

AMERICAN INDIANS AND THE NEW TERMINATION ERA

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Section 9 of the Rhode Island Indian Claims Settlement Act is amended . . . by striking the section heading and inserting the following . . . For purposes of the Indian Gaming Regulatory Act, . . . settlement lands shall not be treated as Indian lands.

– Chafee Amendment, 1997 Omnibus Appropriations Act¹

INTRODUCTION

Conventional wisdom holds that the United States government’s policy for dealing with American Indians runs in cycles. Every few decades, the federal government will pursue policies that recognize and support tribal sovereignty, followed by a few decades of antagonistic and hostile policies. This policy “cycling” has occurred since the federal-tribal relationship was first established by treaty over 200 years ago.² The twentieth century alone has reflected four different policy cycles: the anti-Indian Allotment Policy launched in 1887, the pro-tribal sovereignty Reorganization Policy initiated in 1934, the anti-tribal sovereignty Termination Policy implemented after World War II, and the remedial Self-Determination Policy beginning in 1970.³

I have generally disagreed with this “cycling” assessment because U.S. policy towards Indians has always had the same fundamental

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¹ Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 330, 110 Stat. 3009, 227-28 (1996).

² See FELIX COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 9–10 (LexisNexis 2005).

³ See *id.*

agenda—to promote the expansion of American power and control over Indigenous nations, peoples, and lands. While I acknowledge that this agenda has taken on a different facade every few decades, any impression that actual change in policy has occurred is largely illusory as these historical cycles tend to blur together around the same basic goal. For example, while the Allotment Policy of the late nineteenth century was obviously developed to eliminate Indian nation sovereignty and assimilate Indian people into American society, its revamped replacement, the Reorganization Policy, had the same underlying objective as it sought to destroy traditional tribal governance and promote economic incorporation through the imposition of constitutional governments and corporate organizational structures.⁴

This “assimilationist” agenda has carried forward to the present day. Without question, the end of the Termination Policy of the 1950s and 60s in favor of the Self-Determination Policy of the early 70s proved more respectful of tribal self-government and the goal of economic revitalization.⁵ But a powerful counterbalancing force embedded within the Self-Determination Policy also promoted the integration and assimilation of Indian tribal governments and economies into the vast web of American government and commerce in ways never before experienced.⁶ In this way, these seemingly contradictory policy approaches can be said to have promoted the same basic agenda.

More recently, this policy quandary can be seen with the enactment of the Indian Gaming Regulatory Act of 1988 (IGRA),⁷ which conventional wisdom accepts as a classic example of the Self-Determination Policy at work. To be sure, IGRA has allowed for some Indian nations to generate their own revenue and enter a new phase of development and revitalization. But the fact remains that IGRA was actually enacted to *restrain* the inherent sovereign authority of Indian nations to conduct gaming activities within their territory unencumbered by state gambling laws.⁸ Through IGRA’s compact requirements⁹ and the Supreme Court’s *Seminole* decision,¹⁰ the states now receive a share of Class III gambling revenues and have absolute authority over whether an Indian

⁴ See Russel Lawrence Barsh, *Another Look at Reorganization: When Will Tribes Have a Chance?*, INDIAN TRUTH, Oct. 1982, at 4, 4–5; see also COHEN, *supra* note 2, at 77–85.

⁵ See COHEN, *supra* note 2, at 97–98.

⁶ See *id.* at 99–113.

⁷ Indian Gaming Regulatory Act of 1988 (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701–20).

⁸ IGRA was enacted following the U.S. Supreme Court’s decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221–22 (1987) which held that Indian nations are not subject to state gambling regulations absent express delegation of such authority by Congress.

⁹ 25 U.S.C. § 2710(d)(1)(C).

¹⁰ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 53–54 (1990).

nation can even operate a Class III casino.¹¹ Giving states this kind of power over Indian nations and the exercise of tribal sovereignty has historically been viewed as “terminationist” from an Indian policy perspective, and thus the most destructive and virulent form of colonialism possible.¹²

The Chafee Amendment thus stands as a remarkable piece of modern-era Indian termination legislation. “The measure amends the Narragansett’s original agreement with [Rhode Island], the Rhode Island Indian Claims Settlement Act, by saying that the tribe’s land ‘shall not be treated as Indian lands’ under the Indian Gaming Regulatory Act.”¹³ As a result, the Narragansetts are denied the ability to establish Class III gaming facilities like other Indian nations.¹⁴ Senator Chafee attached this amendment to the Omnibus Appropriations Bill with no notice or opportunity for careful review by his Senate colleagues, much less the Narragansetts.¹⁵ It was attached to an enormous piece of appropriations legislation, which allowed President Clinton to sign the bill without pause and thus making the Chafee Amendment law.¹⁶

Defenders of the Chafee Amendment argue that this action was derivative of the commitment made by the Tribe in the development of the Rhode Island Indian Claims Settlement Act,¹⁷ an equally terminationist legislative act which subjected Narragansett self-government to state jurisdiction.¹⁸ But on its face and in the way it came about, the Chafee Amendment was a naked act of political aggression to suppress the inherent sovereign authority of an Indigenous nation to self-govern. As a result, it is hard for me to reconcile the Chafee Amendment—and, for that matter, IGRA as a whole¹⁹—with the notion that the United States has abandoned its terminationist policy agenda as suggested by the Self-

¹¹ Chris Rausch, *The Problem with Good Faith: The Indian Gaming Regulatory Act a Decade After Seminole*, 11 *Gaming L. Rev.* 423, 424–25 (2007).

¹² Robert Odawi Porter, *Tribal Disobedience*, *TEXAS J. ON CIVIL LIBERTIES & CIVIL RIGHTS* 137, 148 (2006).

¹³ Robert Schmidt, *A ‘Cruel Application’ of Plenary Power: A Last-Minute Rider to an Appropriations Bill Halts the Impoverished Narragansett Tribe’s Gambling Plans*, 23 *Conn. L. Trib.* 2 (Aug. 4, 1997).

¹⁴ *Id.*

¹⁵ *See id.*

¹⁶ *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 330, 110 Stat. 3009, 227–28. (1996).

¹⁷ Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (1978) (codified at 25 U.S.C. §§ 1701–16 (1994)).

¹⁸ *See* Narragansett Tribe v. Nat’l Indian Gaming Comm’n, 449 F.3d 16, 18 (1st Cir. 1998); Jana M. (Lemanski) Berger, *Narragansett Tribal Gaming vs. “The Indian Giver”*: *An Alternative Argument to Invalidating the Chafee Amendment*, 3 *GAMING L. REV.* 25, 26 (1999).

¹⁹ *See generally* Robert Porter, *Indian Gaming Regulation: A Case Study in Neo-Colonialism*, 5 *GAMING L. REV.* 299, 306–08 (2001) (arguing that IGRA and its allowances of state jurisdiction over Indian lands promotes a colonizing agenda).

Determination Policy. Indeed, these and other recent developments to be discussed in this article suggest that the face of United States Indian policy has once again become openly focused on terminating federal recognition of inherent Indian sovereignty.

This article is an effort to examine this policy quandary from a perspective that is both scholarly and personal. I have spent my whole life as an Indian and nearly 20 years as a lawyer and law professor, including over five years as my own nation's chief counsel. Like many who have represented Native peoples, I have dealt with the risks of becoming cynical and discouraged as a result of the endless struggles associated with protecting the sovereignty of our nations. It seems that whenever Native peoples finally succeed in dealing with some historic mistreatment by the American government, something bad happens—like the Chafee Amendment—that takes it all away. And yet, I take comfort in the fact that something must be working because against all odds, Indigenous peoples and sovereignty still exist today.

A big problem in holding the current ground is that too many Indians, their lawyers, and Indian law scholars blindly accept the Self-Determination Policy as a beneficial policy development with no downside effect. To determine whether this misguided belief has any consequence, it must first be assessed whether a neo-termination policy is actually emerging and, if so, whether anything can be done to stop it. Failing to accept that the face of American Indian policy is changing once again will promote underestimation of the challenges facing Indian nations and people and will frustrate the formulation of appropriate responses. And so this article, while not a complete proof of this thesis, hopes to start the process of examining this question.

In doing so, I will first examine some of the legal and policy trends in America's treatment of Indians that are currently taking place. For several years now, I have thought that the study of America's so-called Indian law is completely predictable and intellectually moribund. Recently, however, there have been competing developments emanating from the Supreme Court and the Congress—for example the recent decision in *United States v. Lara*²⁰ and the development of the Self-Governance Program²¹—that offset my concerns that a neo-termination policy has fully emerged. Examining the current policy trends and predicting where things are headed presents an interesting forensic examination.

Secondly, because I am generally an optimist and believe that there must be a silver lining somewhere within these antagonistic develop-

²⁰ *United States v. Lara*, 541 U.S. 193 (2004).

²¹ Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 209, 102 Stat. 2285, 2296-98; Pub. L. No. 103-413, §§ 201-408, 108 Stat. 4250, 4270-78 (codified as amended at 25 U.S.C. §§ 450-458hh (1994)).

ments, I will examine what I perceive to be the opportunities that lie in the current policy landscape. These may not be intuitive assessments for anyone who genuinely believes that the Self-Determination Policy is really working. But opportunities do exist, and they should be better understood in order to seize upon them.

Lastly, I will examine this whole policy quandary from a normative perspective. For the entirety of American history, the United States has basically approached policy questions involving the Indians from one simple perspective—"what do we do with them?" Well, the other side of that policy question is rarely asked, which is, "what do we Indians want for ourselves?"

This is an important question to answer as Native peoples take more control over our own lives. But the question is more difficult than one might think. There is very real tension for Indians in this day and age between choosing the easy path towards living the good life as a member of American society, or choosing the traditional and more difficult path of struggling to preserve life as free and distinct peoples and nations. Compounding the difficulty of this choice is the fact that, because of our inherent differences and generations of colonization-induced social and cultural change, Indians today see the world through very different lenses. Understanding what exactly is happening to us, much less being able to respond coherently, makes the goal of formulating Indigenous survival strategies especially challenging.

I. THE TRENDS

All people who hope to survive must constantly take stock of their current position and assess where things might be headed. Indigenous peoples, more than any other, are subject to this obligation because our lack of recognized statehood means that we may be left out of critical discussions by state actors when decisions are being made that affect our future. As we look around us today, I see a variety of trends that will impact Indian nations and peoples in the years to come.

The first trend is the movement of the Supreme Court away from tribal sovereignty as a territory-based concept in favor of a membership-based concept. This general erosion has actually been going on for some time and is reflected by the handful of old cases in which the Court upheld the authority of states to prosecute non-Indians for crimes committed within Indian country,²² and more recently in the cigarette cases where the Court recognized the rights of states to impose their taxes on

²² See, e.g., *People v. Martin*, 326 U.S. 496 (1946); *United States v. McBratney*, 104 U.S. 621 (1881).

non-Indians doing business within Indian Country.²³ The most virulent articulation of this position occurred in *Oliphant v. Suquamish* in 1978, where the Court denied the inherent authority of Indian nations to exercise criminal jurisdiction over non-Indians, and in the 1990 case of *Duro v. Reina*²⁴ where the Court sought to deny the inherent authority of Indian nations to exercise criminal jurisdiction over non-member Indians.²⁵

The consequences of this change in orientation are significant. If Indian nations are only recognized as having authority over their own citizens and members, then former Chief Justice Rehnquist's observation that Indian tribes are "a good deal more than 'private, voluntary organizations'"²⁶ may soon be coming to an end. At least for those Indians and their lawyers who anchor heavily to what the Supreme Court says about the scope of their inherent powers, this is highly problematic. For others who view their sovereignty without such limitations, this increasingly crabbed form of recognition is going to stimulate greater jurisdictional conflicts with federal, state, and local governments in the years to come.

The second trend is the increasing control by the United States over the question of who or what is an Indian. The United States has traditionally deferred to the judgment of Indian nations in deciding who is a tribal citizen or member.²⁷ This assessment is qualified in two respects: (i) to the extent that the enrollment list of many Indian nations is based upon blood quantum determinations that were originally derived from the federal officials who prepared the roll; and (ii) to the extent that the federal government maintains its own eligibility criteria for federal services that may include individuals who are not tribal citizens or members, but may be the children or grandchildren of such people.

Recently, however, there have been developments to suggest that the United States is displacing exclusive tribal authority to make citizenship determinations. A prominent example is the case of *Poodry v. Tonawanda Band of Seneca Indians*, in which the Second Circuit ruled that the Tonawanda Band of Senecas violated the Indian Civil Rights Act when it disenrolled and banished five of its people without sufficient due

²³ See, e.g., *N.Y. Dept. of Tax & Fin. v. Milhelm Attea Bros.*, 512 U.S. 61 (1994); *Washington v. Colville Tribes*, 447 U.S. 134 (1980); *Moe v. Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976).

²⁴ See *Duro v. Reina*, 495 U.S. 676, 684-88 (1990). *Duro* was legislatively overruled by Congress when it enacted the "Duro Fix" by amending the Indian Civil Rights Act to expressly acknowledge inherent authority over non-member Indians. See Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (codified as amended at 25 U.S.C. § 1301(2) (1990)).

²⁵ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 204 (1978).

²⁶ *United States v. Mazurie*, 419 U.S. 544, e557 (1975) (stating that Congress may delegate to an Indian reservation's tribal council Congress' own constitutional authority under Article I, § 8, clause 3 to control alcohol sales by non-Indians on Indian reservation land).

²⁷ See COHEN, *supra* note 2, at 172; see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 54 (1978).

process.²⁸ The possible impact of this case is that a federal court sometime in the future could order a tribal council to restore Indians to the roll if they were found to have been banished without adequate due process.

Another development contributing to this trend involves the increasing number of tribal citizenship disputes that manage to spill into the federal and state courts, including a situation in recent years involving the Shakopee Mdewakanton Sioux Community in which they actually sought to have Congress get involved and help resolve their enrollment dispute.²⁹

Lastly, there are an increasing number of applications for tribal recognition filed with the Interior Department³⁰ or petitioned to Congress that will require the United States to make a legal decision about who or what is an Indian tribe.³¹

The trend in favor of federal government involvement in tribal citizenship determinations is driven in large part by gaming, or rather, the lure of gaming wealth. As the stakes have literally gotten higher, more and more people are claiming to be Indians, and those who are Indians are fighting more and more over the spoils or potential spoils of having a casino. I do not contend that the United States is getting involved in these matters because it has nothing better to do. Rather, I argue that this trend is being driven primarily by Indians, or Americans claiming to be Indians, who in their desperation or lust for money are willing to allow not just the United States, but even our most feared adversaries—the states—to adjudicate their existence as tribal members. In this situation, American governmental involvement is simply the passive conduit for undermining tribal self-government.

The potential consequence of abandoning this exclusive realm of tribal self-government, of course, is that one day the United States may decide that even existing Indian nations who are not feuding might not be Indian enough. As a thought experiment, imagine what would happen if the Office of Federal Acknowledgement in the Bureau of Indian Affairs started applying the Indian tribal recognition regulations in reverse.³² As our social and cultural distinctiveness continues to deteriorate, the enemies of the Indians may seek to exploit this weakness and press the United States to formally pursue a neo-termination policy.

²⁸ *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 897 (2d Cir. 1996).

²⁹ See *Smith v. Babbitt*, 100 F.3d 556, 557 (8th Cir. 1996); Mike Mosedale, *Members Only*, CITY PAGES, Mar. 22, 2000, <http://citypages.com/databank/21/1007/article8519.asp>.

³⁰ See Bureau of Indian Affairs, Number of Petitioners by State as of February 3, 2006, http://www.doi.gov/bia/off_fed_acknowledg/petitioners_state.pdf.

³¹ See Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. § 83 (2007).

³² See *id.*

The third trend is the modern effort to confiscate Indian wealth and resources. Confiscation of Indian wealth and resources by the European settlers is hardly novel. Indeed, one could argue that confiscating Indian wealth and resources was the *raison d'être* for the formation of the United States. This confiscation has continued in different ways and to different degrees throughout the history, but during the past few years, the Internal Revenue Service has taken more concerted efforts to fully integrate Indians and Indian nations into the revenue machine of the United States government.³³

Whereas for most of American history, Indians were the “Indians not taxed” referred to in the Constitution,³⁴ after the enactment of the Citizenship Act of 1924, Indians have been treated as taxpayers like other American citizens. For several decades now, slowly but steadily Indians and Indian nations have been increasingly incorporated into the U.S. tax collection system. Despite the fact that Congress has never expressly authorized the direct taxation of Indians, the IRS, with the assistance of the federal courts, has evolved boot-strap arguments to reach the conclusion that Indians must pay federal income taxes.³⁵ The justification, such as it is, starts and ends with the fact that Congress unilaterally granted American citizenship to Indians in 1924.³⁶ From this foundation, the federal courts have easily moved beyond the Constitution’s acknowledgment of Indians as a people “not taxed” to one in which Indians as citizens must pay taxes like all other citizens.³⁷ This trend is further reflected by the recently developed IRS Office of Tribal Governments, designed specifically to “help Indian tribes deal with *their* federal tax matters.”³⁸

Fortunately, even the IRS has decided to avoid the legal and political nightmare associated with attempting to tax the income earned by sovereign Indian nations, although its reasoning for not doing so is “fuzzy.”³⁹ However, this is where the trend is headed. In 1995, Donald

³³ See Internal Revenue Service Webpage, Tax Information for Indian Tribal Governments, <http://www.irs.gov/govt/tribes/index.html> (last visited Sept. 25, 2007).

³⁴ U.S. CONST. art. 1, § 2, cl. 2; U.S. CONST. amend XIV, § 2.

³⁵ See COHEN, *supra* note 2, at 673–84.

³⁶ See Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253.

³⁷ See COHEN, *supra* note 2, at 674.

³⁸ About Office of Indian Tribal Governments at the IRS, <http://www.irs.gov/govt/tribes/article/0,,id=96135,00.html> (last visited Apr. 12, 2008) (emphasis added).

³⁹ On the IRS website, the agency declares that I.R.C. § 7871, which codified section 1065 of the Tax Reform Act of 1984, permanently implemented the tax status of Indian Tribal governments, or subdivisions thereof, to be the equivalent of states. What is Internal Revenue Code (IRC) section 7871?, <http://www.irs.gov/govt/tribes/article/0,,id=108359,00.html#A1> (last visited Apr. 4, 2008). This means that Indian Tribal governments receive tax breaks for transactions that involve the exercise of “essential government functions.” See I.R.C. § 7871(b) (West 2007); FAQs for Indian Tribal Governments Regarding IRC § 7871, <http://www.irs.gov/govt/tribes/article/0,,id=108359,00.html> (last visited Apr. 4, 2008).

Trump pushed the House Ways and Means Committee to a 15-21 vote that would have imposed a 34% income tax on tribal government income.⁴⁰ As Indian gaming continues to proliferate and Americans generally continue to view Indian nations less as governments and more like private partnerships or corporations—tying in the first trend discussed above—it is not hard to see the likelihood that greater efforts will be given to a future legislative effort to tax Indian nations.

The fourth trend is related to the previous one—the usurpation of Indian self-government by Executive Branch agencies of the United States government. The simple conception of the relationship between Indian nations and the United States is one of a treaty partnership between sovereign nations in which peaceful relations are established and protection is afforded to the Indians by the United States in exchange for land. However, missing in this simple formulation is the role that the administrative agencies of the federal government are to play.

Going back to the Administration of President Ronald Reagan, all U.S. Presidents since have directed Executive Branch agencies to consult with Indian nations on matters that might affect them.⁴¹ In response, the agencies over the years have developed and adopted their own unique consultation policies to effectuate this mandate.⁴² On the surface, this all looks great. In reality, however, executive branch agencies regularly ignore this consultation policy and engage in aggressive actions against Indian nations in furtherance of their narrow statutory mandates that have the significant effect of undermining tribal sovereignty.

In addition to the IRS, there are agencies such as (i) the National Indian Gaming Commission, which so overextended its statutory man-

⁴⁰ Michael Wines, *Indian-Run Casinos and a Capitol Mystery*, N.Y. TIMES, Sept. 24, 1995, at 24.

⁴¹ See Exec. Ord. 13475, 65 Fed. Reg. 67249 (Nov. 6, 2000), available at <http://www.nepa.gov/nepa/regs/eos/eo13175.html>; Memorandum from President George W. Bush to the Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments (Sept. 23, 2004), <http://www.whitehouse.gov/news/releases/2004/09/20040923-4.html> (last visited Sept. 27, 2007); Statement by President George H.W. Bush, Reaffirming the Government-to-Government Relationship Between the Federal Government and Tribal Governments (June 14, 1991), <http://www.epa.gov/tribalportal/pdf/president-bush91.pdf>; Statement from President Ronald Reagan on American Indian Policy (Jan. 24, 1983), <http://www.epa.gov/tribalportal/pdf/president-reagan83.pdf>.

⁴² See, e.g., DEPARTMENT OF DEFENSE, AMERICAN INDIAN AND ALASKA NATIVE POLICY, <http://www.usace.army.mil/cw/cecwo/reg/DoDPolicy.pdf> (last visited Apr. 2, 2008); Department of Housing and Urban Development Government to Government Tribal Consultation Policy, http://www.hud.gov/offices/pih/ih/regs/govtogov_tcp.cfm (last visited Sept. 27, 2007); DEPARTMENT OF ENERGY, AMERICAN INDIAN AND ALASKA NATIVE TRIBAL GOVERNMENT POLICY (2000), available at <http://www.ci.doe.gov/indianbk.pdf>; DEPARTMENT OF HEALTH AND HUMAN SERVICES, TRIBAL CONSULTATION POLICY (2004) (final draft), http://www.nihb.org/docs/consult_wrkgrp_policy_os_2004-10-01.pdf; Attorney General June 1, 1995 Memorandum on Indian Sovereignty, <http://www.usdoj.gov/ag/readingroom/sovereignty.htm> (last visited Sept. 27, 2007).

date regarding Class III gaming that successful litigation was brought by the Colorado River Indian Tribes to curtail it;⁴³ (ii) the National Labor Relations Board, which reversed 30 years of precedent in *San Manuel Indian Bingo & Casino v. NLRB*, holding that Indian tribal government enterprises are subject to the National Labor Relations Act;⁴⁴ (iii) the Occupational Safety and Health Administration which determined that tribal casinos are subject to the provisions of the Occupational Safety and Health Act;⁴⁵ (iv) and the Equal Employment Opportunity Commission, which sought to apply federal non-discrimination laws to Indian nations.⁴⁶

In going after Indian nations and seeking to subject them to American governmental authority, these administrative agencies have a few things in common: they rely heavily upon the analytically discredited *Tuscarora* rule to conclude that general federal law, which is silent with respect to Indians, should nonetheless apply;⁴⁷ they also appear to be taking action only in instances in which Indian nations are acting inconsistently with stereotypical Indian behavior, such as engaging in traditionally un-Indian activities like running a construction company or a casino; and they appear to be responding to situations in which Indians are regulating the activity of non-Indians or otherwise engaging in commerce with them. In short, these executive branch agencies appear to be acting completely without regard for the fact that they are governmental subdivisions of a nation that has entered into treaty relationships with Indian nations and that, by virtue of those treaties and common law, they have a protective trust responsibility to the nations they are investigating, prosecuting, or trying to regulate.

The fifth and last trend—which may be most significant—is the demise of the “Noble Savage” stereotype in favor of the “Rich Casino In-

⁴³ See *Colorado River Indian Tribes v. Nat’l Indian Gaming Comm’n*, 466 F.3d 134, 140 (D.C. Cir. 2006).

⁴⁴ See *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1318 (D.C. Cir. 2007).

⁴⁵ See *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (“[T]he tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes.”).

⁴⁶ See *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1121 (9th Cir. 1998); see also 42 U.S.C. § 2000e-2(i) (2007); *Indian Preference Under Title VII*, 8 FEP Manual (BNA) 405, 6647–54 (1998).

⁴⁷ See *Donovan*, 751 F.2d at 1116 (“A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches ‘exclusive rights of self-governance in purely intramural matters’; (2) the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties’; or (3) there is proof ‘by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations. . . .’ In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.”(quoting *United States v. Farris*, 624 F.2d 890, 893–94 (9th Cir. 1980))).

dian” stereotype. This is a complicated trend to assess. On the one hand, it is pretty clear that Indians have received some practical benefit from being perceived by Americans as poor, weak, and pathetic savages.⁴⁸ Indeed, that is the conceptual foundation for the Trust Doctrine and much of the federal funding to Indians derived originally from the Snyder Act of 1924.⁴⁹ Of course, while it is true that having the United States protect you from predatory states from time-to-time based on your inferior status, or to provide you with the very real benefit of millions of dollars for health care and other social programs, it is hardly a flattering categorization to accept.⁵⁰

On the other hand, viewing Indians this way is simply degrading and de-humanizing, which is why the recent trend, to view Indians as real people who do not just sit around the campfire doing beadwork and smoking the peace pipe, has very positive dimensions. We, after all, are real people with a real right of self-determination, which includes the right to choose our own lifestyles as we see fit. And that might very well include not living in poverty, not living in our tribal homelands, wearing a suit and tie, or even hiring non-Indians to work for us and make us money so that we can run our governments and take care of our people.

And that is the crux of the problem. As some Indian nations have quite prominently come into wealth, we all have taken on a new identity of “Rich Casino Indians” in the American consciousness, including the poorest of us who remain in the majority of the Native population.⁵¹ Previously, everything in American society relating to Native peoples was built upon the stereotype of the brown-skinned, strong-nosed, black-haired, destitute, noble but heathen savage, and however incorrect this image was, it in part protected Native people from open hostility for a time. The emerging stereotype could lead to a future trend in which American society will become more openly predatory towards Native

⁴⁸ See, e.g., *United States v. Sandoval*, 231 U.S. 28, 39 (1913) (describing Pueblo Indians as a “simple, uninformed, and inferior people”).

⁴⁹ 1924 Indian Citizenship Act, Pub. L. No. 175, 43 Stat. 253 (codified at 8 U.S.C. §1401(b) (2007)) (“*Be it enacted by the Senate and House of Representatives of the Untied States of America in Congress assembled*, That all noncitizen Indians 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 Indian to tribal or other property.”).

⁵⁰ See U.S. Department of the Interior, *Indian Ancestry: What Are the Benefits & Services Provided to American Indians and Alaska Natives*, <http://www.doi.gov/benefits.html> (last visited Sept. 27, 2007).

⁵¹ The average percentage of American Indian living in poverty is 25.7%, compared to 12.4% in the general population. ALEMAYEHU BISHAW & JOHN ICELAND, U.S. CENSUS BUREAU, *POVERTY: 1999*, at 8, <http://www.census.gov/prod/2003pubs/c2kbr-19.pdf>. The average percentage of American Indians unemployed is 7.6%, compared to 3.7% in the general population. SANDRA LUCKETT CLARK & MAI WEISMANTLE, U.S. CENSUS BUREAU, *EMPLOYMENT STATUS: 2000*, at 5 (2003) <http://www.census.gov/prod/2003pubs/c2kbr-18.pdf>.

peoples once again. The predatory streak in society that drove the early terminationists had been held in check by the “pity the poor Indian” segment of American society that has been responsible for many of the so-called benefits that Indians receive today as a matter of law and policy. The demise of collective pity sentiment is why we are seeing changes in how the Supreme Court and Congress view Indian nations. As the American people are spending more time in our casinos and seeing rising political activity from powerful Indian nations and their lobbyists, they and their leaders are slowly changing their stereotypical notions of who we are as peoples. The thin cloak of restraint that provides a modicum of protection for Native peoples is falling away and newer and perhaps more virulent threats are emerging. Even in a constitutional system in which all people are supposed to be treated equally under the law, great inequality still exists. We can only imagine how Indians will be treated in an environment increasingly stripped clean of the tempering influences of the Trust Responsibility or financial support from federal government transfer payments.

II. THE OPPORTUNITIES

While this outlook on the future is rather gloomy, there are counterbalancing forces at work and opportunities for progress are available if they are properly identified and seized upon.

On the legal front, there are two important developments taking place that could serve as the basis for stronger legal recognition of tribal sovereignty. In the tribal law world where I spend most of my time, it is true that the legal systems of Indian nations are becoming more developed. From the veritable dark ages of only 13 years ago when I started my career as an academic, I have seen Indian nations investing greater resources into developing the dispute resolution systems and administrative infrastructure of their governments, including reforming those governments in whole or in part. Even though these developments may not be infusing a sufficient degree of cultural relevance, at least the activity is taking place.⁵² To me, what this means is that in an increasingly hostile world in which American recognition of Indian sovereignty might be waning, Indian nations will be internally stronger in their ability to push back and protect themselves.

The other important legal development relates to the Supreme Court. Two particular passages from recent cases stand out. The first relates to former Chief Justice Rehnquist’s observation in *Seminole Tribe of Florida v. Florida* that the Indian Commerce Clause divests states of

⁵² See Russel Lawrence Barsh, *Putting the Tribe Back in Tribal Courts. Possible? Desirable?*, 8 KAN. J. OF LAW & PUB. POL. 74, 86 (1999) (describing the shift some tribes make from indigenous jurisprudence to the western legal paradigm).

“virtually all authority over Indian commerce and Indian tribes.”⁵³ The second is Justice Thomas’s concurrence in *United States v. Lara*, in which he explained that the notion of Indian nations being recognized as possessing inherent sovereignty cannot be reconciled with the notion that the United States possesses plenary power over those nations at the same time.⁵⁴ Despite its simple logic, this is a shockingly honest statement from a member of the Supreme Court. Phil Frickey, one of Indian law’s pre-eminent scholars, has said that “Justice Thomas’s analysis is the most candid statement by a Supreme Court Justice on federal Indian law since the Marshall Court.”⁵⁵

Though it is too soon after this decision to know in which direction scholarly commentary will head following this observation from Justice Thomas, but one possibility is that the Supreme Court is charting the course to eventually abandon the Inherent Sovereignty Doctrine. That is, that the Court will accept the inevitability of American plenary power and simply accede to the conclusion that tribal sovereignty is just a quaint notion of American charity and that what Indian tribes really do is exercise powers that are delegated by the United States.

This is possible, but unlikely, because if the justices are swayed by Justice Thomas’s comment, they will likely follow his preferred course. Justice Thomas is a conservative textualist, indeed, an originalist who does not believe in the idea of big government and federal power untethered to clear Constitutional authority.⁵⁶ So the idea that the United States has plenary power over anything or anyone is deeply troubling to

⁵³ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996) (“Following the rationale of the *Union Gas* plurality, our inquiry is limited to determining whether the Indian Commerce clause, like the Interstate Commerce Clause, is a grant of authority to the Federal Government at the expense of the States. The answer to that question is obvious. If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. The is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.”).

⁵⁴ *United States v. Lara*, 541 U.S. 193, 215 (2004) (Thomas, J. concurring) (“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.’ Unlike the Court 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 the 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.” (citation omitted)).

⁵⁵ Philip P. Frickey, (*Native American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 470 (2005)).

⁵⁶ Eric R. Claeys, *Raich and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 791, 813–14 (2005).

him. Thus, it is very possible that Justice Thomas would lead the Court in the direction of throwing the Plenary Power Doctrine on the ash heap of history and interpreting the Inherent Sovereignty Doctrine to mean what it says—that Indian nations are sovereigns with absolute limits on the power of the United States to regulate them.

What might those limits be? One explanation for shifts in America's Indian policy is that such shifts simply follow the trends taking place within American law generally and in American society at large. One of the legal trends we have seen emerge from the Rehnquist Court was the scaling back of the Imperial Commerce Clause in favor of a more literal interpretation and application.⁵⁷ Thus, in the Indian law context, Justice Thomas could be signaling a willingness to lead the Court in a direction in which federal power over Indian affairs under the Indian Commerce Clause is also scaled back to a more literal interpretation and application. I have written about this possibility in the past, and it is still a winning idea because it means that the United States might be willing to recognize a whole new level of self-determination by Indian nations as a simple matter of reading the U.S. Constitution honestly.⁵⁸

This legal development is not taking place in isolation from the other branches of the federal government. Since 1988, Congress has embarked upon the Self-Governance Policy by which Indian nations and the United States negotiate funds otherwise directly administered by the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS).⁵⁹ This process, which is as close as one gets in the modern era to treaty-making, is an absolute opportunity for those Indian nations committed to genuine self-determination. Many of the recognized Indian nations have entered into self-governance compacts with the United States.⁶⁰ This is a solid foundation for a future in which the Supreme Court might lift the jackboot of the Plenary Power Doctrine by some measure.

And lastly, it is important to add that we are now living in an era in which a few Indian nations are wealthy. Not just comfortably wealthy, but in a few cases extremely wealthy reflected by the fact that approximately 15% of the tribal gaming operations nationally generated roughly 70% of the \$20 billion in aggregate gaming wealth in 2005.⁶¹ And with

⁵⁷ *Id.* at 801–02.

⁵⁸ See Robert Porter, *The Supreme Court of the American Indian Nations: Case No. 00-1 Kagama and Mahawa v. The United States*, 10 KAN. J. OF LAW & PUB. POL. 465, 471–73 (2000).

⁵⁹ See Robert Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J. LAW REF. 899, 970–72 (1998).

⁶⁰ See Office of Tribal Self-Governance, <http://www.ihs.gov/NonMedicalPrograms/SelfGovernance/index.cfm?module=program> (last visited Sept. 27, 2007).

⁶¹ See National Indian Gaming Commission, *Tribal Gaming Revenues* <http://www.nigc.gov/Portals/0/NIGC%20Uploads/Tribal%20Data/tribalgamingrevenues05.pdf>.

that wealth flows very real political power within the American political system.

Thus, despite some disturbing trends in the way Indians are being treated in the United States today, there are also counterbalancing forces at work that signal an opening to a new era of tribal self-determination. A few Indian nations, with the right motivation and ingenuity, now have the resources to reach the plateau of independence that has not existed for many generations.

This process does not take place in a vacuum and the advocates, advisors, and scholars of Indian law have a role to play in shaping this future. The question, then, is how do we respond to this new reality? Do we carve a new Indian law path where we do what we can to help those Indian nations that are capable and willing to be more free than they are now? Or, do we continue to make the bed with an Indian law that thinks of Indians as simply a historical anachronism in need of “saving” rather than as a machete designed to hack through the jungle of 200 years of colonial suppression of tribal sovereignty?

III. ARE WE BEING SET UP?

I, for one, think the path is clear. The meaningful survival of Indian nations and peoples has never been about waiting for some other people or government to take care of us. It has been our willingness and ability to take care of ourselves and do whatever we have to do to survive. I wish that more Indians and Indian advocates appreciated that reality.

But even if one has clarity of purpose on how to approach the future, it is important to question whether the policy choices being presented today are false ones, that is, to ask the question, *are we being set up?* In other words, as Indians and Indian nations dig deeper into the colonial legal, political, and economic system than ever before, are we achieving true freedom or are we actually being swallowed whole and incorporated into the colonizing society without fully realizing it?

To grasp the full depths of my concern, one needs to be much more paranoid than normal. With tongue planted firmly in cheek, I have a working theory that the true barometer of Indian-ness is not one’s degree of blood quantum, or cultural purity, or ultra-nationalistic ideology, but whether you can conceptualize and live by a good conspiracy theory. Years ago, when I served as the Seneca Nation Attorney General, I was amazed to find that many of my compatriots were unbelievably paranoid. They were not just a little worried about things, but convinced of tremendous conspiracies that revolved around how the White people were trying to take all of our land, steal all of our money, and snatch all of our children. My initial reaction when I heard these stories was that these people were, frankly, disturbed and delusional. And then, after I lived

through New York State's invasion of our territory with 1000 troopers,⁶² I remembered how the U.S. government took 10,000 acres of our Allegany Territory⁶³ and realized that missionaries and local governments had been taking our children away for generations,⁶⁴ and I came to appreciate that these paranoid Senecas were actually pretty rational.

In this day and age, it is easy to forget that the United States and its Indian laws and policies were spawned for a singular colonial purpose—to achieve its manifest destiny by gaining control over our lands, our resources, our nations, and us.⁶⁵ I believe that one major reason why we do not fully appreciate this fact of history is because we have huge pockets of personal and collective amnesia as to what has happened to our people during the most intensive periods of American colonization. Of course, it could be argued that this process of colonization has simply come to an end, that we are now living in a genuine “post-colonial” era. After all, the official military wars are over and formal American policy toward Natives is now focused on promoting self-determination rather than colonial exploitation.

Unfortunately, this is a true statement only if one ignores what has actually been taking place on the battlefield of America's legal war against the Indian nations during the last 200 years. U.S. law dealing with Indigenous peoples is still predicated upon the constitutionally bankrupt Indian control doctrines like the Discovery Doctrine,⁶⁶ Domestic Dependent Nationhood,⁶⁷ and the Plenary Power Doctrine⁶⁸ that were spawned during the nineteenth century. Yes, it is true that the Supreme Court has not referred to us as “simple, uninformed people” for almost 100 years,⁶⁹ but these legal doctrines still serve as the foundation of American colonial legal authority over us in the present day. Maybe with the law becoming much more benign and devoid of the “honesty” of earlier times, it is hard to see the problem and be that upset about what is going on. But if more people appreciated that what Congress and the Supreme Court are often doing today is no different than what they were

⁶² See RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL* (1987); DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928* (1995).

⁶³ See JOY A. BILHARZ, *THE ALLEGANY SENECAS AND THE KINZUA DAM: FORCED RELOCATION THROUGH TWO GENERATIONS* 20 (1998).

⁶⁴ See Indian Child Welfare Act of 1978, 25 U.S.C. § 1901(4); ADAMS, *supra* note 62; DAVID SWATZLER, *A FRIEND AMONG THE SENECAS: THE QUAKER MISSION TO CORNPLANTER'S PEOPLE* (2000).

⁶⁵ Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 Idaho L. Rev. 1, 111–17 (2005).

⁶⁶ See *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

⁶⁷ See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁶⁸ See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

⁶⁹ See, e.g., *United States v. Sandoval*, 231 U.S. 28, 39 (1913).

doing in the nineteenth century, not only would we be outraged, we would be moved to action.

The other reason for our forgetfulness about this colonial legal paradigm is because, as time has passed, we have now become integrated within the American legal, political, and economic system as never before. As a result, whatever colonization activities the United States is engaging in and targeting at Indigenous nations and peoples are not being resisted because the Indigenous peoples today are making rational choices to go along with such activities.

A good example of this process is what has happened with gaming. Before 1988, Indians would have been outraged by efforts of states to assume jurisdictional control over Indian land or activities taking place on Indian land or by efforts of Congress or the Supreme Court to lend it to them. And, indeed, as was discussed earlier, we should still be outraged because we know that IGRA was enacted not to help us, but to work a diminution of our recognized inherent sovereignty to conduct gaming in our territories. With enough money at stake, however, Indian nations by the hundreds have agreed to enter into Class III gaming compacts in which a major degree of jurisdictional sovereignty is ceded over to the states.⁷⁰ Because net gaming proceeds can be used to improve the lives of Indians and promote tribal self-determination like never before, even though it is a debatable choice, it is hardly irrational. As a result, the absence of any serious Indian resistance to IGRA strongly undercuts the notion that the United States is engaged in some kind of predatory colonizing activity.

It has taken me some time to come to grips with this possibility. Almost from the beginning of my career I have wrestled with the historical evidence of how the United States systematically stripped Indigenous peoples of our land and used its legal system to devalue and disrespect our inherent sovereignty. Perhaps naively, I have resisted and have sought to educate others about the travesty of what the United States has done and continues to do on our lands and abroad. In my experience, most Americans and Indians simply do not know or understand the historic process by which the United States and its colonial predecessors applied military, economic, political and legal power, with a heavy dose of disease warfare, to neutralize our nations and, in many cases, to destroy them. Of course, all of us Natives should know this history so that we can avoid future pitfalls and perhaps one day find a way to stop it. But the fact of the matter is that, in the present day, Indians willingly consent to interactions and partnerships with the United States and its states in a way we would have viewed in a prior era as hostile and confis-

⁷⁰ See Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2710(d)(1) (2007).

catory. Thus, given my own evolved healthy sense of paranoia, I must ask whether the colonial framework has simply changed, or whether the “setup” continues, just in a more sophisticated and clever way.

While one might find this perspective unusual or even extreme, this is how the leading theorists on colonialism and its resistance viewed the colonial world as they sought solutions to mark the path from colonial slave to liberated men and women. Frantz Fanon, Paulo Friere, and Albert Memmi among others all wrote about colonialism in the starkest and most dramatic of situations—colonial Africa almost 50 years ago—where obvious brutality and inhumanity was inflicted on the native populations by the dying colonial powers and their native collaborators.⁷¹ They describe a Manichean colonial world, one in which the colonized are derided by the settlers as evil and animal, while reserving to themselves the higher positions of dignity and virtuosity.⁷² And they use old Marxist terms like revolution, resistance, *lumpenproletariat*, and *bourgeoisie*.⁷³ But the framework and analysis of the history, power, and economic exploitation of Africa and its people by European powers that they were writing about 50 years ago is as accurate and as relevant today for understanding what Europeans have done in North America to exploit the indigenous inhabitants of its land base.

For this reason, I keep returning to the lingering question of whether we are being “set up.” As I have watched certain events in Indian law and policy unfold over the last decade, I keep asking myself whether I am just missing something, or whether my Seneca paranoia has simply run amok. I know that my world view has changed in recent years, especially as I have seen the way in which my own nation’s future is brighter as the result of the will of our people to pursue successful Class III casinos, a development that I spent most of my adult life opposing.

But I do not have a good explanation for why so many of us in the law do not spend more time exploring how to move beyond the colonial legal system that continues to suppress the freedom of Indigenous nations and peoples. I have a partial explanation for the lawyers who practice Indian law. They, after all, serve clients who ordinarily have very practical needs and who probably are not too interested in spending a lot of money trying to dismantle some dimension of the colonial legal system. And, of course, there is the naturally self-interested problem that there is too much good money to be made by helping clients navigate through the existing colonial system.

⁷¹ See FRANTZ FANON, *THE WRETCHED OF THE EARTH* (Constance Farrington trans., Penguin Books 1967) (1961); PAULO FRIÈRE, *PEDAGOGY OF THE OPPRESSED* (2000); ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* (1957).

⁷² FANON, *supra* note 71, at 41–42.

⁷³ See, e.g., KARL MARX, *THE COMMUNIST MANIFESTO* (1848).

What evidence is there that America's Indian law is a colonial system of control devoid of legitimacy and rotten to its core? One does not even need to delve into nineteenth-century precedents to see this charade in action. Just look at *Sherrill v. Oneida Indian Nation*, which applied laches to a legal action for the first time to deny Oneida sovereign authority over their own land;⁷⁴ *Cayuga Indian Nation of New York v. Pataki* that applied *Sherrill* to void the \$247 million judgment that would allow the Cayugas to get back their homeland;⁷⁵ the D.C. Circuit Court's recent *San Manuel Indian Bingo & Casino v. NLRB* decision that upheld the NLRB's seizure of regulatory immunity because Indians are finally joining the global economy;⁷⁶ or the way in which the Interior Department and the courts have been playing "Wheel of Fortune" with Indian tribal recognition decisions.⁷⁷ And so on.

Given all of this evidence of duplicity, is the practice of Indian law in the United States really just an elaborate con game that has induced some of the most brilliant minds in the country into believing that justice for the Indian can be had within its confines, something like an Indian law casino with shiny lights, bells and whistles that overwhelms our better judgment? Or are its adherents just naïve do-gooders trying to help those pesky Cherokees who entered the Supreme Court in their dispute against Georgia 175 years ago find justice for all Indigenous peoples at America's courthouse door or corridors of Congress?⁷⁸

These questions, of course, are rhetorical. But I am confident that more critical thinking, and not blind adherence to jingoistic platitudes like the Self-Determination Policy, will better ensure the survival of our nations than what has been happening as of late.

⁷⁴ *Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 202 (2005) ("Today, we decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns. Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. And at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.").

⁷⁵ See *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 273–78 (2d Cir. 2005).

⁷⁶ See *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1314–15 (D.C. Cir. 2007).

⁷⁷ See Schaghticoke Tribal Nation Federal Recognition, Preliminary Finding Issued, <http://www.schaghticoke.com/index.php?page=federal> (last visited Sept. 27, 2007).

⁷⁸ See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1813).

CONCLUSION

The way I view the Indian law world right now may be the truth, or it may not. I do know that my Native and non-Native colleagues who view things differently than myself are not stupid nor ignorant—we just disagree. But there is a common denominator that explains the lure of Indian law for all of us regardless of where we sit and how we view things. That binding force is faith: the faith that things can and will be better tomorrow for the Indians.

This faith is the only thing that explains why article after article is written about an area of law that is so intellectually dead that it still includes the notion of plenary power. Faith that things can be better for the Indians is the only thing that explains why legions of American lawyers continue to believe that they are just one good argument away from helping the Supreme Court find the path properly respecting Indian sovereignty. And this faith is the one thing that keeps me and people like me fighting another day. We believe that some day, we will figure out the one thing that will lead the United States and its legal system to the path of treating Indians fairly and in full respect of our inherent and treaty-protected sovereignty.

It is important to have this faith—not too much, and certainly not too little. Too much faith can lead us into traps, into thinking that the bad old days of American colonialism are over and that brighter days lie ahead. That kind of thinking, in my view, is simply unlawful. If our job either as a matter of professional obligation or personal commitment is to advocate for Native peoples, then our job is not simply to drink the purple Kool-Aid of the American Dream and Manifest Destiny. It is to take all of the law and historical facts into evidence, and use that as best we can to help our people survive and move forward.

We need this faith, for without it there are very dark places that one can go. Unfortunately, too many of our peoples have lost their faith, or had it taken from them. Those of us who have it have a moral obligation to find ways to reinvigorate it in others whenever and wherever we can.

There may, however, be a way to help us focus on more effectively applying our faith to the problems that lie before us. This has particular relevance for those who are educated Natives, especially the lawyers and other professionals. Many of you, like me, have traveled very far in just a lifetime, from the bare ground of our tribal homelands to the halls of professional school, and maybe even back again. On behalf of ourselves and our people, we have to ask ourselves, what is the point of our existence? To simply be rich, powerful, successful, whatever that may mean? Frantz Fanon said that:

The native intellectual nevertheless sooner or later will realize that you do not show proof of your nation from its culture but that you substantiate its existence in the fight which the people wage against the forces of occupation. No colonial system draws its justification from the fact that the territories it dominates are culturally non-existent. You will never make colonialism blush for shame by spreading out little-known cultural treasures under its eyes.⁷⁹

This statement means that we must sidestep the distractions and temptations of modern colonial existence that keep us from pursuing the path that leads to the healing and revitalization of our nations. There are many ways this can be done, and yet many other ways that are simply a waste of time, money, and opportunity. Without elaborating, many of those wasteful extravagances are related to trying to give life to the idea that Indians are citizens of the United States and part of the American polity. These distractions are why our survival as distinct peoples is a difficult thing to achieve.

Years ago, there was an Oneida Indian man in college a year ahead of me named Ray Halbritter, who used to say things like, “the only thing that matters in American society is money, and if Indians don’t have money, then we’re never going to have any power or respect as a people. And if we don’t have power and respect, then we’re never going to make it.”⁸⁰ Until recently, I thought that was an awfully narrow view to take. Such a fixation on money and power undercuts the idea that justice, reason, and ideology really matter to people and can induce them to action.

But you know what? Ray Halbritter went on to lead the Oneida Indian Nation to do something that no other Indians in the United States have done. They have reacquired 17,000 acres of their aboriginal territory using their own money.⁸¹ While the battle continues over whether that land will be recognized by the United States as Oneida land,⁸² what the Oneidas have done in only a dozen years stands as a testament to the fact that it is possible for Indians to leapfrog over one of the chasms of destruction inflicted on us by the Americans—the loss of our lands.

⁷⁹ FANON, *supra* note 71, at 179–80.

⁸⁰ See Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT’L L. & POL. 531, 564–65 (1994) (“We began to view economic power as the crux of sovereignty and political power. Economic power in this society, and in this world, is the real power that is necessary to make change and to empower one-self. It is the means to reach the ends of sovereignty.”).

⁸¹ U.S. Environmental Protection Agency, Oneida Indian Nation, <http://www.epa.gov/region02/nations/oin.htm> (last visited on Sept. 27, 2007).

⁸² See *Oneida Indian Nation v. New York*, No. 5:74-CV-187, slip op. at 3–4 (N.D.N.Y. May 21, 2007).

Separating the colonists from their money at our casinos and using it to buy our own land back from them may not have been what Frantz Fanon had in mind, but it certainly is a concrete exercise of fighting against the forces of colonial occupation to protect our nations and people. We should be spending more time developing and engaging in similar resistance tactics rather than crafting new and innovate ways of bowing down on our knees and asking our oppressors for justice.