonald had once said of Sullivan:

…he is the only fed we trust. After more than five years of complaining about conditions at Spirit Lake to tribal, state and federal government officials who did nothing in response to our complaints, he is the only one who returned our calls. What is in his reports are our stories told to him by us, faithfully recorded and reported by him. Tom Sullivan is the only one we trust in government at any level (Sullivan, Summary of Correspondence, 2013).

At the very end, an elderly woman got up and, having difficulty walking, struggled to get to the mike to report something she had witnessed. "I am an elder,” she finally said, “full-blooded. I have lived here all my life.” She attempted to tell her story but was continually interrupted by someone on the panel, who loudly and repeatedly spoke over her, shushing her and telling her to sit down because they wanted to close the meeting. Intermittently, her words could be heard, “This summer...I looked outside and saw...I called Police...nobody has ever come and asked me about it. Nobody came.” The interrupting voice told her that everyone already knows her story, and she can tell someone from the panel about it after the meeting. He closed the meeting, shutting her testimony down (E. Morris 2013).

She was not allowed to tell the Senate staff what she saw or the number of attempts she had made to get law enforcement to listen. But many in the audience did already know her story, and a woman said, while gathering her jacket, that the elderly woman had told this to the media
for almost a year. The story is printed in the NY Times. The elderly woman had looked out her window and seen a 6-year old boy and 8-year old boy having anal sex on her front lawn. She called the police and they never came to take her story. This report is known, but not officially filed. The women holding a jacket pointed to a man up on the dais and said the police would not take the elder’s statement because the children are nephews of a tribal councilman (Morris, 2013).

This event had occurred while Spirit Lake was under oversight of the BIA, FBI, and Purdon in 2012 and 2013. According to Sullivan, the US Attorney had promised publicly to speak to the elderly woman after the hearing, but he did not. “Nor did anyone from his office take her statement” (Sullivan, 13th Mandate Report, 2013, p. 3). Sullivan also noted that the very next day, on February 28, 2013, “these same two boys were observed by two little girls engaging in oral sex on a Spirit Lake school bus. The little girls reported this to the bus driver, their teachers and the school principal” (2013, 3).and later, on March 14, 2013, “law enforcement went to the home of these two boys because one of them tried to sexually assault a three year old female neighbor who is developmentally delayed” (2013, 3).

In his 13th report, Sullivan castigated those who discredited his reports, noting that tribal Chair Roger Yankton had said on November 5, 2012 at a General Assembly meeting that he knows of no lies in Sullivan’s reports (T. F. Sullivan 2013, 1) and that he had not personally witnessed the abuses, “they have been witnessed by Tribal Elders, a Nun, a former Tribal Judge, foster parents, parents, all enrolled members of the Spirit Lake Nation…All of my sources have been threatened by the supporters of the Tribal Council with loss of employment, jail, as well as physical harm to themselves or their families. While I have not been directly threatened, I have
been told my persistence in this matter places me at the same risk as my sources (T. F. Sullivan 2013, 1).

Had the ACF, BIA and FBI heeded the tribal members at the town hall meeting or Sullivan’s reports, the outcome for toddler Laurynn might have been different. Three months after this 12th report, three-year-old Laurynn Carmen Clarah Whiteshield and her twin sister were taken from a safe and loving home in Bismarck and placed with family members at Spirit Lake in May 2013. At least one of the persons with whom the little girls were placed had been in tribal court previously for child abuse. Sullivan notes that “Despite knowing their own biological children had been removed from their care and custody, that they both had been charged with and convicted of child abuse of their own children, the BIA authorized the placement of these children in their full-time, unsupervised care and custody (Sullivan, Response, 2014).

On June 13, 2013, less than a month after the girls were placed, Laurynn died. This murder occurred during a period when both the BIA and US Attorney’s office had taken over law enforcement and social services on the Spirit Lake Reservation due to a rash of uninvestigated child homicides and were supposedly monitoring placements to prevent further murders (E. Morris 2016).

This case did get media attention in North Dakota because it so closely followed the rape and throat slashing of two other young children at Spirit Lake. As a result, the perpetrator was quickly arrested, tried, convicted and imprisoned all within five months. However, none of the officials who were responsible for placing her in the home were held accountable. The non-native foster mom the girls were taken from read a victim’s impact statement for the sentencing of the murderer of Laurynn. She asked the judge to hold the perpetrator accountable, but also hold the broken system accountable. The federal government, she said, allowed it to happen, and
“ICWA can be an evil law when twisted to fit the tribes wants or needs” (CAICW 2014). From the Goldwater Institute concerning Laurynn:

The forced transfer from a safe, loving foster family to a home that posed great and obvious danger to the girls did not happen in a third-world country but in the United States. It did not happen 40 or 60 years ago but in 2013. And it did not happen because the court ignored the law but because it followed it. Had any of the child custody laws of the 50 states been applied, in all likelihood Laurynn would be alive today. That is because state laws require consideration of the “best interests of the child” in determining termination of parental rights, foster placements, and adoptions. That bedrock rule protects all American children—except children of tribal ancestry, like Laurynn. Although she had never lived on a reservation, because of Laurynn’s ancestry, she was made subject to the Indian tribe’s jurisdiction, which determined it was better to “reunify” her with a grandfather with whom she had never lived instead of the non-Indian foster family who had raised her from infancy and wanted to adopt her (Bolick 2015).

To understand why the violence and abuse persists so easily despite the claim by all officials that it needs to be stopped, one needs to understand the complicated politics engulfing tribal members. In the spring of 2013, due to the prevalence of crime and corruption, tribal elders first attempted to oust the entire tribal council. When they were told they could not do that, they battled to oust the tribal chair. On July 26, 2013, elders and the Spirit Lake tribal council filed a restraining order against Yankton to keep him out of tribal offices (E. Morris 2013).

Sullivan believed the DC agencies did not know what to do about the violence in Indian Country. In a February 2014 letter to McMullen, Sullivan reported:

…I recall when you stormed out of my conference room on the morning of Friday, June 14, 2013 abruptly breaking off a conversation about how best to address the issues I had been raising at Spirit Lake. You were clearly dis-satisfied with my response to the effect that such an effort would not be easy but was doable, would require the active participation of a broad coalition of Tribal, state, federal and local organizations to begin to effectively address these issues and was consistent with the kind of efforts I had lead in the past. At a minimum I told you that every one of ACF program components had to be involved, not just Child Welfare, and that we had to partner with the Indian Health Service, the Office of the Assistant Secretary for Health, the Substance Abuse and Mental Health Services Administration, Health Resources and Services Administration, Departments of Justice, Interior, Education, Labor, HUD and the Small Business Administration. These agencies
and departments represented only the federal; side of the collaboration which would be necessary…You had a far more negative perspective, apparently frustrated in your efforts to convince me that the problems were unsolvable and were quite displeased to hear my positive recommendations on how to proceed (T. F. Sullivan 2014).

In August 2013, Casey Family Services, a non-government non-profit that works in support of tribal sovereignty and the ICWA, offered to “fund a position that will work half time with DOI and half-time with HHS/ACF on major tribal human services areas” (Kennerson, 2013). Under the “Intergovernmental Personnel Act” the Casey Family Services employee was to be “embedded 1/2 time under Assistant Secretary Kevin Washburn, Department of the Interior, Indian Affairs and 1/2 time under Acting Assistant Secretary George Sheldon, Administration for Children and Families.” According to ACF official Jerry Gardner, this was “an opportunity which will allow her to bring two large federal agencies together” and “strengthen communication, cooperation, and collaboration with a focus on Native children and families” (Jerry Gardner, 2013) (Kennerson, 2013).

In early November 2013, many of Sullivan's job responsibilities were transferred to the ACF’s Children’s Bureau. According to the ACF’s Marrianne Mcmullen, the Children’s Bureau was to be “the principal liaison with the state of North Dakota, the Bureau of Indian Affairs and the Dept. of Justice to address child protective issues at Spirit Lake” because “it has become clear that Region 8 IORA [Sullivan’s] involvement has damaged some of the most critical relationships needed for achieving progress for the children and families of Spirit Lake. It is our full intention to rebuild these relationships and move forward in a collegial and productive direction” (Mcmullen, 2013).

Yet, just six weeks earlier, domestic and sexual violence in North Dakota - outside of reservation boundaries – received an entirely different reaction from ACF officials and exactly
the type of attention Sullivan had suggested was necessary for within Indian Country. Just 100 miles west of Spirit Lake, local citizens were reporting out-of-control violence and sexual abuse related to the oil boom, and offices across the DC spectrum seemed eager to get involved. Agencies and departments invited to a meeting to discuss sexual exploitation in the Baaken oil fields included the ACF, DOJ, DOL, DOL/ODEP, OVW, HRSA, SAMHSA/CMHS, and HHS/OASH (Allison Randall, 2013) (Kelley, 2013). According to Allison Randall, Chief of Staff in the DOJ’s Office on Violence Against Women, “the meetings will feature briefings from people on the ground…service providers, tribal leaders, law enforcement… sharing information between agencies so we can coordinate our responses…The crying need for trauma-related interventions is something we can't handle alone” (Allison Randall, 2013). Mark Greenberg and Marylouise Kelley of the ACF both responded, with Kelley stating, “The stories are horrendous, as you have heard, and Tribal populations are extremely vulnerable…We will be glad to work with you going forward. I've copied Angela and Ken in case you want to reach out to them for more information from their site visit” (Kelley, 2013).

On November 21, 2013 Sullivan’s eventual termination from the ACF was foreshadowed. However, the implication did not come from the ACF and it was not received by Sullivan. The sudden and heated remarks came from a Senate office and was said to the Chair of a North Dakota non-profit (CAICW 2014). The following day, Kenneth Martin, senior aide to Senator Cantwell, Chair of the Indian Affairs Committee, apologized by email to the listener he had made the disparaging remarks to, stating, “I apologize as I must have misspoke, as I have no information on the issues surrounding Mr. Sullivan and did not intend to insinuate otherwise. Thank you for the opportunity to clarify” (Martin, 2013).
In his February 2014 letter to McMullen, Sullivan defended himself to the agency, stating that each one of his 13 reports along with its supporting documentation was filed with “the US Attorney for the District of North Dakota.” He added, “When Acting Assistant Secretary Sheldon prohibited me from filing those Mandated Reports, I had no choice but to file information I received from my sources with him or his designee. That is exactly what I have done” (T. F. Sullivan, Response 2014).

In a May 2014 letter to his Superiors, Sullivan noted what he saw as ongoing criminal corruption, and noted these three additional events:

- … One of those former foster parents, a twice-convicted rapist, was overheard outside the Council chambers telling the BIA Spirit Lake Superintendent how to handle the paperwork returning the two pre-teen girls back into his full time care and custody by placing only his wife’s name on those documents and keeping his name off of them. How does the placement of these pre-teen girls back into the home of a twice-convicted rapist contribute to their safety and welfare?
- Both BIA law enforcement and FBI were on hand at the GFAC when the rapes and sodomy were confirmed. In the intervening several years there has been no investigation of these sexual assaults on these two little children. There has been no prosecution of these monsters who sexually assaulted these two children.
- … the father who was found by the local police in a Devils Lake motel naked in bed with his then 10 year old daughter who was also naked. The Ramsey County Attorney investigated that allegation in my Report and brought an indictment against the father for a class two felony of Gross Sexual Imposition. I find it fascinating that a county attorney receiving a single report from me is able, with only limited resources as compared to those available to the FBI, US Attorney and the BIA, to investigate and indict on facts made available in one of my Reports. There are hundreds of comparable allegations made in my thirteen Mandated Reports which fall into the jurisdiction of the FBI, US Attorney and the BIA. How odd that not one of those resulted in an arrest, indictment or tribal warrant… (T. F. Sullivan, Criminal Corruption continues at Spirit Lake 2014).

Six weeks later, an Oversight Hearing was held in Washington DC concerning the abuse of children on the Spirit Lake reservation — including murder. On Tuesday, June 24, 2014, Representative Kevin Cramer (R–ND), the member who had requested the hearing, opened it with quotes from Dr. Tilus and Tom Sullivan concerning the rampant child abuse at Spirit Lake,
which Dr. Tilus had described as epidemic. Of particular concern to Cramer was what led up to
the loss of the tribe’s 628 contract in 2011 – giving oversight of law enforcement and social
services to the BIA – and what the BIA planned to do long-term concerning management of
tribal social services, law enforcement and the tribal court on the Spirit Lake Reservation.

Representative Tony Cárdenas, (D–CA) then gave his rebuttal, stating that while
protection of children is paramount, no one will be allowed to suggest tribal government should
not be sovereign. He said the tribe is inherently sovereign. Anything to erode sovereignty is an
“anathema” to federal Indian policy, and no one should suggest tribal governments cannot
manage their own. Cardenas reiterated the need to build on current policy - not bend to the
wishes of "fringe" groups. Rep. Cárdenas stated that Spirit Lake is making the changes needed
and he looks forward to efforts to help tribes build up state of the art social services (US
Congress, House 2014).

The first witness for the first seated panel, BIA Director Michael Black, said funds are
constrained and the new budget President Obama had announced at Standing Rock, North
Dakota, will help. Social services and job training will be expanded. Black assured the
committee that the BIA will stand shoulder to shoulder with the Spirit Lake tribe and that Casey
family programs and the Administration for Children and Families (ACF) will assist in
expanding the tribe’s programs. He said the tribe is a good partner with strong desire to improve,
but unsubstantiated accusations are hindering efforts to hire new social workers, despite offers of
bonuses for signing on (US Congress, House 2014).

ACF associate Commissioner, Ms. Joo Yeun Chang was next. Chang told the panel of the
various actions the ACF has taken to help the tribe to regain full control of the child Welfare
system (US Congress, House 2014). Chairman Young then asked why "sequestration" – referring
to the BIA taking over services – was said to be part of the current problem when these problems were present before sequestration. Young stated in strong words that children are important – and there is no reason for a child who cannot protect himself to be abused (US Congress, House 2014).

Chairman Young went on to say that if he hears of “one more child hurt in the next six months,” there will be a much longer hearing. Young roared that the BIA has fussed with fee to trust, "and yet we have this going on in Spirit Lake" (US Congress, House 2014). He reiterated that the fee to trust proposal in Alaska was supposed to be about protecting the membership, "Yet this is going on" (US Congress, House 2014). The panel responded that the BIA is reaching out to other tribes and the Casey Foundation to fix the problems at Spirit Lake. Chang said that there needs to be creative solutions for staffing issues. (US Congress, House 2014).

Cramer then asked if anyone had investigated the reports by Tom Sullivan. After the BIA reassured that everything has been investigated, Cramer asked for the Reports from the investigations. When told there are confidentiality issues, Cramer asked them to simply redact names. Rep. Cramer then asked for the details concerning a baby who had died from methamphetamine a couple months earlier, but the representatives of the BIA stated they did not know about the death (US Congress, House 2014).

Cramer rebuked the lack of transparency, citing as an example the media being left out or even physically attacked. Chang claimed the attack on a camera man was the fault of the reporters, as their reporting of child abuse was unwelcomed by the tribe. Rep. Cramer then asked Chang why ACF Administrator Tom Sullivan wasn't allowed to testify that day, although he had been invited by the committee. Chang responded that Sullivan had been told to report things differently but had refused. Cramer informed the committee that he is submitting Sullivan's
mandated Reports into the record. Chang added that Sullivan is inadequate because he has never been to Spirit Lake (US Congress, House 2014).

In the second panel, the new Spirit Lake tribal Chairman McDonald gave an overview of the current child abuse issue and what the tribe has been doing about it - but admitted problems remain. McDonald said he made child protection a priority within his administration and wants more social workers for a short-term fix. McDonald reported that they need 3.5 workers but are funded for only two - and have none currently. He also reported that there are only 8 law enforcement personnel - 2 on each shift. He would like public defenders and Guardian ad litem’s. Finally, McDonald stated that alcohol is a big problem and they need help from Congress to implement their plans.

In contrast to the testimony of the Chairman, her brother, former Spirit Lake tribal judge Molly McDonald told of a report they once tried to make for a child locked in a home. No one helped and tragedy resulted. McDonald shared additional stories, including details of court and law enforcement cover ups and documents being altered. The BIA had promised to help but BIA law enforcement hadn't been reporting on issues presented to them, former Judge McDonald stated that she was told someone didn't want toes stepped on (US Congress, House 2014). When Rep. Cramer asked about the shredding of documents, Chairman McDonald said these were only rumors. Former Judge McDonald then gave accurate details of the shredding of social service documents (US Congress, House 2014).

Anita Fineday of the Casey Foundation testified about tribal sovereignty and Casey Family programs in general. She assured the committee they are also working with the state of ND and had a "shared vision of the work" (US Congress, House 2014). Foster care is an inappropriate old model, she claimed, but culturally relevant programs are the new model.
According to Fineday, ICWA works well and is essential. She claimed most tribes receive state and federal funds but a new model for funding was needed. She encouraged the issues with Spirit Lake and other reservations to be addressed by Congress. No one on the committee asked Fineday any questions (US Congress, House 2014).

Chairman Young asked both Chairman McDonald and former Judge McDonald if there is lack of money or personnel. He also asked Judge McDonald about lack of assistance from BIA police and wondered if local tribal police officers were reticent to arrest their relatives. Judge McDonald agreed there is no accountability. Young then asked Chairman McDonald why people aren't being fired and stated, “Fire the bunch” (US Congress, House 2014). Citing burn-out, Chairman McDonald requested grace for the police officers. Young responded, “Work with us, get the job done.”

Cárdenas asked what part "cultural sensitivity" plays in hiring staff but was told it’s not a part of the problem. Cárdenas also asked more about Tom Sullivan, questioning his character. Chairman McDonald initially defended Sullivan, then said he had written Sullivan and asked for help but never got a response. Rep. Cárdenas then turned to question the capacity of former Judge McDonald.

After asking about a number of child abuse cases, Cramer asked about a tribal Judge who had been removed from the bench – and the hiring of that judge in the first place, as no background check appears to have been done and the judge had a long list of problems as an attorney (US Congress, House 2014). Judge McDonald responded that there is no requirement that a judge be law trained. Rep. Cárdenas stated it has to do with money, and it’s not about it being right or wrong. “We can't criticize them because they don't have the resources. Americans
don't understand that it’s not the tribe’s fault” (US Congress, House 2014). Chairman McDonald mentioned that treaties are not being kept and sovereignty needs to be upheld.

Cramer asked Melissa Brady, the director of Tribal Social Services and Victims Assistance, how many foster homes are on the reservation. Brady responded that there are nine, but foster homes are used all over the state. She added that State practices are used in the tribal foster homes. Rep. Cramer then asked about Sullivan’s report that of over 100 kids were at risk. “What has happened with these kids?” Brady says they found 66 to be safe. Only a couple so far - they found last week - are unsafe but they haven't been removed from the home yet. No mention was made of the other 42 children (US Congress, House 2014)

Judge McDonald stated that accountability is paramount and tribal court needs to take that seriously. Rep. Cárdenas asked if this is a lack of will – or lack of resources. Judge McDonald responded that a lot of what is happening is because people are afraid of getting fired. Everyone will do whatever the tribal council wants them to do. Cárdenas had no follow-up question (US Congress, House 2014).

Chairman McDonald stated they are doing their best to build a positive plan and atmosphere but need additional federal resources to do that. Rep. Cárdenas advised him to keep asking for money, make the requests in writing, and do not get frustrated. He urged Chairman McDonald to get the federal government to “recognize their responsibility” (US Congress, House 2014).

On July 1, 2014, Sullivan wrote to McMullen and stated:

It is unfortunate that neither the leadership of my agency nor my department had the courtesy to inform me that I had been invited by the House Subcommittee on Indian and Alaska Native Affairs to testify about conditions on the Spirit Lake Reservation at the Subcommittee’s Hearing on June 24, 2014…Ms. Chang’s claim that BIA has addressed, “…most notably the safety checks prior to placement” is simply false. If the BIA had addressed the safety checks prior to placement,
Laurynn Whiteshield would be alive today, soon to celebrate her fourth birthday with her twin sister… Instead she has been in the ground for more than a year, dead at the hands of her step-grandmother, who, it was well-known by most families on Spirit Lake, beat and abused her own children so badly they were removed from her home.

… the BIA and Tribal leadership were presented a list of 137 children who were in uncertain placements or unaccounted for at that time. At the Subcommittee Hearing Ms. Merrick-Brady, the Acting Director of Spirit Lake’s Tribal Social Services, explained that 66 children had been found and accounted for. That means that after 13 Mandated Reports, numerous detailed, factual emails about continuing abuse of children at Spirit Lake, 21 months after the BIA Strike Team arrived with much fanfare and ten months after Chairman McDonald was elected Chair there are still more kids unaccounted for than accounted for. How many of these unaccounted for children have been trafficked into the man camps of the Bakken oil fields, just a few hours down the road from Spirit Lake? (T. F. Sullivan 2014).

In response to Chang’s assertion that Sullivan had never been to Spirit Lake, Sullivan stated, “I have been to Spirit Lake three or four times in the last four years. Prior to that time each year I routinely met a couple of times a year in Bismarck with all of the child welfare directors from the four North Dakota reservations” (T. F. Sullivan 2014).

On May 6, 2016, in a seven-page memorandum detailing charges of unacceptable conduct and failure to follow instructions, McMullen stated “it is my conclusion that the sustained charges and specifications fully warrant your removal as proposed” (McMullen 2016, 1). The charges and specifications did not include Sullivan’s reporting of child abuse, but his conduct toward Spirit Lake tribal leaders was mentioned within the ‘Penalty Consideration’ section of the letter, where McMullen stated:

I considered your past disciplinary record. On April 26, 2015, you were issued a Decision on Proposed Suspension for failure to follow proper leave procedures for which you were suspended for fourteen (14) calendar days. On September 16, 2014, you were issued a 3-day suspension for improper conduct, which included a letter to a tribal chairman accusing him of being in "the ranks of the criminally corrupt." Your past disciplinary actions demonstrate a pattern of behavior that compromises the agency's ability to perform its mission, compromising relationships with both staff and external leaders (McMullen 2016, 5).
McMullen concluded, “…it is my decision that, in order to promote the efficiency of the service, your employment is terminated effective immediately” (McMullen 2016, 6).

Reports dating back years cite a high rate of violence against women and children in Indian Country. The Center for Disease Control stated in 2004, “AI/AN women report more domestic violence than men or women from any other race” and “One study found AI/AN women were twice as likely to be abused (physically or sexually) by a partner than the average woman” (University of Oklahoma 2013, 16). This statistic for women has relevance for children. At the ‘First Hearing of the Advisory Committee of the Attorney General’s Task Force on American Indian/Alaska Native Children Exposed to Violence,’ it was confirmed that studies show “…batterers are more than four times more likely than other men to sexually abuse their children or step-children” (DOJ 2013) (Hallie Bongar White 2014, 3). Lonna Hunter, Project Coordinator for the Council on Crime and Justice, had stated:

> Co-occurrence is looking at the issue of maltreatment, but it’s also connecting this to the rate of child sexual abuse. The rate of child sexual abuse by a batterer is four to six times higher than a non-batterer. So, those dynamics of child sexual abuse occur largely when there is domestic violence present in those families. When we look at the high rate of child sexual abuse in Indian Country and violence against Native women, it suggests that the rates could be even higher when considering the correlation to under reporting (Hallie Bongar White 2014, 27-28).

According to White, Elsie Boudreau, “a Yup’ik survivor and child advocate from Alaska,” agreed. Boudreau is quoted saying “in 2010, 40 percent of children seen at Child Advocacy Centers for child sexual abuse were Alaska Native, even though we only represent 15 percent of the entire population in the state of Alaska” (Hallie Bongar White 2014, 27-28).

Ms. Hunter reported,

> I traveled to Rosebud with the Tribal Law and Policy Institute to look at the co-occurrence of domestic violence and child maltreatment to do a site visit there and what I understood from interviewing child welfare workers, domestic violence advocates, survivors, and law enforcement, was that every child had witnessed
violence or it was believed that every child had witnessed violence on the Rosebud Reservation...There were 25,000 calls to law enforcement in one year and there were 25,000 folks who live in Rosebud, and at least two children a day were victims of crime. That is astronomical. That is off the charts compared to the co-occurrence of child maltreatment and domestic violence in the mainstream (Hallie Bongar White 2014, 26).

Darla Thiele, Director of a diversionary project within the Spirit Lake Juvenile Court System, had also reported:

We have many youth on our reservation who have stories to tell. We have young ladies who on weekends are at home taking turns with their siblings holding the door shut while the party is going on in the living room. And they take turns holding the door shut to make nobody comes in to bother any of the siblings (Hallie Bongar White 2014, 55).

The documentation of violence by tribal entities themselves abounds. One reporter noted, types of crimes that Native Americans are likely to be victimized by include: murder, assault, drug trafficking, human trafficking, and gang violence” (Tighe, 2014) (Hyland 2014, 4). In 2014, the Center for Native American Youth had reported, “Violence, including intentional injuries, homicide and suicide, account for 75% of deaths for AI/AN youth age 12 to 20” (SAMHSA). (Center for Native American Youth 2014). The CNAY also stated, “Adolescent AI/ANs have death rates 2 to 5 times the rate of whites in the same age group (SAMHSA), resulting from higher levels of suicide and a variety of risky behaviors” (Center for Native American Youth 2014). The CNAY also cited statistics:

Recent research shows that while the US child mortality rate for children ages 1 to 14 has decreased by 9% since 2000, it has increased by 15% among AI/AN children (National Court Appointed Special Advocate Association) ....Alcoholism mortality rates are 514% higher than the general population” (Center for Native American Youth 2014).

The statistics are overwhelming:

- “According to the Youth Risk Behavior Survey, 16 percent of students at Bureau of Indian Affairs schools in 2001 reported having attempted suicide in the preceding 12 months” (Center for Native American Youth 2011).
• “Subjects with a history of any type of maltreatment were 3 x more likely to become depressed or suicidal than those with normal treatment history” (University of Oklahoma 2013, 15).

• “Young Native Americans taking their own lives — more than three times the national average, and up to 10 times the average on some reservations” (Horwitz 2014).

• “Suicide is the 2nd leading cause of death - 2.5 times the national rate – for AI/AN youth in the 15 to 24 age group (SAMHSA).

• In the US, between 1 in 9 and 1 in 5 AI/AN youth report attempting suicide each year (Suicide Prevention Resource Center)” (Center for Native American Youth 2014).

• “Indians have the highest child suicide rate in the nation, according to the CDC. The suicide rate for Indians 15-34 years old is 2.5 times higher than the national average. Suicide is the second-leading cause of death for that age group” (Flatten 2015).

The Obama administration reiterated the same information: “Suicide is the second leading cause of death—2.5 times the national rate—for Native youth in the 15 to 24 year old age group” (Executive Office of the President 2014, 5), while NICWA, that same year, shared a different rate, “Native teens experience the highest rates of suicide of any population in the U.S.—at least 3.5 times higher than the national average.11 (NICWA, SAMHSA 2014). Some areas have declared states of emergency. The Fort Belknap Indian Community Council is the latest, having declared a state of emergency on July 18, 2019 due to a “dramatic uptick in youth and adult suicides over the last year and a half’ (KRTV 2019).

“Suicide among Native American youth is 9 to 19 times as frequent as among other youths and rising. From Arizona to Alaska, tribes are declaring states of emergency and setting up crisis-intervention teams” (Woodward 2012).

While abuse and neglect are the most likely cause of the engulfing despair, most reporters of the abuse blame ‘historical trauma’ and the federal and state government for what is happening to the children. NICWA maintains there are at least four “distinct forms of trauma” that have been identified in Indian Country, “which can be experienced in a single event, as a prolonged
experience, through interpersonal violence, from a historical event, or via a personal event that occurs over time through several generations” (NICWA, SAMHSA 2014).

- Cultural Trauma
- Historical Trauma
- Intergenerational Trauma
- Current Trauma

According to the CNAY, “As a result of historical trauma, chronically underfunded federal programs, and broken promises on the part of the US government, American Indians and Alaska Natives experience many health, educational and economic disparities compared to the general population. (Center for Native American Youth 2011) (2014).

“We need vital resources that allow us to be at the forefront, special demonstration funding that addresses the co-occurrence of domestic violence and child maltreatment,” said Ms. Hunter. Requests for money are repeated in most if not all hearing testimony, along with the references to historical trauma. (Hallie Bongar White 2014, 35). Lonna Hunter stated in testimony to the Justice Department:

The issues of domestic violence, child sexual abuse, and child maltreatment must be addressed through understanding of the complexity of historical and intergenerational trauma…This is about a political relationship to the United States government. And when we see these astronomical numbers, we understand the full extent of the historical trauma and realize the full frontal crisis we find ourselves in Indian Country with our women and children. It is imperative to understand the context of historical colonization, battering, dominance, and oppression in our villages, communities, and tribal nations in Indian Country. It is imperative because it removes the lens of “victim blaming” (Hallie Bongar White 2014, 30).

The media parrots this line of reason as well, as an NBC station reported, “Native youngsters are particularly affected by community-wide grief stemming from the loss of land, language and more, researchers reported in 2011. As many as 20 percent of adolescents said they thought daily about certain sorrows—even more frequently than adults in some cases...
(Woodward 2012). It could be that some children in tribal communities are being taught they should grieve events that happened before they were born.

According to the Indian Health Service TeleBehavior Health Center at the University of Oklahoma, “Factors that Affect Children’s Responses to Violence” include a child’s immediacy to the violence; age of child at time of exposure; availability of adults to emotionally protect the child; the child’s disposition; and the severity and continual nature of the violence” (University of Oklahoma 2013, 17). Historical trauma is not included in the list  (E. Morris 2016).

Very few media outlets have reported on children such as 18-month-old Jastin Ian Blue Coat, who, after having been removed from his mother in 2013 due to neglect and abuse, was murdered by her in October 2014, following the decision by Standing Rock officials to return him to her. Very few outside of North Dakota heard about the 2013 murder of Laurynn at Spirit Lake or the Oversight Hearing that took place a year later. Far less heard about the murder of a 3-year-old twin that occurred on the Cheyenne River Reservation around the same time of Laurynn’s death. Very few outside of Minnesota heard about the 2016 murder of 2-year-old Kira Friedman, who Leech Lake social services placed with a known felon and meth user. On June 5, 2016, he beat her, put her in a big plastic container, put it in the tub, turned the shower on, and walked away. When he finally returned, she had drowned.

It is sadly common for those witnessing abuse to say nothing, as demonstrated by seven people who faced federal charges after Pine Ridge law enforcement found two toddlers in November 2016, each weighing 13 pounds. The girls were so severely malnourished that a pediatrician compared them to World War II concentration camp prisoners. It appears many were aware of the girls’ condition but said nothing (Cano 2016). There are varied reasons for the lack of reporting. There is a culture of silence on many reservations. Some residents will not turn
family members into authorities for any reason, others are afraid of retaliation if they say something. Some witnesses may be afraid to come forward because they had been complicit or even participatory. Others say abuse must be kept quiet to prevent challenge to and weakening of tribal sovereignty and the Indian Child Welfare Act.

Krakoff states, “ICWA’s provisions include… heightened standards for the removal of Indian children, their foster care placement, and the termination of parental rights” (Krakoff 2017, 507). While ICWA supporters claim to be ‘raising the standard’ for children of heritage by allowing them to stay in documented, dangerous environments, return to dangerous family settings prematurely, or to be taken from a known, safe setting and deliberately placed in danger – they are in fact lowering the standard. Many children of tribal heritage are, in fact, not being given protection equal to what other children are legally mandated to receive.

In the words of Dr. Allen, “… We are talking about our brothers and our sisters. We’re talking about what happens to people who share with us an extremely important identity. And that identity is the identity of free citizens in a Republic…” (2010).

Statistics – 1960’s Through the New Century

Between the early 1900s and late 1970s, the percentage of tribal members remaining on many reservations shrank. The population of those identified as citizens with tribal heritage in the 1960 census was 524,000. In a census sample of males identified as “Indians” by the census, about half had moved between 1955 and 1960 – 111,268 out of 227,600. 39,233 had moved to a different county and 19,753 had moved to a different state. In 1960, 67,435 lived in an urban setting, 126,871 lived in a rural, non-farm setting, and 33,294 lived in a rural farm setting (US Census Bureau 1960). The life expectancy of male tribal members in 1960 was 60, compared to
Caucasian men, which was 67.6 (Stuart 1987, 104). Of women, the numbers were very similar. 111,832 out of 227,341 had moved in the five-year period. 35,609 had moved to a different county, and 16,728 had moved to a different state. In 1960, 71,540 lived in an urban setting, 123,373 lived in a rural, non-farm setting, and 32,428 lived in a rural farm setting (US Census Bureau 1960). The life expectancy of female tribal members in 1960 was 65.7, compared to that of Caucasian women, which was 74.2 (Stuart 1987, 104). In other words, at this point in time about a third of the tribal population lived in an urban setting. These statistics, however, do not make it clear how many remained within reservation boundaries.

Globally for all heritages, child mortality for tribal members fell from 18.2% in 1960 to 4.3% in 2015 (Roser 2019). In Indian Country, the leading causes of death in the early 1950’s was both heart diseases and accidents. Diseases of infancy were the 5th most common cause and homicide was the 10th leading cause of death. Other causes in the top 10 were common infectious and age-related diseases (Stuart 1987, 108).

By the early 1970’s, diseases of infancy had fallen to 7th, but homicide had moved up to 8th. Cirrhosis of the liver was now not only in the top 10, but 4th on the list. Cerebrovascular diseases and diabetes were also now on the list, at 6th and 9th. Further, suicide was now in the top 10 leading causes of death in Indian Country (Stuart 1987, 109).

By the early 80’s, diseases of the heart and accidents remained the top two leading causes of death in Indian Country, with liver disease still at 4th, and homicide and suicide at 8th and 9th. Diseases in infancy had dropped to 10 in leading causes of mortality in Indian Country (Stuart 1987, 111). The life expectancy of male tribal members in 1980 was 67.1, compared to

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81 Stuart’s source: Indian Health Service (IHS). (Stuart 1987, 95). Note: Data from the IHS might be unreliable as it includes only those of tribal heritage who live on the reservation or use urban IHS facilities. There has been no attempt to include or assess persons of Native American heritage who have distanced themselves from the reservation system.
Caucasian men, which was 70.7 (Stuart 1987, 104). The life expectancy of female tribal members in 1980 was 75.1, compared to Caucasian women, which was 78.1 (Stuart 1987, 104).

In the early 1990’s, heart disease and accidents remained the top two causes of death for male tribal members, but malignant neoplasms, while always a part of the top ten causes of death, replaced accidents as one of the top two causes of death in Native American women. Further, tribal members died from alcoholism at a rate 579% greater than those of all heritages combined. They also died of suicide at rates 70% greater and homicide at rates 41% greater (DHHS/IHS 1997, 6).

The life expectancy of tribal members in 1992-1994 was 71.1, compared to Caucasians, which was 76.3 (DHHS/IHS 1997, 134). Drug related deaths rose from 3.4 deaths per 100,000 in 1979-1982 to 5.3 in 1992-1994. This is 18% higher than that for all races in the U.S., which was 5.3 in 1993 (DHHS/IHS 1997, 177). The age at which drug related deaths is highest for tribal members is between 35 and 44 for males and between 45 and 54 for women (DHHS/IHS 1997, 179).

Children aged 1 to 4 years old who died from drug related causes in 1993 were 0.8 per 100,000 for tribal members, compared to 0.2 for all U.S. heritages total. For ages 5 to 14 years, the rates were 0.4 for tribal members and 0.1 for all U.S. heritages. For ages 15 to 24, the rates were 2.9 for tribal members, and 3.0 for all U.S. heritages (DHHS/IHS 1997, 179).

With the turn of the new century, there were 562 federally funded Tribes in the United States. With that, 4,119,301 people claimed in the 2000 census to have American Indian or Alaska Native ancestry in the United States. This number includes individuals who may not be members or eligible for membership in a tribe, as well as individuals who are members of state

82 “Limitations of Data: The IHS service population comprises approximately 60% of all Indians residing in the U.S. These people may or may not use IHS services (DHHS/IHS 1997, 9).
recognized tribes. Approximately 75% live outside the reservation, with about 55% living in metropolitan areas. Only about 25% live on the reservations (US Census Bureau 2000).

Further, about 45% of reservation residents have no tribal heritage or are members of the tribe. On 30% of the reservations, the number of non-members is equal to or greater than the number of tribal members (US Census Bureau 2000). The Montana Supreme Court, in *Skillen v. Menz* (1998), admitted that “interracial marriages are a fact of life, and, as with other marriages, so are interracial divorces and custody disputes over the children of those marriages” (*Skillen v. Menz* 1998).

Patrice Kunesh, in a report published in the *South Dakota Law Review*, noted there was “a steady and substantial increase in the American Indian population in the past century, from a low of 250,000 in 1900 to 524,000 in 1960, to 1.96 million in 1990, and over 4 million in the year 2000. (Kunesh 2007, 7) The largest tribal government in the year 2000 was the Cherokee Nation with 729,533 members, and the Cree Nation was the smallest, with 7,734 members. The States with the heaviest AI/AN populations are Alaska, Oklahoma, Arizona, New Mexico, North & South Dakota, and Montana” (Indian Country Child Trauma Center 2005).

But are there over 4 million tribal members today? “According to the 2010 Census, there are approximately 5.2 million self-identified American Indian/Alaska Natives (AI/ANs) living in the US, of whom 2 million qualify for federal services” (Center for Native American Youth 2014). This statement indicates that while many tribal entities use the larger, ‘self-identified’ census number when wanting Indian Country to appear as large as possible, the enrolled, federally recognized AI/AN population is not 5.2 million, but only “an estimated 2 million” – those being the ones eligible for federal services. The balance may self-identify as Native American but are not enrolled in a federally recognized reservation. This could be for any
number of reasons, including that they have heritage, but do not meet the qualifications for enrollment; that they have heritage, but consciously choose not to enroll; or they have no actual heritage, but have been told they do, believe they do, or wish they did.

The Bureau of Indian Affairs confirms the smaller numbers with a set of consistent but older statistic: “According to the U.S. Bureau of the Census, the estimated population of American Indians and Alaska Natives, including those of more than one race, as of July 1, 2007, was 4.5 million, or 1.5 per cent of the total U.S. population. In the BIA’s 2005 American Indian Population and Labor Force Report, the latest available, the total number of enrolled members of the (then) 561 federally recognized tribes was shown to be less than half the Census number, or 1,978,099 (BIA 2016).

Still, most tribal entities currently quote the larger number (now 5.2 million) when discussing the size of the tribal population nationwide, and use comparable numbers when discussing the number of children under the authority of the ICWA: “Currently, 5.2 million American Indians and Alaskan Natives reside within the United States a number constituting 2% of the American population (US Census Bureau, 2011) (Hyland 2014, 4). The CNAY, although having confirmed there are only about 2 million enrolled tribal members in all the nation, goes on to claim “There are currently over 2.1 million American Indians and Alaska Natives (AI/AN) under the age of 24 living in the United States” (Center for Native American Youth 2014). The ICWA only pertains to children eligible for enrollment.

According to the 2003 DOI-BIA Indian Population and Labor Force Report, the “total number of enrolled tribal members and members from other tribes who live on or near the reservation and are eligible to use the tribe’s Bureau of Indian Affairs funded services” in 2003

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83 Public law 102-477 ‘The Indian Employment, Training, and Related Services Demonstration Act of 1992’
was 1,923,650. This was a 5.9% increase from the 2001 labor force report and 34.7% from 1995. The actual number of tribal members served – as opposed to merely being eligible - in 2003 was 1,587,519. This was a 4.2% increase from the 2001 labor force report, and 26.0% from 1995. It is also a 216% increase over the Total Service Population reported in 1982. The 2003 increase numbers in both the eligible and the served tribal members is attributed to updated tribal rolls, improved record keeping, improved data collection methods, revisions to tribal enrollment criteria, and tribal members returning to the reservation to “benefit from opportunities and services unavailable to them in off-reservation communities” (DOI-BIA 2003).

While the number of reservation residents has gone up in recent years, so has the number of tribal members living off-reservation – some to avoid the high rate of reservation crime and drug abuse. The Center for Native Youth reported, “Violence, including intentional injuries, homicide and suicide, account for 75% of deaths for AI/AN youth age 12 to 20” (SAMHSA)(Center for Native American Youth 2014). “Types of crimes that Native Americans are likely to be victimized by include: murder, assault, drug trafficking, human trafficking, and gang violence” (Tighe, 2014).(Hyland 2014, 4).

Further, a 2014 report from the White House stated, “Suicide is the second leading cause of death—2.5 times the national rate—for Native youth in the 15 to 24 year old age group” (Executive Office of the President 2014, 5), while NICWA reported, “Native teens experience the highest rates of suicide of any population in the U.S.—at least 3.5 times higher than the national average.11 (NICWA, SAMHSA 2014).

In 2014, the National Court Appointed Special Advocate Association reported, “… research shows that while the US child mortality rate for children ages 1 to 14 has decreased by 9% since 2000, it has increased by 15% among AI/AN children.” A 2005 Government
Accountability Office report “notes that insufficient recordkeeping and data collection hamper assessments of ICWA compliance and outcomes” (Krakoff 2017, 508).

**The ‘Adoptive Couple Fix’ (2016)**

Late Tuesday night, January 1st, 2013, the U.S. Senate unanimously passed S. Res. 628, expressing disappointment over a Russian law banning adoption of children by American citizens. Senator Inhofe, one of the two Senate Co-chairs of the Congressional Coalition on Adoption, stated:

> It is extremely unfortunate and disheartening that the Russian Duma and President Putin would choose to deprive the children, the very children that they are entrusted to care for, the ability to find a safe and caring family that every child deserves…It is nothing more than a political play…that ultimately leads to greater hardships and more suffering for Russian children who will now be denied a loving family (CAICW 2014).

In addition, the Congressional Coalition on Adoption Members sent a bi-partisan letter to President Putin urging him to veto the legislation, stating, “We fear that this overly broad law would have dire consequences for Russian children…Nothing is more important to the future of our world than doing our best to give as many children the chance to grow up in a family as we possibly can” (CAICW 2014).

On June 30, 2014, U.S. President Barack Obama stated in a letter to Speaker John Boehner that children crossing our southern border are in an urgent humanitarian situation and the U.S. has a legal and moral obligation to make sure they are appropriately cared for (CAICW 2014). Child refugees and their families, some in dire need and choosing to live apart from their home nations, were to be accepted and assisted. Americans who urged that the children be returned to their home nations for the protection and culturally sensitive care they needed were said to be cruel.
The federal government, which has simultaneously claimed children and families with tribal heritage as both U.S. citizens and wards, has an even greater legal and moral obligation to alleviate the humanitarian crisis within our reservation system. After all, “...there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe…” (United States 1978)

Yet, on December 3, 2014, U.S. Attorney General Eric Holder, despite evidence gathered by his department showing the severity of abuse and neglect within the reservation system, vowed to give permanent jurisdiction of multi-racial children across the nation to tribal governments - with no regard for a child’s wishes, a family’s wishes, or any physical or emotional conditions a child would be placed in. In reference to the ICWA, he stated:

…We are partnering with the Departments of the Interior and Health and Human Services to make sure that all the tools available to the federal government are used to promote compliance with this important law.” And “…because of the foundation we’ve built – no matter who sits in the Oval Office, or who serves as Attorney General of the United States, America’s renewed and reinforced commitment to upholding these promises will be unwavering and unchangeable; powerful and permanent (emphasis in the original) (Holder 2014).

Later, in the spring of 2015, “non-binding guidelines” were published by the BIA stating that the courts “should not consider the best interests of the child in determining foster care or adoptive placements. Placement in an Indian home is presumed to be in the child’s best interests” (BIA 2015). On June 8, 2016, the federal government took the final step and published the guidelines in the federal register, mandating them as rules for all courts. Every child in the nation who presents to a court in need of care must now be vetted for tribal heritage, and if heritage is found, the relevant tribal government must be notified and given the option to intervene and take over jurisdiction of the child (BIA 2016). The BIA states that Congress has “a presumption that
ICWA's placement preferences are in the best interests of Indian children; therefore, an independent analysis of "best interest" would undermine Congress's findings."(BIA 2016). Thus, the rules were written to prevent children and families from ducking the ICWA and avoiding tribal jurisdiction. As noted by the Indigenous Law and Policy Center Blog Michigan State University College of Law (Fort 2016), the new ICWA rules stipulate,

- State courts must ask *each participant* in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know the child is an Indian child. 23.107(a).
- A parental request for confidentiality in a voluntary proceeding does not relieve the court, agency, or other party from any duty of compliance with ICWA, including the obligation to verify whether the child is an Indian child. 23.107(d).
- Only tribes can determine if a child is an Indian child under the law, that is a final determination that cannot be substituted by the state, and the state can use tribal enrollment documentation (for example) to make the judicial determination a child is an Indian child. 23.108.
- Evidence with no causal relationship of poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior does not on its own constitute evidence that continued custody is likely to result in serious emotional or physical damage to the child. 23.121
- Good cause to not follow the placement preferences must be made on the record, the party seeking to deviate bears the burden of proving good cause by clear and convincing evidence, and may not be based “solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.” 23.132 (Fort 2016).

According to the new ICWA rules, if there is any uncertainty as to whether a child is an Indian Child, courts are to “proceed in applying ICWA until they have confirmation that the child is not an Indian child. The tribe believed to be the child’s tribe is the only entity that can make a determination of whether a child is an Indian child or not” (BIA 2016) (Fort 2016).

In deciding whether good cause exists to decline transfer to a tribal court, courts cannot consider:

1. Whether transfer could affect the placement of the Indian child.
2. The Indian child’s cultural connections to the tribe or reservation.
3. Socio-economic conditions or any negative perception of tribal or BIA social services or judicial systems. (Fort 2016).

However, the new BIA rules (BIA 2016) stipulate the courts can consider for good cause,

1. The request of one or both of the Indian child’s parents after they have reviewed the ICWA preferred placement options, if any, that are available
2. The request of the child if the child is of sufficient age and has the capacity to understand the decision
3. The presence of a sibling attachment that can only be maintained through a particular placement
4. The extraordinary physical, mental, or emotional needs of the Indian child
5. The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements that meet the placement preferences, but none has been located. The standards for determining if a suitable placement is unavailable must conform to the prevailing social and cultural standards of the Indian community of the Indian child’s parents (Fort 2016).

Under the new rules, application of the Existing Indian Family Doctrine is blocked:

…the final rule imposes a mandatory prohibition on consideration of certain listed factors, because they are not relevant to the inquiry of whether the statute applies. If a child-custody proceeding concerns a child who meets the statutory definition of “Indian child,” then the court may not determine that ICWA does not apply to the case based on factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her Indian parents, whether the parent ever had custody of the child, or the Indian child’s blood quantum. (BIA 2016, 90-94).

The new rules state a qualified expert witness should be qualified to testify to the prevailing social and cultural standards of the Indian child’s tribe, whether or not the child and his family have practiced the prevailing social and cultural standards of the tribe. Further, an Indian tribe is allowed to petition to invalidate a ruling based on violations of sections of the ICWA law, whether or not the child or family wants the ruling to be invalidated (BIA 2016).

Some of the stipulations within the new rules resemble stipulations within “The Indian Child Welfare Act of 1977,” one of the earliest versions of the ICWA, that after much debate and input from the public, Congress had purposefully left out. [See Definitions: Sec. 4(H) in the Nov
The ethics, if not the legality, of establishing rules in lieu of law after wording similar to that within the rules had been rejected by Congress is debatable (Fiddler, 2016).

The increased push for jurisdiction over other people’s children has increased the push back from those who hold the ICWA is unconstitutional. Swendsboe states in her amicus brief concerning the 2018 ICWA case *Brackeen v. Bernhardt*:

> Because adoption proceedings like this one involve neither “commerce” nor “Indian tribes,” there is simply no constitutional basis for Congress’ assertion of authority over such proceedings. Also, the notion that Congress can direct state courts to apply different rules of evidence and procedure merely because a person of Indian descent is involved raises absurd possibilities. Such plenary power would allow Congress to dictate specific rules of criminal procedure for state-court prosecutions against Indian defendants. Likewise, it would allow Congress to substitute federal law for state law when contract disputes involve Indians. But the Constitution does not grant Congress power to override state law whenever that law happens to be applied to Indians. Accordingly, application of the ICWA to these child custody proceedings would be unconstitutional (Swendsboe 2019).
PART II

Analysis
Chapter 5
ICWA Case Study

The stated purpose of this paper was to examine the physical, emotional, and economic consequences of current federal Indian policy as well as the philosophical underpinnings that guard the interests of corporate community over the life, liberty and property of individuals. The ICWA has had a profoundly negative effect on the lives and liberty of a multitude of families who have tribal heritage. It is necessary to examine ICWA-related statistics and case studies.

ICWA Statistics, 2015-2018

Kate Fort, Staff Attorney for the Indigenous Law and Policy Center at Michigan State University College of Law, relates there were 201 appealed ICWA cases in 2015 which were “on Westlaw and mentioned ICWA.” Of this, only 35 were reported (K. E. Fort 2016). Top states with cases that year, according to Fort, were California with 156 cases, (146 unreported); Michigan, with 7, (3 unreported); Alaska with 6, (3 unreported); and Arizona with 5, (4 unreported). Idaho, Nebraska, New Mexico, and Washington each had 2 reported (K. E. Fort 2016). Fort states the top five issues as ‘not giving proper Notice,’ ‘Determination of an Indian Child,’ ‘Active Efforts,’ ‘Qualified Expert Witness,’ and ‘Placement Preferences’ (K. E. Fort 2016). Fort states:

70 different tribes were represented in the cases, which include any time a parent claims tribal affiliation of any sort (so Cherokee has 58 of the 203 total cases as first tribe claimed, 21 as second tribe claimed and 5 as third, for a total of 84). In 31 cases, the tribe was unknown, in 4 the tribe was unnamed by the court. For those 31, 25 of the cases dealt with a lack of inquiry and/or notice. Finally, of the 35 reported cases, mother appealed 15, father 10, both parents 4, tribe 4, and GAL 1 (K. E. Fort 2016).

In 2016, Fort counted 175 appealed ICWA cases with 30 reported. She noted the cases were retrieved from both Westlaw and/or Lexis Nexis, as opposed to just Westlaw the year
before, and that ICWA or its state equivalent was litigated. She adds they were “standard state court ICWA cases, and do not include ongoing federal litigation” (K. E. Fort 2017). Fort shared that the top five states for ICWA cases in 2016 were California with 114 cases, (10 reported); Michigan with 13, (2 reported); Texas had 7, (1 reported); Iowa had 6, (1 reported) and Oklahoma reported 4 (K. E. Fort 2017). The top five issues for litigation were Notice (106), Inquiry (21), Placement Preferences (10), Active Efforts (8), and Determination of Indian Child (8) (K. E. Fort 2017).

There were 52 different tribes named as the primary in the cases. Fifty-six involved “claims of Cherokee citizenship.” (K. E. Fort 2017). In 21 cases the parents did not know the name of the tribe they had heritage in and the tribe was unnamed in 14 cases. The Cherokee Nation, the Gila River Indian Community, and the Shoshone Bannock each appealed cases. Other cases were appealed by family members or other entities, including 92 that were “appealed by mom, 49 by dad, and 24 by both.” Other parties who appealed include one agency, one child’s attorney, one by foster parents, one by a great aunt and uncle, one by an Indian custodian, and one by a state and foster mother (K. E. Fort 2017). This is a dramatic increase in appeals by family members in comparison to the prior year. Fort does not indicate how many of the appeals were made with the support of the ICWA and which sought to oppose elements of the ICWA.

In early 2018, Fort reported “214 appealed ICWA cases this year” with only 34 reported in 2017 (K. E. Fort 2018). Fort counts the top 5 as California with 152 cases, (5 reported); Alaska with 6, (3 reported); Michigan 5, (2 reported); Texas 5, (2). Kansas 4, (2), Arizona 4, (3), and Washington 4, (0) all had four cases (K. E. Fort 2018). The top five issues were “Notice (132), Inquiry (29), Placement Preferences (7), Active Efforts (10), and Termination of Parental Rights (9), Further, 73 Notice cases “were remanded for proper notice” (K. E. Fort 2018). There
were 57 different tribes named as the primary tribe in a case. In 26 cases the parents did not know the name of the tribe they had heritage in. “In 17, the tribe was unnamed (court did not record name of tribe in the opinion)” (K. E. Fort 2018). Only three cases were appealed by tribes – “the Navajo Nation, the Nenana Native Village and the Gila River Indian Community” (K. E. Fort 2018). Fort did not mention how many were appealed by family members – or whether those family members were using ICWA to their benefit or opposing it.

In early 2019, Fort reported there were “206 appealed ICWA cases” in 2018 with 50 reported cases. (K. E. Fort 2019). The top 5 states where ICWA cases were heard were California with 125 cases, (9 reported); Alaska with 11, (3 reported); Montana had 10, (7); Both Colorado and Michigan had 8, with Colorado reporting 7 and Michigan 2 (K. E. Fort 2019). The top five issues litigated in these cases included: Notice (86), Inquiry (43), Termination of Parental Rights (18), Active Efforts (13), and Placement Preferences (9). There were 59 different tribes named as the primary tribe in a case. In 27 cases the parents did not know the name of the tribe they had heritage in (K. E. Fort 2019).

The average number of ICWA appeals counted by Fort from 2015 through 2018 was about 200 with around 37 reported. Certain tribes and states have been more focused on compliance with the ICWA than others. The following case studies illustrate why many families, courts and social service agencies across the nation, concerned for the best interest of individual children, continue to rebel against the ICWA and avoid compliance.

Case Study Methodology
The Christian Alliance for Indian Child Welfare is a national, non-profit, Christian ministry that has advocated for families hurt by ICWA since February 2004. Their advocacy is both judicial
and educational, as well as a prayer resource for families. The following studies are a representative sample of ICWA cases using CAICW files with family permission or information from a variety of publicly available sources. Additional information can be obtained with permission from individual families.

Case Studies of Rights Imperiled

In November 2014, an advisory committee, created by former Attorney General Eric Holder to study violence against AI/AN children, reported, “Today, a vast majority of American Indian and Alaska Native children live in communities with alarmingly high rates of poverty, homelessness, drug abuse, alcoholism, suicide, and victimization,” and “Domestic violence, sexual assault, and child abuse are widespread” (Attorney General’s Advisory Committee 2014). Yet a month later, in December 2014, Holder had assured tribal leaders that the White House would make certain that compliance with the ICWA would be made consistent and unavoidable across all states, and the changes his administration would make would be permanent (Holder 2014). By June 2016, the Obama administration fulfilled that promise (BIA 2016) – publishing federal rules mandating all children of eligible heritage be subject to the aforementioned “communities with alarmingly high rates of poverty, homelessness, drug abuse, alcoholism, suicide, and victimization.”

The ICWA was enacted with what was said to be safeguards to protect individual rights. Unfortunately, in order to benefit from those safeguards, families must be able to afford an attorney who is knowledgeable of the ICWA. Not only do abuses of the law occur, but in cases where the ICWA was not legally applicable, such as in a custody battle between parents, some
families have felt that ICWA’s inferences have propagated belief that tribal homes are best for children of heritage no matter what the circumstances.

Family case studies reporting positive outcomes resulting from the Indian Child Welfare Act are well-documented. To illustrate types of situations that are not always positive, this paper examines cases of children and families who felt the Indian Child Welfare Act interfered with the best interest of children. Names have been changed,

Case 1

Child’s Heritage

Tribal heritage

Caregiver Relationship

Birth Father, tribal heritage

History

On April 25, 2014, the father, a tribal police officer working under the BIA at the time, filed an Emergency Order for Visitation with the Spirit Lake Tribal Court, requesting that any visitation by his children’s mother be supervised. ‘Billy’ stated that he has provided documentation from the hospital concerning treatment of scabies following the last visit with the mother, who was also a tribal member, and that this was the second time this had happened. The first time had been in February and documentation had been provided at that time as well.

In July 2014, Billy signed another affidavit concerning physical abuse and neglect committed by his children’s mother, and the lack of response from tribal social services. His complaints included lice, bruising, terrorizing, drug paraphernalia and guns within the children’s
reach. Billy obtained hospital documentation of the bruises. In August 2014, he filed another affidavit, this time requesting supervised visits between the mother and his children.

In September 2014, Billy contacted the organization, CAICW, for help because he felt the tribal court and tribal social services were doing nothing to protect children. Stating that tribal social services had told him to stop coming in waving papers, he provided CAICW with several audio tapes he had made while speaking to tribal social workers and a tribal judge. Billy then spoke to CAICW over the phone, stating that no one is protecting any of the children at Spirit Lake. He explained how, as a police officer, he saw child abuse ignored if the perpetrator was someone connected to tribal government. Billy said he had been afraid to speak out about it two months earlier because he was afraid the tribal courts and social services would take his children from him. But at this point, he was willing to speak because “someone needs to do something.”

**Outcome**

Billy died in a traffic accident about five hours after speaking to CAICW. His son also died in the accident, and his daughter was placed with her mother.

**Reason for Case Inclusion**

Represents tribal members who oppose tribal government corruption or jurisdiction over their children.

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**Case 2**

**Child’s Heritage**

Tribal heritage, ineligible for tribal membership
Caregiver Relationship

Father, tribal member; Mother, non-member. Divorcing.

History

A family of five had moved to a closed reservation after the husband had taken a job there. The husband, ‘John,’ had not previously lived on the reservation. After a short time, he began seeing other women as well as abusing drugs and alcohol, telling his wife, ‘Mary,’ “That’s the way they did things on the res.”

Mary moved off the reservation and began divorce proceedings. She was unable to find someone to serve him papers on the closed reservation, and a month later received a summons from tribal court which stated, “Failure to appear at time and place stated above shall result in judgement being entered in favor of the petitioner.” It was her impression that this was binding and that she had no choice.

The divorce was granted by tribal courts a short time later. Custody was to be shared and the three young children were to remain with Mary. A year later, Mary was accepted into graduate school with a full tuition waiver but would need to relocate 80 miles away. The tribal court initially said that as long as she stayed in the state it would be fine. Within a month after the move, John’s cousin, who was his attorney, asked the judge to award full legal and physical custody to John under the premise that the Mary was unstable. Mary then struggled to not only get her children back, but to have visitation. She attempted to have the custody issue switched to county court, but according to the local legal services, the tribal court “gained jurisdiction over the custody status of the minor children” by virtue of the fact that Mary had submitted herself to the jurisdiction of the tribal court when she responded to the original summons and appeared in the court.
Two years later, the oldest child was removed from John due to physical abuse. Nevertheless, the case against John was dismissed. According to Mary, “This was so upsetting that even the child protection worker broke down and cried in court.” The child was sent to an out-of-state facility for counseling. The mother was not allowed to have contact with her for several months.

The tribal court finally set a standard visitation schedule, but John refused to follow it.

Mary remembers:

Every attempt to get the visitation followed has been unsuccessful. The judge who issued the order told me to quit coming up there waving my court papers. The only way I’ve been able to even talk to them is if I catch them at home alone, and the children tell me all the telephone conversations are recorded. The children have told me their dad’s explanation for not letting them come down is that I went to school to be a teacher and they train teachers to manipulate children’s minds and he doesn’t want me to manipulate theirs.

A restraining order was issued to keep her off the reservation:

I was given a court date to try and resolve this, but neither the judge who signed it nor my ex showed up. I was given another date and the judge who signed it still wasn’t there, another judge admonished [John] for trying to keep me from seeing my children, but [John] didn’t want her to hear the case, so the restraining order was never actually dealt with.

At one point, after waiting for over an hour at the reservation boundary line to pick up the kids for a visit, she drove to where she thought they lived to see what the holdup was. John called the cops right away and “wanted me arrested then. Fortunately, they let me go, but without my children. I am afraid to go back to court there, because I don’t want to go to jail for something I didn’t do, but I am going to risk it for a chance to see my kids, even if that chance is small.”
The children had told their father and the court that they wanted to live with their mother. They are convinced that their dad is right when he says he can do whatever he wants there, and he tells them if they do not behave they will not be able to see her. Mary stated:

The tribe claims jurisdiction over my children and myself - who are not accepted as members, we are not enrollable. What will happen to my children when they turn 18 and all their peers get payments and opportunities for college scholarships. They will try, with my help, to make it in a world which they have been purposefully kept out of by a tribe that won’t now accept them. I know that stories like this can change things but not fast enough for me and my children.

Outcome

Mary regained custody of her oldest daughter when she was about 16. Mary never regained custody of her two younger children.

Reason for Case Inclusion

Represents the plight of some non-member parents and children in tribal court. Illustrates the preference some tribal courts have for parents who are tribal member over parents who are not, in part due to family relationships and friendships the court or tribal council have within the tribal community, as well as in part due to the underlying belief fostered by the Indian Child Welfare Act that tribal birth parents are better for children than their non-tribal parents.

Case 3

Child’s Heritage

Tribal member, multi-heritage

Caregiver Relationship

Father, non-tribal member; Mother, tribal member
History

A married couple were living on the reservation and had a young daughter when they decided to go their separate ways. The wife, ‘Susan’ and her mother drove the husband, ‘Jack’ and daughter, ‘Joy’ to the bus station and gave him written permission to leave with Joy. A few months later, Susan traveled to the state where Jack had moved, and they attempted to reconcile. They moved back to the reservation and spent another three months together again there, but Jack once more decided to leave the reservation because of its culture of alcohol and drug abuse. He and the Joy again left the state. During that time, Susan had sporadic contact with Jack and Joy by phone.

Joy became very attached to her father’s extended family, especially her paternal grandparents. Almost four years later, Susan, accompanied by police officers from the county Jack was residing in, came to his home and took Joy. The police officers handed the father a packet of pleadings from tribal court; but presented no valid order from his county. The enclosed tribal Writ of Habeas Corpus had not been domesticated with his state.

Susan had filed for divorce and custody in tribal court months earlier. A hearing on the Motion for Immediate Child Custody and Child Support was held, but Jack had never been served notice of the tribal court hearing. For reasons unknown, the county police, having been given the papers from tribal court, assumed the orders simply needed to be followed.

Following this, Jack hired an attorney with the little funds he could obtain from friends and family and went to tribal court to regain custody but was unsuccessful.
Outcome

The paternal grandfather never saw Joy again as he passed away a few months after she had been taken from Jack. However, two years later, Susan again changed her mind and allowed Joy to visit her father and stay with her paternal grandmother for extended periods. Joy told her father and grandmother of her fears living on the reservation, including issues of neglect and drug abuse. Still, custody was never returned to Jack.

Reason for Case Inclusion

Represents the plight of some non-tribal parents. Illustrates what some extended family experience if a tribal court is hostile to non-members.

Case 4

Child’s Heritage

Tribal member

Caregiver Relationship

Non-tribal members, Foster/adoptive

History

‘Rose’ was an abused infant when first placed off the reservation in the mid-1970’s by social services. The foster family had not been seeking a baby to foster, but when asked to take this underweight infant who had been partially blinded by abuse, they did not hesitate. Within a few years, the ICWA was enacted and Rose’s fight to remain with the family began. After a couple of years, she was finally taken back to the reservation and placed again with her birth mother, who again began beating her. Once, her mother took a cord and whipped her for playing opera music in her bedroom. Rose asked her mother why she had even wanted her back. Her mother
said she did not want her back; the tribal government did. Her mother said she, herself, wished
her attempted abortion had worked.

Rose reported the abuse to other adults on the reservation, but it was not until her case
received some national attention that the tribal government finally allowed Rose to quietly return
to her chosen home under the agreement that the media would not be told. Her mother was never
held accountable for her abuse.

**Outcome**

Rose is now in her 40’s and continues to live and identify with her foster/adoptive family. She
states she has never had a desire to return to the reservation.

**Reason for Case Inclusion**

Represents children of heritage who prefer to live off the reservation, outside of tribal
government jurisdiction, or who do not feel safe living with family members.

Case 5

**Child’s Heritage**

Tribal member

**Caregiver Relationship**

Non-tribal members, Foster/Adoption at request of birth mother.

**History**

The birth mother, ‘June,’ had been seeking a home for her son, ‘Matthew,’ from almost the time
he was born. June had already had several children who were placed with various people –
friends, family and foster homes. She had never felt able to maintain a home for them. She met
the prospective foster parents, ‘Barb’ and ‘Steve,’ for Matthew at a church when he was about 20 months old. She had asked the congregation if there was anyone who would be able to adopt and raise her little boy. After some thought and prayer, Barb and Steve contacted her and agreed to a closed adoption with no more contact. The adoption process began.

Barb reports that the toddler loved to hug and had an infectious laugh with a sweet smile. He bonded with the couple’s daughter, who was just 8 months younger. But two years later, the family was still waiting for his adoption to finalize. It was then that they found out June’s parental rights had not yet been terminated. Now June was telling them she wanted another chance with him. Knowing Matthew wanted to stay with them and would feel grief if he had to leave, they refused. The next year was an emotional roller coaster. The tribe fought hard and attorneys told them to give up. They lost their original attorney and struggled to find a knowledgeable replacement. They finally approached an attorney they had read about it. He refused the case initially, but with prayer, they kept asking until he agreed.

Local media began to follow the case, and when the couple attended court hearings, they were verbally assaulted by crowds of tribal members. Still, they did not give up.

Outcome

Barb and Steve were able to adopt Matthew – but not because they won in court or because the tribe gave in. They were able to adopt because the birth mother changed her mind again. Barb relates:

[June] decided it was best for [Matthew] if we finished the adoption. She said it was through God’s grace and love that she could let him go a second time. We are completing the paperwork for an open adoption. [June] and I are nurturing a new friendship with visits, phone calls, cards, encouragement and most important, love.
As of the writing of this paper, Matthew celebrated his 18th birthday in the adoptive home. According to Barb and Steve, Matthew has been doing extremely well, although June did not maintain close contact through the years – appearing only on occasion after extended absences.

**Reason for Case Inclusion**
Represents plight of children faced with uncertainty and lack of permanency even in extended placements that had the promise of adoption. The sense of stability and security for both the child and adoptive family were dependent on the fluctuating will of the birth mother and tribe.

**Case 6**

**Child’s Heritage**
Tribal heritage, ineligible for tribal membership

**Caregiver Relationship**
Grandmother, no tribal heritage.

**History**
A Colorado grandmother, “Marie,’ had been raising her 7-year-old grandson, “Andrew,’ for a few years when an Oregon tribe contacted her and said she could not have custody because she is white. They told her they will be giving his maternal grandmother custody instead.

Marie sought help in Colorado, but the local social workers and district attorney told her she might as well give up – because “the tribe always wins.” The tribe had also altered the Andrew’s birth certificate to make it appear he was eligible for enrollment, when in fact he was not. He did not have enough blood quantum to be enrollable, so the birth certificate was altered to say his paternal grandmother was his mother.
Unable to afford an attorney but unwilling to allow this to happen to Andrew, the family contacted CAICW for assistance, and CAICW connected them with an attorney who could advise them. He gave them information they needed to represent themselves in court. They were able to stand in court, and armed with the tools given them, were able to inform the judge that the birth certificate was not correct and the ICWA did not say a white grandparent is barred from custody.

Outcome
Marie won custody and Andrew was able to remain with her. Marie reports it has been six years now and he is doing very well. Andrew is on the student council in an advanced magnet school and is constantly assisting others.

Reason for Case Inclusion
Represents non-tribal extended family subject to the arbitrary and at times deceitful actions of some tribal governments.

Case 7

Child’s Heritage
Tribal member

Caregiver Relationship
Non-tribal Foster/adoptive

History
‘Annie’ was only 9 years old when she was taken from a non-tribal adoptive home she loved in and placed in the home of an uncle who made her his bed partner from the first night on. The
adoptive couple had fought very hard to keep her and her sisters safe, taking the case all the way to the State Supreme Court.

Annie begged tribal officials to let her return home to the adoptive home, but to no avail. She believed they would not let her go back to them because her case had become very public when it was appealed to the highest state court. She tried running away several times - back to where she felt safe - but was time and again caught and returned to her uncle. Her adoptive mother remembers Annie made it all the way to their home one rainy night, arriving wet and muddy due to hiding in ditches from the police. The tribe took her back to her uncle again.

Annie finally attempted suicide by hanging when she was 16, and it was only then that the tribal government conceded and allowed her to return to the adoptive home.

Nevertheless, after years of being raped, Annie had a large amount of emotional trauma to work through and it took a few years of genuine love for Annie to find herself again.

**Outcome**

The couple adopted her after it was legal to do so – after she turned 18 - and she continues to identify as their daughter today.

**Reason for Case Inclusion**

Represents those children who do not feel safe in the homes of relatives and have gone through tremendous abuse following a tribal government’s decision to place them in the extremely dangerous home of a relative.
Case 8

Child’s Heritage

Tribal heritage, ineligible for tribal membership

Caregiver Relationship

Grandparents, no tribal heritage

History

A young couple had one daughter together, a 10-month-old who, at 1/16 Indian, was 94% non-Indian. ‘Nnacy’ did not meet the Tribe's blood quantum of 1/8. The mother, ‘Donna,’ also had a 9-year old son, ‘Mikey,’ who was low functioning and, according to the paternal grandfather, “Ed,” who was a retired public school principal, counselor and district school administrator, Mikey possibly suffered undiagnosed Asperger’s Syndrome. Ed relates that the boy threw “very loud and long temper tantrums when told to bathe or brush his teeth and soiled his clothes and the furniture daily.” The boy also fell often; hurt himself several times; and had a very high pain tolerance. He was accidentally hurt by the father, ‘Joe,’ during one episode. Mikey showed no pain when injured, so the Joe, who was a paramedic, didn't take him to the doctor right away. The tribe subsequently made allegations of child abuse to the Department of Human Services. According to Ed, two half-sisters and the maternal Grandmother told Joe and Donna that they were going to take both children away “and you will never see them again.”

“Unfortunately,” the grandfather reported, “and beyond our wildest thoughts, that is exactly what they did!”

Joe was charged with child abuse of his stepson, and Donna was accused of allowing child abuse. The tribe placed the Mikey with his biological father, who had previously been found unfit. The tribal government then placed Nancy with Donna’s half-sister, who had
previously lost custody of her own teenage stepdaughters. According to Donna, she had left her birth family and married off of the reservation because of her family’s sexual, emotional, physical and drug abuses.

Although the paternal grandparents were approved by the county for foster care Nancy had lived in their home for several months, the tribal social services said they were "too old" at age 59 to be foster parents. The family did not see Mikey again after the tribal government removed him, but the parents had visitation with Nancy for one hour twice a month for years.

After Mikey had “seizures and behavioral problems under DHS' care,” Juvenile Court and DHS ordered a medical evaluation. Ed states that the evaluation affirmed to the court that the boy did “have a high pain threshold, that he fell without being able to catch himself, and that he had learning difficulties.” After three and a half years, the court finally decided “there wasn't enough evidence” to sentence either parent.

There was no money left to pursue child custody and their attorney urged them to relinquish their parental rights to both children. According to the grandfather, the judge never made a decision or judgment; the tribe made the decision to keep Nancy, and the judge simply acquiesced. Ed stated:

In visiting with others in similar situations, the courts don't want to mess with the sovereign nations because they don't understand ICWA, and the defense attorneys typically have never heard of ICWA--and so the system of legalized kidnapping goes on. She is gone from our son and daughter-in-law and from us forever. We believe that they might not even tell her that she is adopted (she was much too young to remember what went on, nor the 'people who used to come to visit her at DHS'). It is our prayer that she will one day find out and that she will find her parents and us, her grandparents; that we might get to be part of her life in some way in the future. But it will only be because of her own fortitude and in spite of the Tribe, if it happens at all.

After having mortgaged his home to pay for the couple’s legal battle, Ed, who once served as “an advisor to the local Department of Human Services Child Protection Team and an
advisor to the Crime Commission,” later signed his name, “former grandfather of Mickey and
Nancy.” He added, “We pray some of the laws and practices can be changed so that families in
the future won’t have to go through the hurt, the betrayal by the Tribe for their own member(s),”

**Outcome**

The children were never reunited with their family.

**Reason for Case Inclusion**

Represents the plight of many non-tribal grandparents who do not have the funds to fight a tribal
government for custody of their grandchildren.

**Case 9**

**Child’s Heritage**

Tribal member

**Caregiver Relationship**

Non-tribal foster/adoption

**History**

A home study was done prior to placement of twin toddlers ‘Abbey’ and ‘Beth’ and the home of
her grandfather was found by Spirit Lake Tribal social workers to be “very satisfactory.” The
stated goal of tribal social services was reunification with the parents after they had been
released from incarceration and completed case plans which included evaluations and classes.
Abbey was murdered at the home of her grandfather just a little over a month after her arrival, in
June 2013.
The twins were born on July 19, 2010, and had been living in an admittedly safe, loving foster home in Bismarck since April 2011, when they were nine months old. The girls were one-fourth Spirit Lake Sioux Tribe blood quantum and one-eighth Standing Rock Sioux Tribe blood quantum, but were born in Bismarck and had not lived on either reservation. Around March 1, 2013, when they were two and a half years old, they were enrolled in the Spirit Lake Tribe for purposes of jurisdiction. On April 9, 2013, the tribe filed a petition to transfer their case to Spirit Lake Tribal Court, pursuant to ICWA. The tribal court then ordered their transfer from their Bismarck home on May 13, 2013 and placement with their grandfather and his wife, ‘Fay,’ a woman known by Spirit Lake tribal social services and court to have been abusive to children in the past.

Fay is alleged to have beaten the twins several times. On June 13, 2013, Abbey was thrown down an embankment and Beth was pushed to the ground. Fay then told her own children to beat the twins. They did. Sometime later that night, lying on the bed next to her twin, Abbey died. Beth, just three, remembers waking up and finding her sister (in her words) “blue, and gray.” It was later found she died of severe head injuries that her caregivers did not seek medical attention for. Beth and other children in the home were removed by tribal social services that day.

By June 25, 2013, the FBI had begun an investigation and the U.S. Attorney’s office had already filed federal criminal charges against Fay in connection to Abbey’s death and she was in federal custody. She was charged with “child abuse and neglect.”
Outcome

Abbey died at the hands of a family member a month after she placed in the home of a known child abuser on the Spirit Lake Reservation. On June 21, 2013, Beth was transferred back to her foster home she felt safe in.

Reason for Case Inclusion

What happened to Abbey represents the plight of young children placed in the homes of relatives known to be dysfunctional or even abusive – for no other reason than to be “in compliance” with ICWA.

Case 10

Child’s Heritage

Tribal member

Caregiver Relationship

Non-tribal foster/adoption

History

‘Jay’ was born in January 2005, positive for methamphetamine. Jay’s parents, who lost custody immediately, wanted him to be adopted. Jay’s mother was non-tribal, and his father, ‘Tony,’ was an enrolled tribal member. Jay was placed in the foster care system and moved from one home to another. His mother reiterated her desire that he be adopted. When he was three months old, parental rights were terminated and the state began to look for placement in a tribal home.

‘Clint,’ the father in the licensed foster home that was chosen, was of Cherokee descent. Clint and ‘Harmony’ had also adopted two boys of Chippewa heritage. Clint is a police detective and Harmony is a registered nurse. When they received Jay, he suffered with gastric
reflux, upper respiratory infections, extreme vomiting, and allergies to dairy and soy. Nevertheless, they were committed to caring for him and hoped to adopt him.

In June 2005, when Jay was 6 months old, the state reinstated Tony’s parental rights for the purpose of enrolling Jay in the tribe. However, they were not able to physically locate Tony until November 2005. He was allowed one day to meet Jay and sign enrollment papers. The state also gave Tony a list of tasks to complete to regain custody. Tony declined custody and stated he would like Jay to be adopted. The state then asked Tony for the name of a relative. He gave them the name of a cousin, ‘Trudy.’

The state located Trudy, who agreed to take the child. A social worker that was a tribal member was assigned to facilitate the process, and a hearing was scheduled for August 9, 2006. Jay was now a year and a half old. On August 4, the social worker took Jay, Clint and Harmony to meet Trudy for a transitional visit. When they arrived at Trudy’s home, no one answered the door. After waiting and knocking for several minutes, the Social Worker called Trudy, who was in the home. Trudy stated that she had sprained her ankle, was unable to care for the baby, and asked that the visit be canceled. The worker agreed but asked to speak to Trudy inside first. Inside, there was a strong smell of green marijuana, and drug paraphernalia was on the tables. Harmony, who was an RN, examined Trudy’s ankle but could not detect an injury. Nevertheless, Trudy declined to accept Jay for the visit.

After leaving the home, Clint and Harmony expressed their concerns about drug use, the small size of the home, its lack of cleanliness, lack of preparation for the arrival of a small child, and the general health of the cousin. As a detective familiar with signs of drug use, Clint was concerned drugs were being dealt out of the home. The social worker denied smelling marijuana.
and warned the couple that if they “ruffle feathers” they will be denied the opportunity to serve as a respite home for Jay and will never see him again.

Unable to simply look away and pretend the situation was okay, Clint and Harmony wrote a letter to the judge outlining their concerns. Unfortunately, upon arriving for the hearing, they were told it was canceled. When they asked how to give the judge a letter, they were told it would have to come through the social worker. The foster parents then gave the letter to the state attorney general, who assured them they had legitimate concerns and that he would deliver the letter.

The social worker called later that day and reiterated that they should not upset the tribe and that she will not go against what the tribe wants to do because they are colleagues and they have “professional respect to honor.” The next day, Clint and Harmony were informed that they are no longer welcome to accompany Jay to Trudy’s home. The tribal social worker took Jay for a transitional visit and again warned them not to interfere with the transfer. The worker stated she had her “Indian ethics” to uphold. She assured the couple that if they cooperate, they will have the opportunity to visit Jay and serve as respite care.

Jay returned from the weekend very ill. The social worker, before delivering him home, called and told them to make an appointment with their doctor. Harmony met the social worker at a local store and brought Jay to the doctor, where he was diagnosed with asthma and given breathing treatments and steroid treatments. He was also given a referral for a gastro-intestinal evaluation.

After the next transitional visit just a week later, the social worker again called and said Jay needed to see the doctor, this time for a head injury. She said she had been changing him at a roadside rest area when he fell out of the car and hit his head on the door. However, the social
worker said she would be bringing him to the doctor this time, not the foster family. Harmony made the appointment with their doctor but went over to the clinic anyway, despite protest of the social worker. The social worker would not allow her in the examination room, but due to the baby’s wheezing, the doctor told her he would examine the breathing and intestinal issues again as well.

Over the next couple weeks, Jay’s breathing did not improve, despite medication. Transitional visits were halted for a few weeks. On October 19, 2006, the judge ruled that the foster parents were not De Facto parents and had no standing. On October 23, 2006, Jay was removed from their home and transferred to the care of the cousin.

**Outcome**

Their two older boys, grieving the loss, were found sleeping on the floor of Jay’s room the next morning, next to his empty crib. The foster/adoptive family has not seen Jay since. They were told at one point that he had been moved out of Trudy’s home in the spring of 2007 but, six months after he was placed, but have had no information since.

**Reason for Case Inclusion**

Illustrates the difficulties and obstructions some families have experience when advocating for the best interest of a child.
Chapter 6

American Family Dynamics Study: Data Analysis

Research Question and Study

One area of federal Indian policy that has profound effect on the physical, emotional and economic outcomes of persons of tribal heritage is the Indian Child Welfare Act. The question asked in the late 1990’s by researcher Carol Locust while doing what came to be known as the ‘Split-feather Study’ was, “Are you a Native American who is adopted?” She further explained, “We are seeking subjects for an academic study of adoption.”

Locust has not reported the exact steps taken to obtain participants, so it is unclear whether only those who were adopted into non-tribal homes responded to her survey and this was a reflection of the percentage of those adopted into non-tribal homes, or whether the focus was altered after the survey had begun, but Locust reports 20 participants, all of whom were adopted into non-tribal homes. From this study of 20 adoptees, Locust concluded that children who had tribal heritage and were placed in non-Indian foster or adoptive homes had greater problems with self-identity, self-esteem, and inter-personal relationships than their peers. However, her primary research did not include tribal members who were not fostered or adopted, tribal members who were foster or adopted into tribal homes, or non-tribal youth adopted into the homes of tribal or non-tribal Americans, including youth and homes of other, non-white heritages. Without control groups, causality cannot be determined.

With this in mind, the American Family Dynamics Survey was designed to expand on the Locust research by gathering data from several control groups as well as seek out the overall health and perspective of persons of even minimal Tribal heritage or connection to Indian Country who do not normally identify themselves as ‘Native American.’ This mixed-method
study queried the general U.S. population. Along with the general assessment of varied aspects of the family lives of individual participants, this study was designed to answer several questions left unanswered by the Split-feather Study:

- Does placing children who have tribal heritage into foster/adoptive non-Indian homes put them at greater risk for experiencing psychological trauma leading to the development of long-term emotional and psychological problems in later life?
- Do tribal members who were adopted into non-tribal families as children show greater problems with self-identity, self-esteem, and inter-personal relationships than do their peers?
- Are the ties between children with tribal heritage and their birth families and culture stronger than that of their non-tribal peers, no matter the age at adoption?"
- Regardless of age at placement, do adoptees with tribal heritage list identity with their family and their tribe as their first priority, and the sorrow of not knowing their culture, language, heritage and family as a life-long, often emotionally debilitating anguish?

Addition questions of interest include:

- How does the physical, emotional and financial health of members of federally recognized tribes compare with the physical, emotional and financial health of non-federally recognized tribes or those unconnected to Indian Country?
- How do tribal members feel about federal policies that mandate their cases be heard only in tribal courts?
- Do persons of tribal heritage believe federal Indian policy infringes on their life, liberty and property?

**Methods**

This research will identify some correlations that suggest causation, using primary sources as well as data from the very sources that support and promote the Indian Child Welfare Act. Primary sources include historical documents, peer-reviewed articles, court rulings, congressional testimony, and reports from tribal, federal agencies, and non-profit organizations.
Research Design

Other than the U.S. census, tribal governments are the sole aggregators and distributors of statistics concerning Indian Country. When Congress or the executive branch survey persons of tribal heritage, they inquire to tribal leaders, send pollsters to homes on the reservation, and conduct surveys through Indian Health Services or other tribal programs. However, none of those methods ever reach a vast percentage of those with heritage. Many of those who have distanced themselves from the reservation system have mainstreamed into the larger culture and do not use Indian Health Services or other tribal services.

Further, tribal officials represent tribal members who have the option of voting in reservation elections, but they do not represent people of heritage who are not enrolled members. This is not a problem when an issue is focused totally within reservation boundaries – but it is a critical issue when Congress passes legislation concerning children who are eligible for membership but have never had any connection to Indian Country. Many of those who have distanced themselves from the reservation system have done so purposefully, but they are not organized as a group or have any common point of access. Therefore, there is no easy way to survey these stakeholders other than surveying America’s general population and asking if the survey participant is a tribal member or has tribal heritage.

The reasons for a comprehensive study surveying the entire range of population:

- Ethics: A comprehensive survey of autonomous adults does not single out one people group over another
- Validity and Reliability: A comprehensive survey provides control groups
- Meets a goal: A comprehensive survey is necessary to identify and clarify a previously un-measured, un-surveyed target group.
- Justice: It is important to include non-tribal entities in the study in order to ensure a comprehensive balance, as many individuals affected by federal Indian policy have never lived in Indian Country and come from multi-heritage families.
• Justice: A comprehensive survey, with equitable selection and distribution, will benefit society - as well as the hidden target group - with new information concerning American family dynamics. Leaving a segment of population out could be detrimental to an understanding of current family dynamics throughout the U.S. as well as the target group.
• Beneficence: This comprehensive survey has potential to benefit and is unlikely to harm

Research Purpose
The purpose of this causal comparative study is to assess the health, worldviews and dynamics of diverse families across the nation, and test whether children who have experienced homelife outside the traditional model are prone to greater problems with behavioral, mental health, self-identity or self-esteem issues than their peers. This study could affect Federal and State legislation and assist in the physical and emotional protection of children.

Other goals included identifying conclusively that there are different subsets of tribal members and persons of heritage – urban, suburban, rural, and reservation – some deliberately disconnected from the reservation system and tribal governments. This is a significant detail – as despite assertions that federal Indian law is not discriminatory because it is based on “political distinctions” rather than racial distinctions (Morton v. Mancari 1974, 551), federal, state and tribal governments have included individuals and their children under legislation and administrative rules based on heritage, not political affiliation.

Research Approach
The operational hypothesis posed for this survey is that children with tribal heritage and a history abuse, neglect, or Fetal Alcohol Effects, who have experienced long-term placement
in homes other than a tribal or ICWA compliant home, are prone to greater problems with behavioral, mental health, self-identity or self-esteem issues than their peers.

Because displacement from the traditional family structure could occur for a variety of reasons, the question framed in the invitation was, “Our nation is undergoing many changes in family structure and dynamics. How have these changes affected children?” This approach was chosen for its potential to draw the greatest diversity of participants.

- The number of children raised in single parent homes, homes of extended family, or foster homes has increased. Comprehensive research and empirical data on the outcome of foster care is incomplete.
- More children are reported to have behavioral and mental health concerns.
- Reports dating back decades cite a high rate of mental health issues and violence for children in foster care.
- Being a comparative study, data gathered can be used to address issues specific to comparison groups.
- There is a lack of sufficient research studies comparing outcomes of foster children of tribal heritage with those of other heritages
- This is the first study to compare quantitatively and qualitatively the effect foster care and adoption have had on children of tribal heritage.

**Research Strategy**

To obtain primary research concerning the experiences of American citizens, this study tested the hypothesis through a large quantitative, anonymous, online survey allowing for the comparison of diverse groups of adults who were raised outside of the traditional nuclear family with diverse adults who were raised within the traditional nuclear family. There were 50 questions in the survey. Invitations to participate were promoted on social media as well as newspaper ads in three regions of America.

The study also involved a smaller qualitative interview study of volunteers from the larger group. Participants in the qualitative interviews were invited to contact the researcher following
their participation in the quantitative online survey. The questions were similar to those of the quantitative survey. Results from the qualitative survey will be presented in a future paper.

The chosen research design for this research proposal is Causal Comparative, also referred to as ‘post facto’ or ‘non-equivalent control group’ studies. This design was chosen because the independent variable ‘placement history’ cannot be manipulated. Variables included independent variable(s) generally defined as ‘placement history,’ dependent variable(s) generally defined as ‘damaging effects,’ controls and intervening variables(s) included adults who were children from traditional nuclear homes and adults who were children placed in the homes of relatives, as well as alternate sources of damaging effects.

A child’s placement history is an independent variable because it is historical data that cannot be manipulated. Outcomes of children of varied backgrounds, worldviews, heritages and placement history were compared: for example, children who were placed in foster homes vs. children who remained in their birth home or were placed in kinship homes.

Population and Sampling Design

Both the quantitative and qualitative studies were open to any U.S. citizen over the age of 18.

Population

According to the 2010 U.S. census, there were almost 250,000,000 adults living in the United States. Of that, 6.8 million (2.74%) identify as having American Indian or Alaska Native heritage. This number includes those who are multi-heritage. Of these, 2.2 million are members of one of the 573 federally recognized tribes (IHS 2019).
On September 30, 2016, it was estimated that 437,465 children from all heritages were in foster care and more than a quarter of those in care (32%) were in relative homes, and nearly half (45%) were in nonrelative foster family homes (GWIF 2018). Almost half of these children, 44%, were Caucasian. About 23% identified as Black or African-American, 21% Hispanic and 10% were listed as “other races or multiracial.” This included children with tribal heritage, children of various other heritages, and children who were multi-heritage. About 2% were unknown or unable to be determined (GWIF 2018).

There is no government database tracking domestic adoptions, but in 2012, the University of Oregon reported that approximately “5 million Americans alive today are adoptees, 2-4 percent of all families have adopted, and 2.5 percent of all children under 18 are adopted” (Herman 2012).

Almost 1100 participants were necessary from these varied sub-groups of the American population to ensure statistical significance when comparing them. While this survey garnered 1351 participants, the number of tribally enrolled respondents who had experienced adoption or foster care was 139.

**Sampling Method**

Using the website tool ‘SurveyMonkey,’ the quantitative survey was posted online at the end of July 2018. Invitations to participate in the online survey were posted on Social media, including Facebook, Twitter, Instagram, Pinterest, and Linkedin were used to invite participants to respond to the survey. Sporadically, the social media posts were promoted as paid ads. Email invitations were also sent to about 30 people, asking them to share the survey with friends and family of all heritages and political leanings. In January 2019, newspaper ads were placed in three select
cities: Bemidji, MN, Kalispell, MT, and Oklahoma City, OK. Invitations were also placed in the forum of Adoption.com. In March 2019, Amazon’s Mechanical Turk was employed to increase participation, and particularly, respondents with Tribal heritage. Most participants over the eight-month period responded through Facebook ads and Mechanical Turk. On June 17, 2019 there were 1351 participants with 534 identifying Tribal heritage.

The flyer for the qualitative interview was added to the end of the quantitative survey. Upon finishing the survey, all participants viewed the flyer for an interview portion of the survey and had the option to volunteer for the qualitative Interview. If they chose to, they were asked to send a separate email directly to the researcher.

Data Collection Administration

SurveyMonkey is an online survey host with a dedicated Trust & Security program focusing on application, network, and system security. Identifying information was not required for this online survey and anonymous options were set.

Quantitative Survey participants were not required to sign the consent form, which was the first page of information that participants saw after clicking on the survey link. Qualitative Interviews volunteers signed consent forms that were sent to them by email prior to the interview. Participants in the follow-up qualitative research were given private, confidential interviews: These interviews were recorded to ensure accurate documentation of responses and assist with keeping the interview streamlined and as brief as possible. The audio recordings were kept confidential in a password protected computer with limited access and following data analysis will be transferred to an external hard-drive and placed in a bank safe deposit box. The
consent forms for interview participants will be kept separate from respondent data. Password locked computers were used during analysis and writing of the report.

Data for the interviews is aggregated and will not be connected to names on Informed Consent forms other than through a codebook, which will be kept separate from the data in a secured environment. If a participant chooses to withdraw from the research, audio recording will be destroyed.

Data Analysis Techniques

Analysis of the final, finished study will begin with a ‘Test of Statistical Significance’ to determine if the null hypothesis is probably true in the population.

Analyzing the nominal and ordinal variables of the quantitative results will begin with varied ‘Contingency Tables.’ There will then be an analysis of ratio variables using ‘Linear Regression’ and ‘Correlation.’ ‘Multiple Regression’ and ‘Correlation’ methods allow for efficient summarization of data that has many variables.

Limitations of Methodology and Ethical Considerations

Limitations: Restricted funds limited the number of people the study was able to reach.

Conflicts of Interest: The student researcher is a volunteer Chairwoman and Administrator of the Christian Alliance for Indian Child Welfare and a Congressional appointee on the Alyce Spotted Bear and Walter Soboleff Commission on Native Children. There is no financial conflict of interest. These relationships were noted on information and consent forms respondents were offered prior to participation. Direct interviews were recorded for accuracy, reliability and accountability.
Quantitative Survey

Data Analysis

Out of 1351 participants, 366 responded that they had a great-grandparent who was “Native American.” 136 were enrolled in a federal tribe, or 37%, and 60 in a state tribe, or 16%. 141 were born on a reservation, and 114 said they were born totally disconnected from Indian Country, with the remainder in towns close by a reservation or in an inner-city tribal community. Over a quarter, 28%, 104 of the 366 never visited a reservation or tribal community. Further, almost a third of those with heritage who experienced foster care or adoption, 30.56%, said they were raised outside of and unconnected to any Native American community or reservation, and never visited a reservation or relatives.

Of those confirming heritage, 47% had experienced foster care or adoption. 53% had not. Further, 66% of those who experienced foster care or adoption state that ICWA was involved in their placement. Of these fostered respondents with heritage, over half, 52.02%, reported they are enrolled in a federally recognized tribe, 28.32% are enrolled in a state, not federally, recognized tribe, and 4.05% are eligible for enrollment but have chosen not to enroll.

Questions

This study will determine whether children with tribal heritage and a history abuse, neglect, or Fetal Alcohol Effects, who have experienced long-term placement in homes other than a tribal or ICWA compliant home, are prone to greater problems with behavioral, mental health, self-identity or self-esteem issues than their peers.
According to the CDC, “Child abuse and neglect are serious public health issues with far-reaching consequences for the youngest and most vulnerable members of society. Every child is better when he/she and his/her peers have safe, stable, nurturing relationships and environments” (CDC 2019). Does placing children of tribal heritage in non-Indian foster homes increase their risk for experiencing psychological trauma and long-term emotional and psychological problems? To measure the current well-being of participants, several questions were asked pertaining to their physical, emotional, and economic health. The following is one example:

1. At this present time in your life – do you feel or experience -
   a. An adult in your household who often or very often supports you, nurtures, lifts you up, or praises you? Is there an adult you live with who makes you feel safe and loved?
   b. A friend with whom you feel strong ties and bonding.
   c. Safety
   d. A difference in learning style from other adults in receiving, processing, integrating, and applying new information.
   e. Depression
   f. Loss of self-esteem
   g. Personal grief from the loss of
      i. Family
      ii. Heritage
         1. Language
         2. Culture
         3. Spiritual beliefs

(American Family Dynamics Survey 2019)

Interestingly, non-foster/adoptees of tribal heritage felt a statistically significant higher “sense of loss of family” and “personal identity/growing up feeling different” than foster/adoptees of heritage did. The foster/adoptees, on the other hand, felt a statistically significant higher sense of loss of “culture/specific community” and “personal identity/biological relatedness to others with same skin” than non-foster/adoptees. Foster/adoptees had better education outcomes, but equal financial outcomes.
Further, preliminary results showed that 80% of adults of heritage who experienced foster care or adoption as a child currently feel emotionally connected to one or more other adults and 67.67% feel loved. While 30.56% of these respondents were raised “outside of and unconnected to any Native American community or reservation, and never visited a reservation or relatives,” over 60% did not feel grief from the loss of “cultural practices they never had a chance to experience” and a full two thirds of these respondents state that they have not felt “discrimination from the white community.”

Participants in the American Family Dynamics survey also took the Adverse Childhood Experiences test, which was generated from the Adverse Childhood Experience Study (1997). The ACE is a widely accepted screening tool and indicator for future physical and emotional difficulties. The Centers for Disease Control and Prevention now hosts the official website for the 1995 to 1997 ACE study.

To find one’s ACE score, a respondent answers ten questions, each worth one point. The sum of points at the end of the questionnaire is the respondents ACE score, with a higher number increasing the risk for risky health behaviors, chronic health conditions, low life potential, and early death (CDC 2019). According to the CDC:

The presence of ACEs does not mean that a child will experience poor outcomes. However, children’s positive experiences or protective factors can prevent children from experiencing adversity and can protect against many of the negative health and life outcomes even after adversity has occurred (CDC 2019).

To find a respondents ACE score, we asked participants the following questions:

While you were growing up, during your first 18 years of life:

1. Did a parent or other adult in the household often or very often…Swear at you, insult you, put you down, or humiliate you? or Act in a way that made you afraid that you might be physically hurt?
2. Did a parent or other adult in the household often or very often…Push, grab, slap, or throw something at you? or Ever hit you so hard that you had marks or
were injured?
3. Did an adult person at least 5 years older than you ever…Touch or fondle you or have you touch their body in a sexual way? or Attempt or actually have oral, anal, or vaginal intercourse with you?
4. Did you often or very often feel that …No one in your family loved you or thought you were important or special? or Your family didn’t look out for each other, feel close to each other, or support each other?
5. Did you often or very often feel that …You didn’t have enough to eat, had to wear dirty clothes, and had no one to protect you? or Your parents were too drunk or high to take care of you or take you to the doctor if you needed it?
6. Were your parents ever separated or divorced?
7. Was your mother or stepmother: Often or very often pushed, grabbed, slapped, or had something thrown at her? or Sometimes, often, or very often kicked, bitten, hit with a fist, or hit with something hard? or Ever repeatedly hit at least a few minutes or threatened with a gun or knife?
8. Did you live with anyone who was a problem drinker or alcoholic or who used street drugs?
9. Was a household member depressed or mentally ill, or did a household member attempt suicide?
10. Did a household member go to prison?

(CDC 2019)

ACE Scores

While the ACE test is intended for individual assessment, the Split-feather theory does not construe tribal members as individuals, but as a class. Therefore, we will compare the results of the some of the classes the Split-feather theory refers to when it uses the term “peers.” A total of 931 participants answered the ACE portion within the American Family Dynamic Survey. In Graph 1.0, the median for persons of all heritages and family dynamics is 1 and the mean is 2.01. This is one way of viewing peers of children of tribal heritage. The Response column indicates the number of participants that answered positively to the question.
Graph 1.0 shows their responses:

Q27 While you were growing up, during your first 18 years of life...
(Condensed ACE test - Mark ALL that apply - Checked boxes will count as YES)

Answered: 931  Skipped: 420

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<thead>
<tr>
<th>ANSWER CHOICES</th>
<th>RESPONSES</th>
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<tbody>
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<td>1. Did a parent or other adult in the household often or very often...Swear at you, insult you, put you down, or humiliate you? or Act in a way that made you afraid that you might be physically hurt?</td>
<td>35.56% 335</td>
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<td>2. Did a parent or other adult in the household often or very often...Push, grab, slap, or throw something at you? or Ever hit you so hard that you had marks or were injured?</td>
<td>27.07% 252</td>
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<tr>
<td>3. Did an adult person at least 5 years older than you ever...Touch or fondle you or have you touch their body in a sexual way? or Attempt or actually have oral, anal, or vaginal intercourse with you?</td>
<td>21.59% 201</td>
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<tr>
<td>4. Did you often or very often feel that ...No one in your family loved you or thought you were important or special? or Your family didn’t look out for each other, feel close to each other, or support each other?</td>
<td>25.03% 233</td>
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<td>5. Did you often or very often feel that ... You didn’t have enough to eat, had to wear dirty clothes, and had no one to protect you? or Your parents were too drunk or high to take care of you or take you to the doctor if you needed it?</td>
<td>10.85% 101</td>
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<td>6. Were your parents ever separated or divorced?</td>
<td>25.24% 235</td>
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<td>7. Was your mother or stepmother: Often or very often pushed, grabbed, slapped, or had something thrown at her? or Sometimes, often, or very often kicked, bitten, hit with a fist, or hit with something hard? or Ever repeatedly hit at least a few minutes or threatened with a gun or knife?</td>
<td>11.39% 106</td>
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<td>8. Did you live with anyone who was a problem drinker or alcoholic or who used street drugs?</td>
<td>25.03% 233</td>
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<td>9. Was a household member depressed or mentally ill, or did a household member attempt suicide?</td>
<td>22.23% 207</td>
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<tr>
<td>10. Did a household member go to prison?</td>
<td>5.37% 50</td>
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</table>

NONE OF THE ABOVE

Total Respondents: 931

Graph 1.0. Full ACE results
Graph 1.1 below shows preliminary results for 174 persons with tribal heritage who experienced foster care or adoption:

**Graph 1.1. ACE results: NA foster children**

Preliminary results within Graph 1.1 show a median of experiences for this group of 1, and a mean of 2.2, which is just slightly higher than the population at large.
Graph 1.2 shows the preliminary results for 195 persons with tribal heritage who did not experience foster care or adoption:

**Graph 1.2. ACE results: NA - no foster care**

These preliminary results show a median of 1, which is equal to that of children who experienced foster care or adoption, and a slightly lower mean than in the general population, 1.49.
1.3 shows results for persons with no tribal heritage who experienced foster care or adoption (69 participants):

**Graph 1.3. ACE results: foster children, general population**

The results for this group of non-tribal individuals who experienced foster care or adoption show median points of 1 and a mean of 2.2, the same as that of tribal members who experienced foster care or adoption.
Multiple Heritages

Question 33 asked ‘Did you have a great-grandparent who was a member of a federal recognized tribe? Do you have any Native American heritage?’ 897 within the survey responded, with 366 responding ‘Yes’ and 531 responding ‘No.’ Question 34 piped from 33, and asked, are you an enrolled member? 369 responded. Graph 2.0 illustrates these results:

American Family Dynamics Survey

Q34 Are you an enrolled tribal member?

Answered: 369  Skipped: 92

Graph 2.0. Enrolled members

10 respondents chose ‘other.’ Of the enrolled members who responded to the survey, most have multiple heritages. Table 1.0 illustrates the multiple diverse heritages of the 196 survey participants who are enrolled members of state and federally recognized tribes:
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<th>Q2</th>
<th>YES - I AM ENROLLED IN A FEDERALLY RECOGNIZED TRIBE</th>
<th>YES - I AM ENROLLED IN A STATE RECOGNIZED TRIBE, BUT NOT A FEDERALLY RECOGNIZED TRIBE</th>
<th>NO - I AM NOT ENROLLED, BUT AM ELIGIBLE FOR MEMBERSHIP, AND WANT TO ENROLL</th>
<th>NO - I AM NOT ENROLLED, BUT AM ELIGIBLE FOR MEMBERSHIP AND WANT TO ENROLL, BUT DON'T KNOW HOW OR HAVEN'T HAD A CHANCE</th>
<th>NO - I AM NOT ENROLLED, BUT AM ELIGIBLE FOR MEMBERSHIP, BUT HAVE CHOSENNOT TO BE ENROLLED</th>
<th>OTHER (PLEASE SPECIFY)</th>
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Total Respondents 136 64 70 29 26 41 10 540

270
This study also questioned the trust level diverse Americans had in the court systems. Respondents marked each court system they felt safest with.

**Table 1.0. Multiple heritages**  
**Trust in the Court Systems**

<table>
<thead>
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<th>ANSWER CHOICES</th>
<th>RESPONSES</th>
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<tbody>
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<td>10.08%</td>
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<tr>
<td>State (2)</td>
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<td>County (3)</td>
<td>16.16%</td>
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<td>City (4)</td>
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<tr>
<td>Tribal (5)</td>
<td>3.10%</td>
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<td>Trust and feel safe with all of them</td>
<td>12.19%</td>
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<td>6.39%</td>
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<tr>
<td><strong>TOTAL</strong></td>
<td>1,001</td>
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**Graph 3.0: Overall trust in the Court systems**

Graph 3.0 reflects the positive responses of 1001 U.S. citizens of all heritages and family dynamics.
Graph 3.1 shows the responses of enrolled tribal members in regard to their trust in court systems. There were 196 respondents:

**American Family Dynamics Survey**

**Q14** If you were to experience a violent crime and were able to pursue justice, which law enforcement and court would you feel safest turning to for justice?

- **Federal**
- **State**
- **County**
- **City**
- **Tribal**
- **Other (please specify)**

**Answer choices**

<table>
<thead>
<tr>
<th>Answer Choices</th>
<th>Responses</th>
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<tr>
<td>Federal (1)</td>
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<tr>
<td>State (2)</td>
<td>23.98%</td>
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<tr>
<td>County (3)</td>
<td>10.20%</td>
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<tr>
<td>City (4)</td>
<td>22.45%</td>
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<tr>
<td>Tribal (5)</td>
<td>9.68%</td>
</tr>
<tr>
<td>Trust and feel safe with all of them (6)</td>
<td>4.59%</td>
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<tr>
<td>Other (please specify) (7)</td>
<td>3.57%</td>
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<td><strong>Total</strong></td>
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**Graph 3.1 Enrolled tribal members**

Although the sampling was small, it was interesting to note that less than 10 percent of enrolled tribal members trusted and felt safe in tribal court.
This study was conducted to determine whether children with tribal heritage and a history of abuse, neglect, or Fetal Alcohol Effects, who have experienced long-term placement in homes other than a tribal or ICWA compliant home, are prone to greater problems with behavioral, mental health, self-identity or self-esteem issues than their peers.

The *American Family Dynamics Survey* indicates that children of tribal heritage are physically and emotionally diverse, with the majority of the children being multi-heritage and living outside of the reservation system. About a third of those with tribal heritage and potentially subject to the ICWA live totally disconnected from Indian Country.

A crucial point demonstrated by this survey is that relying on data solely from within the reservation system, such as through Indian Health Services or from tribal government entities alone, is inadequate if one is seeking data concerning citizens with tribal heritage in general. Results are skewed toward those who depend on Indian Health Services and tribal government services. The experiences of citizens whose families have mainstreamed into the larger culture are left out of findings.

The case studies demonstrate the diverse problems created for children and families by the Indian Child Welfare Act. Negative and even traumatic impact of the ICWA on the emotional, psychological and physical health of many children as a consequence of the application of ICWA is well documented.

The median ACE scores for the selected groups seem to indicate a relatively equal risk for children who have experienced foster or adoptive homes, no matter the heritage. On the
other hand, results from other questions within the American Family Dynamics Survey have indicated that some, but not all, children with tribal heritage who have experienced long-term placement in foster or adoptive homes are prone to greater problems with behavioral, mental health, self-identity or self-esteem issues than their peers. Nevertheless, multiple studies have indicated adverse childhood experiences are the primary catalyst for behavioral and mental health issues within foster children, not heritage. A fuller analysis of the American Family Dynamics Survey will be done in a later paper. One variable that needs more study is alcohol-related prenatal birth defects.

Preliminary results from the American Family Dynamics Survey do not support the contention that children with tribal heritage who have experienced long-term placement in homes other than a tribal or ICWA compliant home are prone to greater problems with behavioral, mental health, self-identity or self-esteem issues than their peers as a direct result of their physical or cultural heritage.
Conclusion

The United States of America was founded with the natural premise that life, liberty and the ability to pursue one’s happiness are unalienable rights, untouchable by government. Natural law has affected this nation’s ideology and influenced public policy for centuries. That is not to say perfection has ever been achieved or that it ever can be - but during the worst parts of American history, those who respect the rule of natural law have made consistent effort to overcome America’s failings by pushing against those who do not. American citizens have historically had an exceptional desire for balanced justice and have consistently strived to maintain or retrieve it.

Those who opposed slavery from the time of America’s inception to abolishment of bondage 80 years later were just one example. When Congress changed the status of the tribes in 1871, it did not invalidate the treaties - although it could have taken that additional step. Treaties signed over 150 years ago have won court battles for many tribes throughout this last century. The treaties with tribal governments continue to exist today, including a handful that were signed by the British before the United States was even a nation.

Treaties and international law go hand in hand. One cannot reasonably claim that international law and the title of Discovery are not valid with respect to North American tribes, while at the same time maintaining treaties are binding with respect to North American tribes. If international law is irrelevant to tribal governments, so are treaties.

Additionally, if it is not self-evident that civil rights inherently apply to tribal members just as they do to all men, then they are not inherent to all men. The truths that the Founding Fathers knew to be self-evident – that all men are created equal; endowed by their Creator with
certain unalienable rights; and among these are life, liberty, and the pursuit of happiness – were apparently not self-evident to everyone. Sporadic attempts at justice aside, for almost two centuries, our federal government has ignored the inherent humanity of tribal members. Nevertheless, all men – no matter their heritage – are endowed by God with inalienable rights that not even Congress, the Courts, tribal officials, or the President can destroy or legally ignore.

What we learned from this paper’s Literature Review was that not every historical researcher, whether a tribal member or not, agrees with premises given by Cohen and Marshall, and if these foundational premises are questionable, then the entirety of federal Indian policy is as well. A growing body of work construes federal Indian law and policy from a constitutional perspective and is finding current policy unconstitutional. Further, in relation to emotional and psychological effects of foster care, the body of research from a multitude of studies overwhelmingly points to present day causes shared by all heritages as opposed to racism or vague historical trauma as the cause.

While some children and families faced with foster care, adoption or child custody disputes have felt protection through the ICWA, others have felt forced into relationship with tribal governments. The national dilemma has become whether an individual’s right to privacy, Constitutional equal protection, and freedom of association are of less priority than tribal sovereignty and the future of a tribe.

Too many within federal government choose to please political leaders and protect tribal interests and sovereignty rather than save children’s lives. The federal government has reduced children to the status of a ‘resource’ for tribal governments, just as the private property of individual tribal members has been relegated to the control of the BIA as a resource for tribal governments. Children are treated as material assets, and adults are treated as children.
While federal government has focused on how the ‘child drain’ has affected tribal governments and the future of the tribe as an entity, little attention has been paid the diversity of individuals affected by federal Indian policy – many of whom have spiritual beliefs, political views or parental practices unlike those promoted by the tribal government. Not only are the views of individual tribal members diverse, it is unarguable that children of slight tribal heritage have many more non-tribal relatives than they have tribal relatives.

The “best interest” that select federal agencies appear to be concerned with is that of the tribal government. There is no acknowledgement that most eligible children are multi-racial or live outside of Indian Country. The Obama administration’s 2016 rules prejudicially assume it is always in the best interest of a child to be under jurisdiction of tribal government, even if parents and grandparents have chosen to raise them in an alternative environment and worldview. The 2016 rules marginalize the rights of birth parents as well the reality of extended tribal and non-tribal birth family.

While not protective of the rights of individuals, the 2016 ICWA rules have long been called for by tribal leaders. Tribal officials, while requesting increasing amounts of money per member, have simultaneously insisted on increased control over members. Tribal governments, using ‘wardship’ and ‘trust relationship’ as revenue vehicles, requested Congress enact legislation giving control over certain vulnerable children to tribal governments and have repeatedly returned to DC to insist Congress make the resultant ICWA even more stringent – covering more people and closing all “loopholes” for escape. When some members of Congress recognized the overreach and constitutional implications of ICWA amendments and blocked them from passage, tribal leaders went to the White House to insist on the strict regulation of
independent families – even going so far as to accuse some families of committing ‘fraud’ by not admitting they had tribal heritage.

Tribal leaders have also asked federal and state governments to take responsibility for ensuring larger numbers of children and families remain within the reservation system - even if against the will of the children and families - and federal and state governments have acquiesced. Ironically, in doing this, tribal leaders, under the premise of strengthening jurisdiction over children of heritage, have essentially admitted their lack of it. In going to Congress with the expectation and demand that Congress do something about grounding enrollable children to the reservation system, tribal leaders have admitted they lack the authority and are willing to submit to the sovereign authority of the United States of America. They have also admitted that the best interest of children and families are second to the best interest of the tribe as a corporation.

Independent political communities have a legitimate right to determine their own membership. However, basing that determination on an individual’s heritage and then forcing the individual into political affiliation on the basis of that heritage is the epitome of racism. While family and community are important to children of every culture, tribal government claims that eligible children are lost without tribal culture infer there is something inherently different about children of tribal heritage as opposed to other children. Recognition that children of every heritage are individuals with their own wants, needs and goals is quashed. While it is unarguable that a certain amount of strain occurs when traversing disparate cultures, children from around the world are successfully and happily adopted into American homes on a regular basis. Yet, it has become accepted belief that children of tribal heritage are, as a rule, unable to thrive outside of Indian Country. The evidence is to the contrary. The vast majority of tribal members live outside of reservation boundaries and many are living happy and successful lives. However,
according to statistics provided by numerous tribal organizations, the BIA, FBI, and ACF, crime and physical, and sexual abuse have been steadily worsening on many reservations – even with reservation crime and child abuse frequently underreported.

A concerned community does not wait for additional studies to act on an obvious and immediately known danger. We do not wait for a study to rush a child out of a burning building. When a child is bleeding to death, we know to immediately put pressure on the wound and get the child to a hospital. Unwillingness to deal effectively with the immediate needs of children suffering extreme physical or sexual abuse from extended family or community – no matter where it is – casts doubt on tribal and federal government assertions that safety of the children is of paramount importance. These ten statements are not absolute to all reservations and individuals, but clarify the general reality witnessed:

- Crime and child abuse are rampant on many reservations
- Crime and child abuse are rampant because the U.S. Government has set up a system that allows for extensive abuse and crime to occur unchecked and without repercussion.
- Because a certain amount of crime has been allowed to occur unchecked, many families who desire a safer community for their children (not all) have moved away from the reservation system.
- At the same time, gang related tribal members remain or move to the reservation because it is protected from state police. With the increase in gang activity there is an increase in crime, drug abuse, alcoholism, child neglect, child abuse, and Fetal Alcohol Spectrum Disorder.
- As a result of the migration off the reservation, tribal governments experience a drop in federal funds.
- As an increasing percentage of healthier families leave the reservation system, an increasing percentage who remain willingly participate in the crime and abuse.
- As a result of increasing crime and child abuse, more children are in need of care.
- Some tribal governments are reticent to admit they no longer have enough safe homes to place children in, and not wanting to place the children off the reservation, have placed children in questionable and even dangerous homes.
- It appears more important to some in federal government as well as some in tribal government to protect tribal sovereignty than it is to protect children.
- In other words, there seems to be a protection of tribal sovereignty at all costs – even at the cost of children’s lives.
In contrast, the following five points clarify self-evident truths that policy makers need to know:

- International law and treaties are valid and relevant
- Life, liberty, and the ability to pursue happiness are rights endowed by the Creator to all men equally, no matter their heritage.
- The vast majority of tribal members live outside of reservation boundaries and many are living happy and successful lives.
- A wide body of research confirms that foster care children of every heritage experience higher levels of emotional and psychological trauma.
- A growing body of work by legal and historical researchers is finding current federal Indian policy unconstitutional

Although the ICWA has some statutory safeguards to prevent misuse, numerous families continue to be hurt by the law. While the ICWA itself states it is not to be used in custody battles between birth parents, parents can refuse tribal court jurisdiction, non-tribal grandparents have the same rights as tribally enrolled grandparents, and courts can deviate from placement preferences with “good cause,” what has played out in various state and tribal courts has not always reflected the wording of the law. Further, wording in a law is of no help if one does not have the money to hire an attorney who knows Indian law. Many times, families fighting ICWA are low income. Further, many non-tribal courts do not understand the law and defer to the tribal court. The ICWA has given some tribal leaders, social services and tribal courts a sense of entitlement when it comes to children of heritage.

The era of the Indian Child Welfare Act will become one of the numerous shames in American history. While many have been led to believe the ICWA is a righteous law, the reality is that powerless citizens have again been placed under a subjugation. If the ICWA were to remain law, it would require several amendments. Children of tribal heritage need protection equal to that of any other child in the United States. State health and welfare requirements for foster and adoptive children should apply equally to all. Importantly, those assigned to child
protection, whether federal, state, county or tribal, need to be held accountable if a child is knowingly left in unsafe conditions. (*Title 42 USC 1983*).

Further, fit parents, no matter their heritage, should have the right to choose healthy guardians or adoptive parents for their children without concern for heritage or the overriding wishes of tribal or federal government. US Supreme Court decisions upholding family autonomy under 5th and 14th Amendment due process and equal protection include *Meyer vs. Nebraska*, *Pierce v. Society of Sisters*, and *Brown v. Board of Education*.

The ‘Existing Indian Family Doctrine’ should also be available to families and children who choose not to live within the reservation system. *Alexandria* had held that “recognition of the existing Indian family doctrine [was] necessary to avoid serious constitutional flaws in the ICWA”. Thus, if the existing Indian family doctrine has already been ignored in current ICWA cases, then serious constitutional flaws may have already occurred.

Next, United States citizens, no matter their heritage, are guaranteed civil rights which include fair hearings. When summoned to a tribal court, parents and legal guardians, whether enrolled or not, should be fully informed of their rights, including 25 USC Chapter 21§1911(b), which states “Transfer of proceedings [to tribal jurisdiction]” will occur only “…in the absence of good cause to the contrary, [or] objection by either parent….” Further, the rights of non-member parents must be upheld. According to 25 USC Chapter 21§1903(1)(iv), ICWA placement preferences “shall not include a placement based … upon an award, in a divorce proceeding, of custody to one of the parents.” ICWA placement preferences also include all grandparents - no matter the heritage. Finally, non-members must be able to serve county and state summons to tribal members within reservation boundaries and must have access to appeal.
Additionally, a “qualified expert witness” must be someone who is able to advocate for the well-being of the child, first and foremost, not a tribe. An expert witness needs to be a professional person with substantial education and experience in the area of the professional person’s specialty and significant knowledge of and experience with the child, his family - and the culture, family structure, and child-rearing practices the child has been raised in. There is nothing a tribal social worker inherently knows about a child based on nothing more than the child’s ethnic heritage. This includes children of 100% heritage who have been raised apart from the tribal community. A qualified expert witness needs to be someone who has not only met the child, but has worked with the child, is familiar with and understands the environment the child has thus far been raised in, and has professional experience with some aspect of the child’s emotional, physical or academic health. This is far more important than understanding the customs of a particular tribe.

Finally, if tribal membership is truly a political rather than racial designation, than the definition of an “Indian” child is one who is “enrolled” in the tribe, not merely “eligible.” Allowing tribal governments the right to determine their own membership at the expense of the rights of any other heritage or culture as well as at the expense of individual rights is indeed political. However, relatives being told these children are suddenly now members of an entity with which the family has had no political, social or cultural relationship betrays the reality that at least in the case of their child, “race” is determining membership.

Keeping children, no matter their blood quantum, in what a State would normally determine to be an unfit home – solely on the basis of tribal government claims that European values do not apply to and are not needed by children of tribal heritage – is racist in nature and a denial of the child’s personal right to life, liberty and the pursuit of happiness.
Tribal members are not just U.S. citizens; they are human beings. They are not chattel owned by tribal governments or servants indentured to the success of tribal governments, nor are they lab rats for Congress, pawns to be used at the negotiating table, or zoo exhibits for patronizing tourists looking for entertainment.

Even if a child had significant relationship with tribal culture, forced application of ICWA conflicts with the Constitution. There is nothing within the U.S. Constitution nor any treaty that gives Congress the authority to mandate individuals stay connected to a tribe, support a particular political viewpoint, or raise their children in a prescribed culture or religion.

For this reason, the ICWA cannot remain law. Natelson has shown that the ICWA goes far beyond the limited scope of the Indian Commerce Clause. While some tribal members appreciate that proper application of the Constitution means that Congress has no plenary power over tribal affairs, it also means that Congress has no power to enact laws such as the ICWA.

In light of constitutional issues inherent to the foundational enactment of the Indian Child Welfare Act, the ICWA must be repealed. The Commerce Clause does not give Congress plenary authority over tribes or children of heritage, and tribal governments do not have the authority to force membership onto individuals, no matter their age.

Allowing individuals to employ their full constitutional rights would preserve to citizens their God-given right to individuality, liberty, and property, which is what the United States government is tasked to do. In the words of Dr. William Allen, Emeritus Professor, Political Science, MSU and former Chair of the U.S. Commission on Civil Rights:

“... We are talking about our brothers and our sisters. We’re talking about what happens to people who share with us an extremely important identity. And that identity is the identity of free citizens in a Republic...” (2010)84

84 Dr. William B. Allen’s keynote speech at the Christian Alliance for Indian Child Welfare’s ICWA Teach-In, titled ‘Indian Children: Citizens, not Cultural Artifacts,’ on October 28, 2011 in the chambers of the Senate Committee on Indian Affairs.
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Appendix

Appendix 1: Brothertown Survey Document

*Field Book*

of the survey of the Indian lands in Brothertown, Oneida Co., New York.

Beginning on the southerly line of the lands granted to part of the Shawnee and Make marked NE corner of Brothertown, by richberry, marked and run. Hence S9°15' W55°55' to line a Make 162 in. S5° W from a bush.

Marked for the South East corner of Brothertown, Hence N8°58' W17°40' a Make marked NW corner of Brothertown, hence N4°45' E44°47' 2in a Make marked NW corner of Brothertown, hence N8°08' E2°36' 62in to the place of Beginning. Containing according to the contents of all the Lots, A9537 48

*Official federal documents and all works published before 1923 are in the public domain.*

Citation: Brothertown Digital Historical Library
Appendix 2: President Andrew Jackson’s Letter to the ‘Civilized’ Indian Tribes, October 1829, (Raab 2019)
Text of President Andrew Jackson’s original letter to the 'civilized' Indian tribes, October, 1829 (Raab 2019)

The Raab Collection, an auction house specializing in historical artifacts, stated:

The President dictated a letter he handed to Haley, and it was taken by Haley himself to the seats of power in the Choctaw and Chickasaw nations, which were where this first confrontation would take place. The letter was to be read aloud by Haley, who was to assure them of its authenticity. It was carried by Haley throughout the southeastern stretches of the U.S. and was read to hundreds of Native Americans and their leaders (Raab 2019).

According to the Raab Collection, the original letter had been lost to time, though a draft had been preserved, allowing most of the text to be known. The letter became famous and is quoted in several books, including Fathers and Children: Andrew Jackson and the Subjugation of the American Indian by Michael Paul Rogin. Although not all of the original text is clear, the following is “the final letter, signed, likely in the hand of his nephew Andrew Jackson Donelson, Washington City, October 15, 1829, to Haley, presented and not mailed, and carried throughout the Choctaw and Chickasaw nations” (Raab 2019):

Having kindly offered to be the bearer…of any communications to the Indians [through the] countries you will pass on your [way] home, which I might think proper to make to [them, I], take the liberty of placing in your hands [copies] of a talk made by me last Spring, to the [Creeks] which I wish you to show to the Chiefs of the…Choctaws. As far as this talk relates to the present situation and future prospects, it is their white brothers and my wishes for them to remove beyond the Mississippi, it [contains] the [best] advice to both the Choctaws and Chickasaws, whose happiness and…will certainly be promoted by removing [beyond] the Mississippi.

Say to them as friends and brothers to listen [to] the voice of their father, & friend. Where [they] now are, they and my white children are too near each other to live in harmony & peace. Their game is destroyed and many of their people will not work & till the earth. Beyond the great river Mississippi, where a part of their nation has gone, their father has provided a co[untry] large enough for them all, and he ad[vises] them to go to it. There, their white…[will not trou]ble them, they will have no claim to [the l]and, and they & their children can live upon [it as] long as grass grows or water runs, in peace and plenty. It shall be theirs forever. For the improvements which they have made in the country where they now live, and for the stock which they [can]not take with them, their father will [sti]pulate, in a treaty to be held with them, [to] pay them a fair price.
Say to my red Choctaw children, and my Chickasaw children to listen. My white children of Mississippi have extended their laws over their country; and if they remain where they now are...must be subject to those laws. If they will [remove] across the Mississippi, they will be free [from] those laws, and subject only to their own, and the care of their father the President. Where they now are, say to them, their father the President cannot prevent the operation of the laws of Mississippi. They are within the limits of that state, and I pray you to explain to them, that so far from the United States having a right to question the authority of any State to regulate its affairs within its own limits, they will be obliged to sustain the exercise of this right. Say to the chiefs & warriors that I am their friend, that I wish to act as their friend, but they must, by removing from the limits of the States of Mississippi and Alabama, and by being settled on the lands I offer them, put it in my power to be such.

That the chiefs and warriors may fully understand this talk, you will please [go] among them and explain it; and tell [them] it is from my own mouth you have...it and that I never speak with a [forked] tongue.” Here a portion of a page is unclear. However, using the text of the draft and extant final segments, it continues:

Whenever [they make up their] minds to exchange [their lands]...[for land] west of the river Mississippi, [that I will direct] a treaty to be held with them, [and assure them, that every] thing just & liberal shall [be extended to them in that treaty.] Their improvements [will be paid for], stock if left will be paid [for, and all who] wish to remain as citizens [shall have] reservations laid out to cover [their improvements; and the justice due from a father to his red children will be awarded to] them. [Again I] beg you, tell them to listen. [The plan proposed] is the only one by which [they can be] perpetuated as a nation....the only one by which they can expect to preserve their own laws, & be benefitted by the care and humane attention of the United States. I am very respectfully your friend, & the friend of my Choctaw and Chickasaw brethren. Andrew Jackson” (Raab 2019).

Official federal documents and all works published before 1923 are in the public domain.
Citation: Raab Collection: Andrew Jackson (Raab 2019).
Appendix 3: President Andrew Jackson's Speech to Congress on 'Indian Removal'

December 6, 1830

"It gives me pleasure to announce to Congress that the benevolent policy of the Government, steadily pursued for nearly thirty years, in relation to the removal of the Indians beyond the white settlements is approaching to a happy consummation. Two important tribes have accepted the provision made for their removal at the last session of Congress, and it is believed that their example will induce the remaining tribes also to seek the same obvious advantages.

The consequences of a speedy removal will be important to the United States, to individual States, and to the Indians themselves. The pecuniary advantages which it promises to the Government are the least of its recommendations. It puts an end to all possible danger of collision between the authorities of the General and State Governments on account of the Indians. It will place a dense and civilized population in large tracts of country now occupied by a few savage hunters. By opening the whole territory between Tennessee on the north and Louisiana on the south to the settlement of the whites it will incalculably strengthen the southwestern frontier and render the adjacent States strong enough to repel future invasions without remote aid. It will relieve the whole State of Mississippi and the western part of Alabama of Indian occupancy, and enable those States to advance rapidly in population, wealth, and power. It will separate the Indians from immediate contact with settlements of whites; free them from the power of the States; enable them to pursue happiness in their own way and under their own rude institutions; will retard the progress of decay, which is lessening their numbers, and perhaps cause them gradually, under the protection of the Government and through the influence of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community.

What good man would prefer a country covered with forests and ranged by a few thousand savages to our extensive Republic, studded with cities, towns, and prosperous farms embellished with all the improvements which art can devise or industry execute, occupied by more than 12,000,000 happy people, and filled with all the blessings of liberty, civilization and religion?

The present policy of the Government is but a continuation of the same progressive change by a milder process. The tribes which occupied the countries now constituting the Eastern States were annihilated or have melted away to make room for the whites. The waves of population and civilization are rolling to the westward, and we now propose to acquire the countries occupied by the red men of the South and West by a fair exchange, and, at the expense of the United States, to send them to land where their existence may be prolonged and perhaps made perpetual. Doubtless it will be painful to leave the graves of their fathers; but what do they more than our ancestors did or than our children are now doing? To better their condition in an unknown land our forefathers left all that was dear in earthly objects. Our children by thousands yearly leave the land of their birth to seek new homes in distant regions. Does Humanity weep at these painful separations from everything, animate and inanimate, with which the young heart has become entwined? Far from it. It is rather a source of joy that our country affords scope where our young population may range unconstrained in body or in mind, developing the power and facilities of man in their highest perfection. These remove hundreds and almost thousands of
miles at their own expense, purchase the lands they occupy, and support themselves at their new homes from the moment of their arrival. Can it be cruel in this Government when, by events which it cannot control, the Indian is made discontented in his ancient home to purchase his lands, to give him a new and extensive territory, to pay the expense of his removal, and support him a year in his new abode? How many thousands of our own people would gladly embrace the opportunity of removing to the West on such conditions! If the offers made to the Indians were extended to them, they would be hailed with gratitude and joy.

And is it supposed that the wandering savage has a stronger attachment to his home than the settled, civilized Christian? Is it more afflicting to him to leave the graves of his fathers than it is to our brothers and children? Rightly considered, the policy of the General Government toward the red man is not only liberal, but generous. He is unwilling to submit to the laws of the States and mingle with their population. To save him from this alternative, or perhaps utter annihilation, the General Government kindly offers him a new home, and proposes to pay the whole expense of his removal and settlement (A. Jackson 1830).

Andrew Jackson's Speech to Congress on 'Indian Removal'" by President Andrew Jackson (1830) is in the public domain. Citation: President Jackson's Message to Congress "On Indian Removal", December 6, 1830; Records of the United States Senate, 1789 - 1990; Record Group 46; Records of the United States Senate, 1789 - 1990; National Archives and Records Administration (NARA)
Yonder sky that has wept tears of compassion upon my people for centuries untold, and which to us appears changeless and eternal, may change. Today is fair. Tomorrow it may be overcast with clouds. My words are like the stars that never change. Whatever Seattle says, the great chief at Washington can rely upon with as much certainty as he can upon the return of the sun or the seasons. The white chief says that Big Chief at Washington sends us greetings of friendship and goodwill. This is kind of him for we know he has little need of our friendship in return. His people are many. They are like the grass that covers vast prairies. My people are few. They resemble the scattering trees of a storm–swept plain. The great, and I presume—good, White Chief sends us word that he wishes to buy our land but is willing to allow us enough to live comfortably. This indeed appears just, even generous, for the Red Man no longer has rights that he need respect, and the offer may be wise, also, as we are no longer in need of an extensive country.

There was a time when our people covered the land as the waves of a wind–ruffled sea cover its shell–paved floor, but that time long since passed away with the greatness of tribes that are now but a mournful memory. I will not dwell on, nor mourn over, our untimely decay, nor reproach my paleface brothers with hastening it, as we too may have been somewhat to blame.

Youth is impulsive. When our young men grow angry at some real or imaginary wrong, and disfigure their faces with black paint, it denotes that their hearts are black, and that they are often cruel and relentless, and our old men and old women are unable to restrain them. Thus it has ever been. Thus it was when the white man began to push our forefathers ever westward. But let us hope that the hostilities between us may never return. We would have everything to lose and nothing to gain. Revenge by young men is considered gain, even at the cost of their own lives, but old men who stay at home in times of war, and mothers who have sons to lose, know better.

Our good father in Washington—for I presume he is now our father as well as yours, since King George has moved his boundaries further north—our great and good father, I say, sends us word that if we do as he desires he will protect us. His brave warriors will be to us a bristling wall of strength, and his wonderful ships of war will fill our harbors, so that our ancient enemies far to the northward—the Haidas and Tsimshians—will cease to frighten our women, children, and old men. Then in reality he will be our father and we his children. But can that ever be? Your God is not our God! Your God loves your people and hates mine! He folds his strong protecting arms lovingly about the paleface and leads him by the hand as a father leads an infant son. But, He has forsaken His Red children, if they really are His. Our God, the Great Spirit, seems also to have forsaken us.

Your God makes your people wax stronger every day. Soon they will fill all the land. Our people are ebbing away like a rapidly receding tide that will never return. The white man's God cannot love our people or He would protect them. They seem to be orphans who can look nowhere for help. How then can we be brothers? How can your God become our God and renew our prosperity and awaken in us dreams of returning greatness? If we have a common Heavenly Father He must be partial, for He came to His paleface children.
We never saw Him. He gave you laws but had no word for His red children whose teeming multitudes once filled this vast continent as stars fill the firmament. No; we are two distinct races with separate origins and separate destinies. There is little in common between us.

To us the ashes of our ancestors are sacred and their resting place is hallowed ground. You wander far from the graves of your ancestors and seemingly without regret. Your religion was written upon tablets of stone by the iron finger of your God so that you could not forget. The Red Man could never comprehend or remember it. Our religion is the traditions of our ancestors—the dreams of our old men, given them in solemn hours of the night by the Great Spirit; and the visions of our sachems, and is written in the hearts of our people.

Your dead cease to love you and the land of their nativity as soon as they pass the portals of the tomb and wander away beyond the stars. They are soon forgotten and never return. Our dead never forget this beautiful world that gave them being. They still love its verdant valleys, its murmuring rivers, its magnificent mountains, sequestered vales and verdant lined lakes and bays, and ever yearn in tender fond affection over the lonely hearted living, and often return from the happy hunting ground to visit, guide, console, and comfort them.

Day and night cannot dwell together. The Red Man has ever fled the approach of the White Man, as the morning mist flees before the morning sun. However, your proposition seems fair and I think that my people will accept it and will retire to the reservation you offer the them. Then we will dwell apart in peace, for the words of the Great White Chief seem to be the words of nature speaking to my people out of dense darkness.

It matters little where we pass the remnant of our days. They will not be many. The Indian's night promises to be dark. Not a single star of hope hovers above his horizon. Sad-voiced winds moan in the distance. Grim fate seems to be on the Red Man's trail, and wherever he will hear the approaching footsteps of his fell destroyer and prepare stolidly to meet his doom, as does the wounded doe that hears the approaching footsteps of the hunter.

A few more moons, a few more winters, and not one of the descendants of the mighty hosts that once moved over this broad land or lived in happy homes, protected by the Great Spirit, will remain to mourn over the graves of a people once more powerful and hopeful than yours. But why should I mourn at the untimely fate of my people? Tribe follows tribe, and nation follows nation, like the waves of the sea. It is the order of nature, and regret is useless. Your time of decay may be distant, but it will surely come, for even the White Man whose God walked and talked with him as friend to friend, cannot be exempt from the common destiny. We may be brothers after all. We will see.

We will ponder your proposition and when we decide we will let you know. But should we accept it, I here and now make this condition that we will not be denied the privilege without molestation of visiting at any time the tombs of our ancestors, friends, and children. Every part of this soil is sacred in the estimation of my people. Every hillside, every valley, every plain and grove, has been hallowed by some sad or happy event in days long vanished. Even the rocks, which seem to be dumb and dead as the swelter in the sun along the silent shore, thrill with memories of stirring events connected with the lives of my people, and the very dust upon which you now stand responds more lovingly to their footsteps than yours, because it is rich with the blood of our ancestors, and our bare feet are conscious of the sympathetic touch. Our departed braves, fond mothers, glad, happy hearted maidens, and even the little children who lived here and rejoiced here for a brief season, will love these somber solitudes and at eventide they greet shadowy returning spirits. And when the last Red Man shall have perished, and the memory of my tribe shall have become a myth among the White Men, these shores will swarm with the
invisible dead of my tribe, and when your children's children think themselves alone in the field, the store, the shop, upon the highway, or in the silence of the pathless woods, they will not be alone. In all the earth there is no place dedicated to solitude.

At night when the streets of your cities and villages are silent and you think them deserted, they will throng with the returning hosts that once filled them and still love this beautiful land. The White Man will never be alone.

Let him be just and deal kindly with my people, for the dead are not powerless. Dead, did I say? There is no death, only a change of worlds (Seattle 1854)

Official federal documents and all works published before 1923 are in the public domain.
Citation: Civil Rights and Conflict in the United States: Selected Speeches (Lit2Go Edition): Speech Cautioning Americans To Deal Justly with His People January 12, 1854.
They presented themselves in Washington City under the auspices of the Superintendent, and I was directed by the President of the United States, or by the Secretary of War, to attend at the Executive Mansion upon a certain day—in 1854—I think, in March.

Upon the Indians presenting themselves to the President of the United States, he made a few remarks to them; told them he was desirous to hear what they had to say to him; that they had come a great distance to see their Great Father; that he had understood from the agent they had important communications to make and favors to ask, and that he was prepared to hear them with the greatest consideration. They represented in detail pretty much what I have given as the history of their tribes, and the circumstances under which they had become located in the far West. The President, after hearing all they had to say upon the subject, gave a reply, in which he assured them of the constancy, friendship, and protection of the Government of the United States; the consideration to which they were entitled from the fact of their having emigrated west of Arkansas at the suggestion of the President, and assured them that it entitled them to the most favorable consideration of this Government. He told them, you are now in a country where you can be happy; no white man shall ever again disturb you; the Arkansas will protect your southern boundary when you get there.

You will be protected on either side; the white man shall never again encroach upon you, and you will have a great outlet to the West. As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by this Government, and never again removed from your present habitations.

Indians have acted; though the United States, in carrying out their portion of the contract in relation to a part of the tribe west of the Mississippi.
Appendix 6: Patent in Fee to Gideon Peon (1947)

Congressional approval:

| Official federal documents are in the public domain. Citation: (NARA). Library of the University of Illinois at Urbana-Champaign: “…[M]onthly catalog of United States Government publications” (Univ of Illinois 1947). |
Presidential veto of Patent in Fee for Gideon Peon and Joseph Pickett

1947. 2 p. t


3026 100. Patent in fee to Gideon Peon, veto message from President of United States returning without approval bill (S. 403). July 25, 1947. 3 p. t

Hon. JOHN MCCAIN,
Chairman, Senate Committee on Indian Affairs,
Washington, DC.

DEAR MR. CHAIRMAN: This letter presents the views of the Justice Department on H.R. 3286, the `Adoption Promotion and Stability Act of 1996.' We strongly support H.R. 3286 without the inclusion of title III. …

Title III
A. Detrimental impact on tribal sovereignty
The proposed amendments interfere with tribal sovereignty and the right of tribal self-government. Among the attributes of Indian tribal sovereignty recognized by the Supreme Court, is the right to determine tribal membership. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). Section 302 of H.R. 3286 provides that membership in a tribe is effective from the actual date of admission and that it shall not be given retroactive effect. For persons over 18 years of age, section 302 requires written consent for tribal membership. Many tribes do not regard tribal enrollment as coterminous with membership and the Department of Interior, in its guidelines on Indian child custody proceedings, has recognized that `[e]nrollment is the common evidentiary means of establishing Indian status, but is not the only means nor is it necessarily determinative.'

[Footnote] Through its membership restrictions, H.R. 3286 may force some tribal governments to alter enrollment and membership practices in order to preserve the application of the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 et seq., to their members.


B. Detrimental impact on tribal court jurisdiction
H.R. 3286 would amend the ICWA to require a factual determination of whether an Indian parent maintains the requisite `significant social, cultural, or political affiliation' with a tribe to warrant the application of the Act. Title III fails to indicate which courts would have jurisdiction to conduct a factual determination into tribal affiliation. To the extent that State courts would make these determinations, H.R. 3286 would undercut tribal court jurisdiction, and essential aspect of tribal sovereignty. See Iowa Mutual Ins. Co. v. La Plante, 480 U.S. 9, 18 (1987). Reducing tribal court jurisdiction over Indian Child Welfare Act proceedings would conflict directly with the objectives of the ICWA and with prevailing law and policy regarding tribal courts.

The President, in his Memorandum on Government-to-Government Relations with Native American Tribal Governments (April 29, 1994), directed that tribal sovereignty be respected and tribal governments consulted to the greatest extent possible. Congress has found that `tribal
justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments, See Indian Tribal Justice Act, 25 U.S.C. 3601(5). Retaining ICWA's regime of presumptive tribal jurisdiction crucial to maintaining harmonious relations with tribal governments, to ensuring that the tribes retain essential features of sovereignty and to guarding against the dangers that Congress identified when it enacted ICWA in 1978.

Thank you for the opportunity to comment on this matter. If we may be of additional assistance, please do not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

Ann M. Harkiss,
(For Andrew Fois, Assistant Attorney General). (US Congress. Senate 1996)

Official federal documents are in the public domain. Citation: Senate Report: H.R. 3286: Adoption Promotion and Stability Act of 1996
4/3/2012

LETTER OF GRAVE CONCERN

To: 
Ms. Sue Settle
Chief, Division of Human Services
Bureau of Indian Affairs

From: 
Michael R. Tilus, PsyD, MP
Director, Behavioral Health
Spirit Lake Health Center

Through: 
Mr. Timothy Q. Purdon, JD
The United States Attorney’s Office
District of North Dakota

Subject: LETTER OF GRAVE CONCERN
Spirit Lake Tribal Social Services Grievances

STATEMENT OF CRISIS: I believe the children of the Spirit Lake Reservation are not safe due to the unchecked incompetence of the Tribal Social Services (TSS) to operate within established professional standards of social service practice.

NEED: As our sister agency on the reservation, the Behavioral Health Department (BHD) of the Spirit Lake Health Center (SLHC) Indian Health Service (IHS) depends on the TSS to adequately, legally, and ethically investigate, assist the court to adjudicate, and case manage to protect the abused and neglected children that are reported on formal #960’s by this BHD and other mandatory reporting agencies.

CONTINUAL DANGEROUS MALPRACTICE HISTORY OF SPIRIT LAKE TRIBAL SOCIAL SERVICES:

Legal and Regulatory Violations

- Over the past five years, the BHD has witnessed dozens of cases where TSS did not follow tribal law; autonomously removed children from their home or dwelling; did not follow through with the proper tribal court authorization establishing temporary legal guardianship; BHD is aware of parents who have had their children illegally removed for upwards of 12 months or more without filing for tribal temporary legal guardianship.
- TSS has presented many of these cases to BHD, representing themselves as the new temporary legal guardian, requesting BHD services, therapy, evaluation, or psychopharmacotherapy. After
multiple cases in which the BHD discovered that in fact, no legal documents had been filed with tribal court authorizing TSS as legal guardians. After reviewing these cases with TSS, it is clear to me that TSS intentionally misrepresented themselves and lied regarding proper legal and regulatory violations. As these cases involved minors, the ongoing dangerous malpractice violations of TSS directly jeopardized the BHD’s practice guidelines, legal mandates, and professional liability of licensed behavioral health providers.

- Often, due to the close and very supportive professional relationship the BHD had with the Spirit Lake Tribal Court, and principally, Associate Judge Molly McDonald (since she handled juvenile court matters), BHD often discovered the failings of TSS to secure proper legal authorization to remove minors from their situations. The failure to obtain legitimate custody orders is egregious conduct, given the fact that the existing tribal court was very approachable, concerned, engaged, and demonstrating active close oversight in judicial activities related to the wellbeing of children. Access to the court was in no way a valid defense for the failure to obtain appropriate legal documentation and orders.

- TSS “Child Protection Services” (CPS) investigator, representing herself as the current temporary legal guardian of a minor, attempted to maneuver and then intimidate me into prescribing atypical antipsychotics for a child she had determined needed something to control his “anger.” When I refused, informing her that in my practice, all patients, especially children, will be given a full psychological and psychopharmacological evaluation prior to any possible medication trial. Furthermore, all children would also need to be medically evaluated by a primary physician to rule out any organic cause of these symptoms. After this CPS worker was unsuccessful with me she brought the child to the walk-in at SLHC, again attempting to get this minor child medicated without the parents present; without it being a true psychiatric or medical emergency. The physician refused to medicate as well. In investigating this CPS’s claim, I was informed by tribal court that no actions had been filed by the TSS for any temporary guardianship of this child.

- TSS CPS staff came to BHD office requesting I interview a young female adolescent she had recently removed from the reservation high school because she “heard” this adolescent had been sexually molested, and because she herself had been molested as a girl she “knew” this girl was a victim. When the girl’s mother called TSS staff to protest her being removed and interrogated, TSS staff threatened to have the mother arrested by tribal police for interference in her “investigation.” Teenager was transported by tribal police with TSS staff to my office. TSS staff informed me this teenager was under the temporary legal custody of TSS and she requested I evaluate her for her alleged sexual abuse. TSS staff also hinted at possible suicidal ideation.

- In my interview, I found no clinical evidence to suggest sexual abuse or any other pathological condition. When I informed TSS staff of my findings, or lack thereof, TSS staff informed me that she still believed teenager had been molested. When I attempted to get TSS to sign proper paperwork for me authorizing treatment assessment, TSS staff informed me that she has authority to remove and place any child when she deems fit; with that understanding, this teenager was “in fact” under TSS guardianship. At that time I realized I had been lied to and had been complicit in evaluating a minor without the proper authorization of her legal guardian.
informed the TSS staff of my anger and disbelief that she would misrepresent herself and this patient to me in this way. In order to protect myself and staff's licenses, I needed to make an administrative decision that the BHD would not accept any more referrals from TSS unless they were truly suicidal. Ultimately, this teenager was still removed without any proper authority and no court documents were filed by TSS to authorized temporary legal guardianship and custodial care. Unfortunately, this type of scenario was repeated constantly over the past five years.

- Accepting a few cases from TSS over the phone proved problematic. TSS tended to not present during the intake; did not complete the legally required Intake Documents with parents or legal guardian's authorization for psychological services. With promises to "get it to you", BHD waited for weeks while attempting to case manage acute cases without proper authorization or information, and on one occasions never received anything returned. Often after a few cases were begun, BHD discovered that in fact, TSS did not have temporary legal guardianship of these children, and the BHD was essentially providing illegal care. If the minors were not suicidal, at that time I informed all BH staff to terminate their therapy immediately, pending full legal authorization for treatment of a minor from either their authorized parent or legal guardian.

- During many of these TSS cases we accepted, BHD therapist/doctor attempted to contact the TSS case manager to discuss acute needs and gather collateral information. Calls would be made multiple times, on multiple days, without response. Parents of the removed children complained about the same problem of being unable to ever reach a TSS case manager and if they did, were treated with disrespect and annoyance. Eventually, BHD also gave up on attempting to reach TSS case managers as this appeared to be a never ending lesson of "no response."

- In ongoing efforts of attempting to work with TSS and the recent Associate Juvenile Judge Molly McDonald, it was apparent to both the court (Judge Molly McDonald) and BHD that TSS staff misrepresented themselves in court, lied about fact finding, and had serious boundary violations in their professional work.

- I consulted with my supervisor, Dr. Candelaria Martin-Arndt, Clinical Director, of SLHC, and with the SLHC Administration on multiple occasions. These legal and regulatory issues were directly impacting the safety of the most vulnerable patients on the reservation - the children. They were also exposing the BHD and the SLHC to significant risk hazard for compliance with unethical, illegal, action towards minors in the malpractice delivery of professional services.

- As the Director of the BHD, I discussed my concerns with multiple TSS CPS staff; I met with the previous TSS Director Kevin Dauphinais on multiple occasions, informing him of my grave concerns and problems working with him and his staff's behavior. He denied problems; vaguely promised change; informed me on another occasion that I simply "didn't understand the Indian people"; or informed me that he and his staff knew the family far better than I did and there wasn't any concern for my filed #960s. Unfortunately, these legal and regulatory problems continued.

- Extensive case management activity began to clearly fall by the wayside as TSS reckless and random behavior continued. Since many of these minors were BHD patients, I began instructing
the only other full time BH provider this department has [a LCSW] that we would have to extend our efforts at doing critical case management activity to ensure our patient's wellbeing, safety, and coordinated care. This has added an exhausting element to the BHD staff that are already overwhelmed with reservation need and lack of resources and staff.

- In 2011, as the Director of Behavioral Health, I made the administrative decision to refuse accepting any more referrals from TSS due to these ongoing professional misconduct and legal irregularities. Services were therefore limited to emergency assessment of suicidal risk where confidentiality and legal authority are waived for patient safety. It was frankly too dangerous professionally to work alongside with TSS. I feared TSS behavior could, or would, expose them, and by complicity BHD, to possible FBI investigation for child abduction, child endangerment, and potentially felony neglect.

Public Safety

- Of a major concern to the BHD is growing public health hazard that untold #960s have apparently never been investigated. Child abuse is epidemic in our society and is unfortunately a public health disaster in Indian country. During one fairly recent three week period the BHD filed approximately ten #960s. Shortly after this time, the TSS CPI staff member was fired. To date, we are not aware of any follow up on any of these filed allegations of potential child abuse. After calling TSS to get an update on these #960’s, we were told they had no record of them, and no paper trail to refer any new TSS staff too. No TSS staff had knowledge of anything.

- To date, in many of our BHD therapy cases involving minors where we have filed #960s when BHD has attempted to gain clarification with new TSS staff (previous TSS staff are not working there any more), new TSS staff report they have no record of the #960 documentation; are not aware of the situation; and have no knowledge if anything has been done. Acting TSS Director Dennis Meyer recently informed BHD staff that often the information we were recently inquiring about “is too old” (less than a year in our records), and therefore “can’t be followed up any more” concerning a current patient who previously filed #960s and then went to court to secure her grandchildren due to domestic violence in her daughter’s home.

- Previous TSS CPS staff has attempted to solicit, triangulate, and set up a formal “evaluation” from BHD to determine if a child had been potentially sexually abused. This is directly the responsibility of the TSS CPS, not the BHD. On several of these attempts, the CPS staff person informed me that “she knew” this child had been molested, because "I just know these things." No other evidence was presented; but the child was removed regardless.

- Parents who have informed us about potential child abuse reported back to BHD staff after months, if not more than a year, that they have never been talked to by TSS CPS on any #950s that they, or we, filed.

- Many parents who were themselves either patients, or parents of minors who were patients, reported they were unable to reach their assigned TSS staff by phone or in person after weeks and weeks of trying. This was the BHD experience as well.
• One previous TSS CPS staff was herself convicted of felony child abuse and still was hired by the
TSS Director Kevin Dauphinais who acknowledged this fact when confronted with it. Yet,
Director Dauphinais hired this staff person anyway, as a CPS officer.
• An example of one case included as an attachment (with the identity safely screened) gives
the times and dates of BHD’s efforts to collaborate and file #960s on behalf of our patients, with
the ongoing lack response and regard from TSS for this minor’s safety and the public safety. This
is but one of our minor patients that the BHD is intensely concerned about.
• As a result of this ongoing problem, BHD now routinely file three #960’s: 1] TSS with limited
information; 2] full account with FBI; and 3] full account with previous Tribal Juvenile Court
Judge Molly McDonald.

Professional Misconduct

• Since June of 2007, I have yet to receive one paper document from TSS on a formal CPI
investigation finding, a case management report, a SOAP note, or any crisis note. I personally
suspect TSS does not keep legal documentation of their efforts.

• Patients have complained to me that on occasion when they went to TSS, there were faxed
reports, #960’s, and other documentation “lying around where anybody could see it.”

• State, federal, and professional health organizations like the American Medical Association or
the American Psychological Association generally require maintenance of appropriate
professional documents in compliance with HIPPA and Privacy Act standards. I suspect the BIA
has some kind of formal standard on this as well.

• Over the past five years, unfortunately, the majority of TSS staff who has been hired, fired, or
left have not been licensed or credentialed by any state or national professional behavioral
health agency or board. As such, TSS staff do not have to uphold a Professional Code of Ethics
Professional Practice Standards as dictated by these regulatory agencies. They are not
accountable for their professional behavior or lack thereof, to their licensing or credentialing
boards. This is a disservice to the Spirit Lake Nation, as these licensing and regulating agencies
are by nature, designed to protect the public and ensure the safe practice of your skill.

• Patients have reported to BHD that TSS have on occasion used them (a minor), while under TSS
temporary legal guardianship, to “babysit” TSS children while TSS staff attended a social event
rodeo.

• Recently, a TSS case manager whom was transporting a minor for therapy at BHD stated that
they stopped off at Warrick bar to “pick up a pizza”. When BHD inquired as to the status of this
child’s case and future plans of her placement, the TSS case manager reported she knew nothing
about it, and only “transported them.”

• BHD has several cases where minor children were autonomously removed from successfully
placed foster care off the reservation and brought back to an unsafe, substance abusing, violent
environment because “the Director said all the kids need is here on the rez” (patients parents
words). Subsequent to this forced return, one minor child was raped without legal/police
investigation or involvement due to obscure reasons. Minor was previously already a sexual
victim and was removed from this environment due to that sexual abuse. Minor’s depression
and substance abuse increased, resulting in 2 more substance involved date-rape incidents. Within about six months minor ran away to another state. TSS remained uninvolved.

- Multiple reports from multiple sources and patients allege intimate sexual boundary violations between the previous TSS staff.
- TSS staff have used professional names and titles unethically, i.e., calling themselves a "Social Worker" when they had not earned the academic degree or had the license.

Gross Mismanagement and Oversight

- Over the past five years, there have been multiple attempts by many parents who were BHD patients, tribal court officials, BHD SLHC, and other agencies both on and off the reservation, protesting the lack of involvement of TSS with the Spirit Lake Suicide Coalition. Previous Director attended 2, maybe 3, meetings in the 5 plus years, and brought an authoritarian and hostile attitude to the meeting. This lack of active involvement in the reservation wide suicide prevention coalition is, in my opinion, a major failing of the previous Director of TSS. This lack of involvement is also a major loss in the ongoing efforts of all suicide prevention coalition members to have a seamless wrap around service for suicidal people on the Spirit Lake reservation.
- Unfortunately, in my professional opinion, the Spirit Lake Tribal Council (SLTC) failed in their direct oversight of the TSS program and their willingness to tolerate gross mismanagement. In addition, BIA Superintendent Mr. Rod Cavanaugh failed in his federal BIA administrative and #638 fiscal accountability oversight of the TSS program.
- Additionally, in my professional opinion, previous TSS Director Kevin Dauphinais' malfeasance is inexcusable with ongoing tragic consequences to many Spirit Lake children.
- In August of 2008, Sister Joanne Streifel and I had already identified this critical problem and discussed potential areas of intervention with TSS. We decided to have Sister Joanne author a "letter of concern" discussing the lack of confidence and grave concern we had with then Director Kevin Dauphinais' misleadership of the TSS and the concern we felt for the abuse and neglected children of the reservation. We felt that since Sister Joanne was both a LCSW professional working at the Indian Health Service, had worked for multiple agencies on the reservation, and is a registered member of the Spirit Lake Tribe, her professional letter might have some influence. This letter was personally sent to then Chairperson Myra Pearson and every Council Member. The BHD and Sister Joanne received no response or inquiry.

Result

- I and most of the other agencies on and off the reservation that work together around child welfare have no confidence in the TSS leadership or program, BIA Superintendent, or Spirit Lake Tribal Council to provide safe, responsible, legal, ethical, and moral services to the abused and neglected children of the Spirit Lake Tribe.
- As the Director of the BHD, I have no confidence or trust in filing a #960 with TSS that they will operate ethically, legally, or with the best interests of all the various parties- the child's, the
parents', and the Spirit Lake Nation. I have lots of reasons to believe that #960s will not be investigated; lost; mishandled; or handled by TSS themselves autonomously at their own discretion.

- TSS has not, and does not operate by a professional code of conduct or ethics; they do not have licensed and credentialed Child Protection Service Investigators or therapists trained for this work; and historically, they have had reckless and random professional misconduct. The #960 document is potentially the most confidential and revealing with allegations of possible child abuse or neglect of a minor. To release #960s to this department may in fact violate good practice standards for the BHD.

- The children, elderly, and vulnerable populations on Spirit Lake Reservation are at great risk of increased abuse, neglect, and harm due to unchecked incompetence.

RECOMMENDATIONS: I recommend the BIA DIVISION OF HUMAN SERVICES close the current TSS program with all its staff and begin a thorough program review. I do not believe it is possible to patch up problems or appoint a new Acting Director to the TSS. The problems are too systemic and acute.

I would encourage the BIA to conduct a decisive leadership review of previous Director Mr. Kevin Daughnais and current BIA Superintendent Mr. Rod Cavanaugh for their gross dereliction of duty and professional misconduct of the TSS program.

In addition, I would encourage the BIA, and request the North Dakota State Board of Social Work Examiners, review current Acting Director of Tribal Social Service Mr. Dennis Meier's for his leadership complicity of these identified ethical, legal, and professional irregularities. Mr. Meier worked alongside previous Director Mr. Kevin Daughnais for an extended period of time and has been the Acting Director of TSS since Dec 2011 to present. As a professionally trained and licensed LSW (Licensed Social Worker) in the State of North Dakota, Mr. Meier carries an additional professional responsibility and code of ethics to uphold.

Finally, I would request the BIA to re-establish an outside reservation Tribal Social Services program with qualified, credentialed, culturally competent, and appropriately licensed professionals who would work ethically, legally, and morally to protect the Spirit Lake reservation children, elderly, and disabled from abuse and neglect.

It is my professional opinion that with this systemic unchecked incompetence, the abused and neglected children on this reservation face repeated traumatic life altering consequences without an end, ever cycling them through repeated suicidal attempts with increasing grave risk for suicidal completions.

Very respectfully,

Michael R. Tilus, PsyD, MP
Director, Behavioral Health
COMMANDER, U. S. PUBLIC HEALTH SERVICE
Enclosure: 1 (Case Study)

cc: Sister Joanne Streifel, LICSW
Indian Health Service (retired)

Spirit Lake Suicide Prevention Coalition Members
Fort Totten, ND

Mr. Doug Boknrecht, LICSW, BDC
Assistant Regional Director,
Lake Region Human Service Center: Region III
 Devils Lake, ND

Ms. Molly McDonald
Associate Juvenile Judge Spirit Lake Tribal Court (previous)

Ms. Arlene de la Paz, Chief Executive Officer
Spirit Lake Health Center Indian Health Service

Mr. Dennis M. Meier, LSW
Acting Director, Spirit Lake Tribal Social Services

Mr. Rod Cavanaugh
Spirit Lake BIA Superintendent

Ms. Shirley Cain, J.D.
Chief Judge, Spirit Lake Tribal Court

Mr. Rodger Yankton
Chairperson, Spirit Lake Tribal Council

Dr. Vickie Claymore-Lahammer, PhD
Deputy Area Director, Behavioral Health
Aberdeen Area Indian Health Service

Mr. Weldon B. Loudermilk
BIA Regional Director
Great Plains Regional Office

Ms. Jeannie Thomas
FBI and FBI Victims Advocate
FBI Bismarck Field Office
North Dakota State Board of Social Work Examiners
PO Box 914
Bismarck, ND 58502-0914

North Dakota State Board of Social Work Examiners
ATTN: Complaints
PO Box 914
Bismarck, ND 58502-0914

Center for Native American Youth
Ms. Erin Bailey, Director
US Senator Byron Dorgan (Founder)

Behavioral Health Department
Spirit Lake Health Center
4/3/2012

**Case Example**

Names and privacy data have been removed for confidentiality. This is one of dozens of cases we have attempted to manage with Tribal Social Services over the past four plus years. (DrT)

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**Comments from Sister Joanne Streifel, LICSW, Suicide Case Manager:**

This young lady had had multiple threats of suicide and one attempt. We have worked with the court and school and TSS over two years ago to try and get this young lady into a residential treatment center because of the major dysfunction within her family. Her parents are divorced. Each parent now has a SO in their homes which is very upsetting to this young lady. The custody has shifted back and forth to the father and mother. This young lady was moving from house to house, including her grandmother’s home when I first got involved in her treatment. She was acting up in school swearing at teachers and threatening to harm the principle at the time. She was hospitalized at Prairie St. John’s. At discharge it was recommended that she be placed at a residential home for intense treatment however TSS did nothing to help with her placement, but only returned her to the dysfunctional home where again she is moving from father’s home, where she does not get along with the SO and has threatened in the past to harm their new infant, to mother’s home where she is faced daily with alcohol and marijuana usage.

Below is a list of the times that we have assessed her to be suicidal:

1. 3/30/10
2. 6/30/10
3. 9/23/10
4. 9/29/10
5. 10/20/10
6. 12/29/10
7. 11/18/11
8. 1/20/12 - attempt by cutting
9. 3/05/12

#960’s filed:

1. 8/31/09
2. 4/12/10
3. 4/15/10
4. 9/23/10
5. 1/23/12
6. 2/29/12
7. 3/5/12
Spirit Lake Behavioral Health's attempts to follow up recommendations of the court:

4/7/10 Contact with TSS
4/15/10 Contact with TSS
4/15 School calls/pt out of control
4/16/10 Mtg with school, court, MH, TSS, Law enforcement and parents
4/22/10 case given to Jessica at TSS
5/7/10 BH called TSS – no response– court received no response
5/19/10 Contacted court – still no word from TSS
6/8/10 Contacted court – no response from TSS
6/30/10 Suicide assessment
7/6/10 No response from TSS
7/8/10 TSS wanting to send pt to Prairie St. John in Fargo– Pt admitted there
7/21/10 TSS wanting to send pt to State Hospital because of Mental retardation
8/6/10 – Pt roaming back and forth from home to home.
8/31/10 TSS reports no group home will accept pt because GAST is 60

Therapist Ms. Joni Henry's, L.C.S.W; Comments:

XXX was first introduced to me due to an alleged suicide attempt on 1/21/12 where she was sent to Mercy ER due to a cutting episode after getting into a verbal altercation with her father's SO. The cuts were ruled by the Crisis worker as superficial and the pt was placed back into her mother’s care. Since then I have had 7 sessions with XXX. Throughout our time working together I have filed four 960's which pertained to the following incidents:

1/25/12: Upon the verbal altercation with her father’s SO she went to her mother’s home. On 1/24/12 XXX and her mother were asked to leave her mother’s SO home, while the SO was under the influence of ETOH and possibly marijuana. Mothers SO has a history of being physically and verbally abusive toward the mother.

2/29/12: Pt stated that she was slapped by her mother in the head and in the arm to get up for school. Later that morning she got into a verbal argument with her mother and her mother’s SO. Later at school she received a text from her mother stated that she cannot go back to the house, which left her without a place to stay. Pt had planned to go to her father’s home but was
uncertain if she was allowed to go there, pt was not looking forward to having to stay with her father due to not getting along with her father's SO which resulted in an alleged suicide attempt on 1/12/12.

Pt also stated that she has been dealing marijuana to "survive". Pt stated that she "needs to deal marijuana in order to help provide for her family" pt stated that her mother and father are both aware that the pt deals drugs and "they are okay with it."

3/5/12: Pt disclosed that she was staying with her father again due to an incident that occurred where she was hit in the head by her mother and again asked to leave the her mother’s home due to getting into another verbal argument with mother and mother’s SO. Pt further stated that her father abuses marijuana and "pills." Pt further mentioned that she continues to struggle with chronic passive suicidal ideation and live in a chaotic environment that involves chronic alcohol and substance abuse, domestic violence, and other chaotic situations.

3/12/12: Pt disclosed that as a young child she was physically beating with a broom, wire clothes hangers, fly swatter, belt (where the buckle is located), and her father would griper her by her arm and leave bruises where his finger prints were. Pt stated that she continues to be threatened by her parents.

We have had several concerns of XXX and numerous # 960s have been filed on this child in reference to allegations of sexual molestation, being exposed to ETOH and drugs within both parents' homes, child abuse, and child neglect. Pt has been diagnosed with MR and has cognitive limits so she is a very vulnerable minor and at very high risk to being further taken advantage of by others. Pt continues to be at extreme high risk of harming herself; she has an extensive history of suicidal ideation and one attempt.

Case Management: Contact with Spirit Lake Tribal Social Services:

1/31/12: Jackie Bavaro from TSS contacted provider and stated that she had received the 960 in regards to pts safety. She is planning on starting the investigation this week if time permits. Jackie stated that she will continue to keep SLBH updated with the results of the investigation.

2/14/12: pt was expected to have an appointment with provider but pt was a no show. no call for scheduled appointment. BH staff attempted to contact the school to transport pt, however pt was not in school today.

Provider attempted to contact pts mother, however mother was recently hospitalized in Grand Forks and was unable to talk. Mother was not aware where pt may be and why she was not in school today.

Provider attempted to contact TSS Jackie Bavaro in reference to the 960 that was previously filed. However, provider was unable to reach TSS case worker.
2/15/12: I contacted Jackie Bavaro (TSS) to f/u on the 960 filed on pt last month. Jackie states that if time permits she plans on f/u with family later this week. Informed her of the seriousness of this situation and the need to start working on possible placement. Jackie states she will further investigate this matter.

2/21/12: F/u with TSS in reference to 960s (Jackie Bavaro, TSS case manager was unable to f/u with family.)

2/28/12: Continue f/u with TSS in reference to pts placement and the recent concerns about pt selling drugs. (No response from TSS in reference to recent 960).

As of today there has been no further response from Tribal Social Services in the Month of March. Pts “current TSS case manager/investigator was no longer working at TSS”. We have not received any further response from TSS since 2/28/12 in reference to XXX. Another 960 was filed on 3/5/12 and 3/12/12.

Respectfully,

Michael R. Tilus, PsyD, MP
Director, Behavioral Health

4/3/2012