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SELF-DETERMINATION, NOT TERMINATION

Past, Present, and Future of the American Indian
Movement

By Walter R. Echo-Hawk

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A Trail of Broken Treaties

Since the arrival of European settlers in what is now the United States, their relationship with American Indians has been characterized by expropriation, betrayal, and genocide. By the 20th century, disease, war, and forced assimilation had reduced the indigenous population to a mere shadow of what it once had been. By the 1950s, as Hollywood westerns had transformed the Indian into a tragic symbol of lost freedom and innocence, the federal government had adopted a policy designed to eliminate Indian Tribes as discrete groups. The legacy of conquest continues to shape U.S. policy and inflicts ongoing suffering on Native communities to this very day.

Against overwhelming odds, however, Native Americans fought back. The Tribal Sovereignty Movement has proved to be a profoundly important social movement which eventually succeeded in establishing modern Indian nations. With the National Congress of American Indians, the National Indian Youth Council (NIYC), other American Indian organizations, and tribal leaders struggling for Indian self-determination, the government eventually, in 1970, reversed its policy.

As these victories were being won, many American Indian activists adopted a more confrontational stance. The American Indian Movement (AIM) combined militant tactics with traditional spirituality to instill Native pride, insist on the continued presence and relevance of Native America, and meaningfully implement self-determination. The Trail of Broken Treaties called attention to the U.S. government's long and sorry record of betrayal, while occupations from Washington, DC, to Wounded Knee directly confronted that government, provoking the reprisals and prosecutions that would lead to AIM's collapse. Obviously, the struggle is not yet won, as American Indians have suffered an enormous and unresolved historical trauma, but the experiences of both patient engagement with official channels and militant confrontation continue to inform current struggles for Indian self-determination.

In this essay, Walter Echo-Hawk lays out the history of as well as the next steps for securing the rights of the United States' indigenous peoples. Echo-Hawk is a Pawnee Indian, working as attorney, law professor, tribal judge, author, and activist. His activism began in the late 1960s in the Red Power workshops of the NIYC. As a Native American rights legal advocate since 1973, he has represented American Indian tribes and indigenous groups in the United States. Echo-Hawk argues that the framework of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which the United States has endorsed but not yet implemented, offers the best path for redressing the injustices that American Indians, Alaska Natives, and Native Hawaiians continue to suffer. It is time for all Americans—whether Native or non-Native—to come together to bring the United States in line with international human rights standards and thereby begin to undo the original contradiction at the heart of the American experiment.

*Stefanie Ehmsen and Albert Scharenberg
Co-Directors of New York Office, January 2014*

Self-Determination, Not Termination

Past, Present, and Future of the American Indian Movement

By Walter R. Echo-Hawk

Though well documented in indigenous literature, the stirring tale of the tribal sovereignty movement in the United States is not widely known. The activism that has propelled the rise of modern Indian nations since 1950 is a social movement that ranks alongside the civil rights, women's, and environmental movements. It is a story that deserves to be told. When faced with systemic oppression, human experience is clear: life is intolerable under unjust conditions, and the redress of injustice is itself a value that births great social movements. In the struggle for Native American justice, these axioms are strongly evident.

The American experiment rests on a foundation of democracy and human rights, but the United States has not always lived up to its core values, as the experience of Native Americans illustrates. The growth and expansion of national institutions securing liberty for many bypassed indigenous peoples. In the young and growing republic, Red Indians were seen as expendable. They were engulfed by conquest and colonialism to make way for settlers and immigrants. Manifest Destiny marched across the continent with no regard for the rights of tribal people. This national behavior resulted in an "Indian problem" that sorely contradicts core values of the republic. The spectacle of subjugated tribal people living in the midst of a free and democratic society has long confounded and perplexed the nation, and until this contradiction is rectified, U.S. society will continue to be stalked by the demons that inhabit free nations built on dispossession and

subjugation. They question our legitimacy, self-image, and national origin myth. A democratic society cannot exist that is half free and half subjugated.

By 1950, Native America slumped to its nadir. Tribal people were living in dire socio-economic circumstances under the Great White Father in a racially segregated society. All branches of government worked to stamp out the last vestiges of native culture and to renege on treaty commitments. At this low point—in the darkest hour when bare survival was the order of the day—hard-hit Indian tribes mustered the will to resist.

During the 1950s and 1960s, they mounted a last ditch effort to survive forced assimilation. Tribal advocacy slowly coaxed the government into abandoning its termination and assimilation policies. Elected tribal leaders and inter-tribal organizations intent upon self-determination led the struggle, spurred by a nascent youth movement that arose from growing discontent among native youth. Guided by an intelligentsia that viewed the situation through the lens of colonialism, tribal youth questioned the existing order with increased militancy. In the coming years, many would become leaders. The crowning success of this period of struggle came in 1970 when President Nixon repudiated past Indian policies and announced the historic Indian Self-Determination Policy.

In the late 1960s, as the termination era was coming to a close, the civil rights movement

engulfed America. This movement opened indigenous eyes to the possibility of emancipation from injustice through increased militancy. Open revolt became the order of the day until the mid-1970s. But over the long haul, the tribal sovereignty movement mounted by Indian tribes and their elected leadership proved more influential, even though the will of every advocate was surly strengthened and propelled by American Indian Movement (AIM) activism, which peaked in the early 1970s. AIM combined the spiritual power of Native American with direct political activism. The larger tribal sovereignty movement focused on the right to self-determination and worked to implement President Nixon's new Indian policy. This broad-based movement resisted life under inequitable conditions by reclaiming tribal land, sovereignty, heritage, and pride. For the rest of the 20th century, it took a soldier's stance, leading to great strides in the modern era (circa 1970-present). This social engineering was propelled by tribal leadership, legal work, political advocacy, scholarship, grassroots activism by an entire race of people, and—above all—tribal governments committed to exercising sovereignty in the face of great adversity. The past two generations' quest for indigenous justice is a testament to Native America's will to survive.¹

Current Challenges Faced by Native America

Despite many historic advances during the 20th century, the modern tribal sovereignty movement has not completed its work, nor has tribal self-determination been fully attained in the United States. The engrained legacy of conquest is hard to eradicate in a colonized land. It

is deeply entrenched in the legal culture, mindset, and social policies of the nation. Though Americans are a fair-minded people who take great pride in their human rights values, the legacy of conquest has produced hard-to-solve social ills in tribal communities, nefarious legal doctrines, a Supreme Court trend toward trimming back hard-won Native American rights, and lingering inequities that shock the conscience. Against these powerful forces, Native America's stride toward justice has faltered in recent years.

The intransigent challenges faced by Native America today are familiar in most modern nations with inherited histories of colonialism. They operate to bar the door to the full recognition of indigenous human rights under the current U.S. legal framework. As a result, much work remains before Native America can enter the body politic on a fair and equitable basis, with the full measure of its inalienable indigenous human rights intact. Nonetheless, the last chapter on the American experiment cannot be written until this unfinished business is resolved and Native America stands in the light of justice. The key for entering this realm was beyond the reach of the forbears of the tribal sovereignty movement. Today it lies in implementing the landmark United Nations Declaration on the Rights of Indigenous Peoples (2007) ("UNDRIP") into the legal culture and social fabric of the United States. Though it formally endorsed the Declaration in 2010, the United States has stopped short of implementing it and has not discussed with Native American leaders how we should go about the task of implementing these UN standards, which are designed to protect the survival, dignity, and well-being of indigenous peoples worldwide though a human rights framework in the post-colonial era. To set the stage for the human rights phase of the tribal sovereignty campaign, this study surveys Native American activism from 1950 to the present.²

1 For further treatment, see Walter Echo-Hawk, *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Fulcrum Publishing, 2013), and *In The Court of the Conqueror: The Ten Worst Indian Cases Ever Decided* (Fulcrum Publishing, 2010).

2 This complex history is chronicled by a comprehensive

It is fitting to examine *activism*. After all, it powers social justice movements—though foot soldiers are guided by strategic leadership, scholarly research, and a philosophical foundation, as illustrated by the tribal sovereignty movement. This study defines *activism* as militant action for transformational social change *and* direct political action by elected tribal leadership using conventional methods.

This analysis begins by examining the vulnerable situation of Native America during the rise and growth of the United States, as Manifest Destiny spread harshly across the land. Then it will look at the precursors of modern indigenous activism from the 1950s and 1960s, leading to Nixon's landmark Indian Self-Determination Policy in 1970. Next, it summarizes the rise of modern Indian nations from 1970 to the present, documenting the major successes, failures, and trends experienced by this social movement. It will conclude with insights about the future struggle for Native American rights in the 21st century. This reconnaissance-level study covers these wide-ranging and complex topics in a summary fashion.

This study is respectfully dedicated to the fallen tribal leaders, advocates, and activists who are no longer with us. To name a few who stand out in the author's memory: Clyde Warrior (Ponca), Martha Grass (Ponca), Robert Thomas (Cherokee), Gerald Wilkinson (Cherokee), Browning Pipestem (Oto-Missouri/Osage), Vine Deloria, Jr. (Standing Rock Sioux), Russell Means (Lakota), Vernon Bellcourt (Chippewa), Wallace Black Elk (Lakota), Patrick Left Hand (Kootenai), and Rubin Snake (Ho-Chunk)—we stand on your shoulders and this is for you, baby! The Great Spirit works in mysterious ways: you ushered us to the very doorsteps of true *self-determination*, as that term is defined by modern international human rights law and applied to indigenous peoples in the UNDRIP. It is the paramount challenge of this generation to take up your mantle and enter into a human rights framework for defining Native American rights in the 21st century, preserving the best from existing law along the way and merging it with the UNDRIP to form a seamless, more just body of law. It is hoped this study will spark support for extending to Native America human rights enjoyed by the rest of humanity under modern international law.

The Enduring Legacy of Conquest

What is the "legacy of conquest?" Much has been written about the "Winning of the West." Schoolbooks and mass media tend to glorify

body of literature familiar to indigenous readers. This scholarship includes the following work, some of which is relied upon in this study: Daniel M. Cobb, *Native American Activism in Cold War America: The Struggle for Sovereignty* (University Press of Kansas, 2008); Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (Norton, 2005); Paul Chat Smith and Robert Allen Warrior, *Like A Hurricane: The Indian Movement from Alcatraz to Wounded Knee* (New York: New Press, 1996); Stan Steiner, *The New Indians* (Delta, 1968). See also Cobb (2008), n. 3, p. 210.

American history, but there is no escaping the dark side of Manifest Destiny: it took a terrible toll on Indian tribes. We will review this traumatic history and then examine how its legacy is still present in the legal culture, institutions, and social fabric of the United States and still felt by real people living in tribal communities. As will be seen, this inherited legacy from a bygone era mires America in neocolonialism today, long after the community of nations repudiated the institution of colonialism, in all of its known forms.

The legacy of conquest has left massive social trauma. In 1492, at least five million American Indians inhabited the land now comprising the United States. By 1900, only 250,000 were left alive. This four-hundred-year period witnessed an astounding population collapse of more than four million people—one of the largest ever seen in world history.³ The human race has experienced staggering “die offs” due to calamity and genocide.⁴ As terrifying as these horrific experiences are, only about five percent of the American Indians survived by 1900. This staggering death rate brought the Red population to the brink of extinction. The depopulation of the Pawnee tribe is a case in point: in the 1700s, the estimated population was 22,000, but it plummeted to only 635 people by 1900.

Scholars identify six major causes for the alarming population decline: (1) extended warfare in over forty “Indian Wars” over a one-hundred year period that included illegal use of force; (2) the spread of pandemic disease among tribal people by settlers during the course of colonial expansion; (3) the forcible separation of Indian children from their parents and tribes by the government during the 19th and 20th centuries and placement into non-Indian settings and institutions where the children could be brainwashed of their cultures for assimilation into the settler society; (4) the forcible removal of Indian nations from their lands and territories, resettlement, and the widespread dispossession of Indian land; (5) the destruc-

tion of tribal habitats, ecosystems and subsistence resource bases, which contributed to the tribal demographic collapse; and (6) the forcible assimilation and intentional destruction of tribal cultures, languages and religions by the government.⁵ This is a successive march of traumatic events from a tumultuous chapter in American history.

Social researchers describe the chronic aftereffects of traumatic events observed in human survivor populations as *posttraumatic stress disorder* (PTSD).⁶ That social pathology is seen in Native American communities with cataclysmic histories; and it is variously classified as “post-colonial stress disorder,” “historical trauma,” or “historical unresolved grief.”⁷ When left unhealed, trauma and unresolved grief are deposited by intergenerational transfer into the survivors’ offspring; and they inherit pathologies marked by the appalling life and mental health statistics that exist in tribal communities today.⁸ Those socio-economic indicators shock the conscience: (1) the highest poverty rate in the nation, with one in three Indians living on the reservation below the poverty line; (2) the highest rate of violent crime in the nation where American Indians are twice as likely to be victimized by violent crime as any other ethnic group, 34 percent of Native American women will be raped in their lifetime, and 39 percent will be subjected to domestic violence, mostly at the hands of non-Indians, according to Justice Department statistics; (3) the surviving remnants of Native American cultures, languages, tribal religions,

3 Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* (Norman: University of Oklahoma 1987), pp. 42-49.

4 During the Middle Ages, Europe lost more than 40% of its population due to mass death from war, disease, and famine; Rwanda suffered a sudden death toll in 1994 due to genocide, when 11% of the population was killed and only 29% of the Tutsi population survived the one-hundred-day nightmare; and in Europe only 37% of the Jewish population survived the Holocaust. See, J.M. Roberts, *The Penguin History of the World* (Oxford University Press, 1990), pp. 483-484; Philip Gourevitch, *We Wish To Inform You That Tomorrow We Will Be Killed With Our Families: Stories From Rwanda* (Pacadot 1999).

5 Thornton (1987). See Echo-Hawk (2010), pp. 399-420, and Echo-Hawk (2013), pp. 100-105, for further analysis.

6 See Thomas Ball, “Prevalence Rates of Full And Partial PTSD and Lifetime Trauma in a Sample of Adult Members of an Indian Tribe” (University of Oregon Dissertation, 1998); Maria Yellow Horse Brave Heart, “The Return to the Sacred Path: Healing the Historical Trauma and Historical Unresolved Grief Response among the Lakota through a Psychoeducational Group Intervention,” *Smith College Studies in Social Work*, 68 (3), June 1998, pp. 288-305.

7 Ibid.

8 Echo-Hawk (2013), pp. 100-105.

holy places, and intellectual property rights to their heritage and identity as under assault by the dominant society on many fronts; (4) the highest high school drop-out rate in the nation (36 percent) and low academic achievement in public schools that perpetuate culturally destructive curricula and educational policies proven to deny American Indian children equal education opportunity; (5) public media that is unaccountable to Native Americans, filled with racial stereotypes, but devoid of any real depictions of American Indians or journalistic coverage of their issues; (6) the lowest life expectancy rate in a nation, where the average American secures 60 percent more healthcare annually than Native Americans, and where the rate of alcoholism among Native Americans is 627 percent greater than in all other races, tuberculosis is 533 percent greater, diabetes is 249 percent greater, accidents are 204 percent greater, suicide is 72 percent greater, pneumonia and influenza are 71 percent greater, and homicide is 63 percent greater; and (6) by 1955 land held by American Indian tribes had shrunk to just 2.3 percent of its original size.⁹ These open wounds are socio-economic indicators of large-scale historical trauma and are seen as “normal,” because they have lingered for so long that they threaten to become permanent fixtures in Native American life.

The Indian Laws

In addition, the legacy of conquest deeply affects the law and is clearly visible in the legal culture. The task of justifying the unjustifiable fell to the courts. As might be expected, the jurists were hard-pressed. They had to depart from the high values that normally animate the nation. The Supreme Court resorted to the law of conquest and colonialism and fitted it to the American setting. The resulting body of law is known as federal Indian law. It provides the

9 Ibid., pp. 104-105.

legal framework for defining Native American rights.¹⁰

Federal Indian law contains three discernable and sometimes overlapping lines of judicial thought: (1) conquest; (2) colonization, and (3) the tribal sovereignty and protectorate principles.¹¹ This is a conflicting train of thought that produces inherent tension between the good and bad sides of the law. It is at once protective of the Indian nations by fostering their inherent tribal sovereignty exercised within a benign protectorate and also hampered by a dark side with anti-indigenous features that strive to undermine this regime. As a result, the law is not a reliable bulwark. Rather, it is a malleable framework that readily bends toward good or evil, help or harm—depending on the political winds or popular prejudice that sway ever changing judicial or legislative policy.

The doctrine of conquest was implanted by the Marshall Court when it defined tribal land rights in *Johnson v. M'Intosh* (1823).¹² The court wrote: “title by conquest is acquired and maintained by force” and the “conqueror prescribes its limits.” Conquest has a dark and menacing connotation. It bespeaks naked aggression, brute force, and raw power exerted in the appropriation of territory and in the subjugation and governance of inhabitants of a conquered land.¹³ Conquest is not normally considered a legitimate source of governmental power in a free and democratic society, for to do so would suggest that force, not consent of the governed, is the moral justification for government. Instead, democracies rely on constitutional law to govern their citizenry and guide

10 The leading treatise is *Cohen's Handbook of Federal Indian Law* (LexisNexis, 2012, Ed.).

11 Echo-Hawk (2013), pp. 105-125.

12 *Johnson v. M'Intosh*, 21 U.S. 543 (1823), ascribed to Indian tribes diminutive land rights and justified this result by the doctrines of discovery and conquest.

13 Merriam-Webster's Collegiate Dictionary (2005) defines “conquest” as the act of conquering, especially territory “appropriated in war” or acquired by “force of arms.”

relations with political subdivisions. In the United States, only Native America is subject to the law of conquest.

After *Johnson*, Indian law opinions quickly filled with metaphors of war.¹⁴ *Johnson* and its progeny allow the government to divest Indian land title, extinguish aboriginal land, and exercise dominion over Indian peoples and their property without their consent or normal constitutional protections. By 1955, the notion of conquest was firmly embedded; the Supreme Court assumed all Indian tribes were conquered and defined their rights through the lens of conquest. It upheld confiscation of aboriginal land without compensation:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, its was not a sale but the conqueror's will that deprived them of their land. In the language of Chief Justice Marshall, "however extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates under it, it becomes the law of the land and cannot be questioned."¹⁵

Obvious problems with this line of judicial thought place its continued use into question. First, the factual and legal basis for the doctrine rests on dubious ground.¹⁶ Second, the clothes of a conqueror do not fit a free and democratic society; it is repugnant to core values to define indigenous rights through the lens of

conquest, when the Bill of Rights protects the human rights and fundamental freedoms of everyone else. Finally, there is no room for the doctrine in modern international human rights law; it is anathema to human rights and rejected by the UNDRIP for defining indigenous rights.

The law of colonialism is another closely-related line of judicial thought. Chief Justice John Marshall imported that body of law from early international law in *Johnson*, when he adopted the doctrine of discovery and expanded it to fit the American setting. Professor Robert J. Miller defines the doctrine as:

an international law principle under which European countries, colonists and settlers made legal claims against the lands, assets, and human rights of indigenous peoples all over the world in the fifteenth through twentieth centuries. In essence, the Doctrine provided that newly arrived Europeans automatically acquired property rights in land and sovereign, political, and commercial powers over indigenous peoples without their knowledge or consent. When Europeans planted their flags and religious symbols in "newly discovered" lands, they were using the well-recognized legal procedures and rituals of the Doctrine of Discovery to demonstrate their country's legal claim to indigenous land and peoples. The doctrine was created and justified by feudal, religious, racial, and ethnocentric ideas, all premised on the belief of Europeans and Christian superiority over other cultures, religions, and races of the world.¹⁷

The Discovery Doctrine is a venerated foundational principle in the law of colonialism worldwide. Subsequent cases built on that foundation by adding principles of guardianship and plenary power premised upon the supposed racial and cultural inferiority of tribal people, as the courts constructed a robust—but noxious—body of colonial law.¹⁸ These cases did not envision a benign regime

14 The saber-rattling progeny of *Johnson* is surveyed in Echo-Hawk (2013), pp. 107-11, (2010), pp. 123-159.

15 *Tee-Hit-Ton v. United States* (1955), 348 U.S. 272, 322 (1955).

16 The United States acquired virtually all Indian land by purchase in peace and friendship treaties, not by armed force; and the incorporation of Indian nations into the United States through their treaties is not considered conquest as a matter of law. Echo-Hawk (2013), pp. 109-110.

17 Robert J. Miller, Lisa Lesage & Sebastian Lopez Escarcena, "The International Law of Discovery, Indigenous Peoples, and Chile," 89 *Neb. L. Rev.* 819, 820 (2011).

18 Echo-Hawk (2013), pp. 111-114.

administered for the benefit of the Indians, but rather, one that facilitates occupation of Red land since “the dominant purpose of the whites in America was to occupy the land.”¹⁹ As such, the law was placed into the service of colonialism. However, colonialism does not furnish an appropriate framework for defining Native American rights, because: (1) it suffers from pronounced racism; (2) the brand of colonialism that emerges from the dark side of federal Indian law is a far cry from human rights to self-determination, self-government and indigenous institutions in the UNDRIP; (3) instead of promoting the growth of democracy, its legal principles rest on unjust legal fictions and retard maturation;²⁰ and (4) colonial rule is condemned by the international order.

The third line of thought is the inherent tribal sovereignty doctrine and related protectorate principle described in *Worcester v. Georgia* and its progeny.²¹ These are protective principles. They mitigate notions of conquest and colonialism by declaring self-government an inherent power exercised by Indian nations acting as separate political communities in the domestic order under the protection of the United States. Four bedrock rules of law emerge from the *Worcester* framework: (1) Indian tribes enjoy a sovereign right of self-government that is not divested by their incorporation in the United States, free from interference by the states; (2) Indian treaties must be honored as the supreme law of the land; (3) the doctrine of discovery and edicts from Europe do not operate to divest Indian land or sovereignty; and (4) reservation borders are protective barriers against hostile states and settlers. Furthermore, the relationship between Indian nations and the United States

under *Worcester* resembles a protectorate common in international relations, where a weaker nation exists under the protection of a stronger one that is responsible for protecting its political integrity and well-being. Under this arrangement, Indian tribes are described as “nations,” not “colonies;” the stronger power is obliged and empowered to protect Indian nations, but does not have license to prey upon, exploit, or destroy them, nor divest their political, property, cultural, or human rights.²²

The protective line of judicial thought allowed Indian nations to make great strides in the modern era. However, it is constantly pitted against the dark side of the law; and until that internal tension is resolved, Indian nations can only advance so far under a legal regime plagued by dichotomy: they cannot be self-determining while captive to doctrines of conquest and colonialism because the two conditions are contradictory and incompatible. Furthermore, Indian policy under such a legal framework can become remarkably malleable; and it has historically experienced wide pendulum swings between notions of tribal sovereignty and self-determination on the one hand and policies of assimilation and termination on the other that are aimed at the disappearance of Indian tribes and culture. This problem is compounded by the absence of human rights in federal Indian law, which would stabilize policy swings by placing acceptable limits on the treatment of Native America. Unfortunately, the foundational cases expressly eschew “abstract” notions of justice and morality when defining Native American rights, and this has produced a strangely amoral body of law, bereft of human rights discourse or precepts, with an amazing prevalence of unjust judicial opinions.²³

19 Echo-Hawk (2010), p. 389 (citing Tee-Hit-Ton on p. 285, quoting from *Carino v. Insular Government of the Philippine Islands*, 212 U.S. 449 (1908)).

20 Echo-Hawk (2013), pp. 115-116.

21 *Worcester v. Georgia*, 31 U.S. 515 (1832). See also Echo-Hawk (2013), pp. 116-125.

22 Echo-Hawk (2013), pp. 121-125.

23 *Ibid.*, pp. 12-16. See also Echo-Hawk (2010) for a survey of the dark side of federal Indian law.

The Ongoing Political Dilemma

The legacy of conquest has also produced an enduring political dilemma. Ever since Manifest Destiny began, the political question has been: *What do we do about the indigenous peoples?* Excluded from the nation-building process, marginalized indigenous peoples find themselves living subject to a political system they did not make, had no role in developing or administering, and to which they did not consent. The issue of their incorporation is a critical ingredient for democracies founded on the consent of the governed because their legitimacy depends upon consensus and non-coercion in every sector of society, but this element is missing when indigenous peoples are concerned. All agree in abstract principle that they cannot remain relegated to the margin in the midst of a free and democratic society, living under laws and institutions that perpetrate oppressive colonial conditions from a bygone era. However, what is the best approach for bringing indigenous peoples into the national community?

This is a vexing question because their situation falls outside the general pattern for the growth and formation of nations and outside the normal mode for incorporating immigrants into the national community through voluntary assimilation. Tribal people already inhabit the nation: they predate it and do not want to shed their sovereignty, lands, and cultures in order to assimilate. To accommodate their unique situation and aspirations, host nations must go beyond the normal modes of incorporation and foster multicultural societies with a multinational dimension capable of bringing indigenous peoples into the national culture on a consensual basis with their indigenous human rights intact. This process has been described as “belated nation-building;”²⁴ and until it is completed the United States remains

mired in injustice and frozen in an age of neo-colonialism, with the core values and ideals enjoyed by everyone else are beyond the reach of indigenous peoples.

In the United States, conflicting approaches were taken by the government to incorporate Native Americans into the national community. The zigzagging methods historically ranged (1) from the *Worcester* protectorate system to the Indian Removal Movement that segregated the Indian race from the rest of society; (2) from exterminating the Indian race at the zenith of the Indian Wars, to peaceful policies of civilizing and Christianizing reservation Indian wards of the government for assimilation (circa 1886-1934); (3) from rebuilding tribal governments under the Indian Reorganization Act to dismantling them by the Indian termination and assimilation policies of the 1950s and 1960s; and (4) from termination back to restoring self-government and granting Indians control over their destiny under the Indian Self-Determination Policy from 1970 to the present. The debate over the best approach continues into the present day.²⁵ However, the UNDRIP may provide guidance toward resolving this perplexing political problem. It weighs in on the side of recognizing indigenous human rights under principles of justice, equality, non-discrimination, and good faith, and it validates the Indian Self-Determination Policy as the right approach. If this path is taken, the belated nation-building steps laid out by the UNDRIP can help the United States move beyond the legacy of conquest.

In sum, the legacy of conquest is seen and felt in the shocking social ills that stalk traumatized Native American communities, in legal inequities, and in the long-standing political problem of incorporation. Indigenous activism since 1950 has sought to redress these injustices. We now turn to this history.

24 Echo-Hawk (2013), pp. 127-128.

25 Ibid., pp. 130-131.

American Indian Activism Since 1950

As the legacy of conquest reached its zenith during the 1950s, indigenous life slumped to its lowest point. Relegated to living life at the bottom of a racially segregated society, impoverished Indian tribes faced their legal, social, economic, political, and cultural nadir. Their land holdings sank to the lowest point. Federal Indian law hit rock bottom.²⁶ Above all, national policy was aimed at making Indians disappear. During the Cold War, civil liberties ebbed under McCarthyism. "Better dead than red" hysteria left little tolerance for divergent indigenous cultures. While Hollywood westerns romanticized the past, the government pressed Indian tribes to the brink of extinction through policies intended to bring about the disappearance of Native America as the solution for the "Indian problem." This was the Termination Era (1943-1961).²⁷

Beginning in 1934, federal policy had fostered self-government by encouraging tribes to form modern governments. By World War II, fledgling governments existed, but few of the newly elected leaders had meaningful experience under federal paternalism. In the 1950s, Indian policy shifted dramatically: it sought to promote the disappearance of Native America altogether. Rapid assimilation of American Indians was the goal. This was accomplished through the abrogation of Indian treaties, terminating the government's political relationships with Indian tribes and its responsibilities towards American Indians, and ending Indian programs as soon as possible. To pave the way

for termination, Congress sought to resolve indigenous claims against the United States, once and for all, through the Indian Claims Commission.²⁸ The Bureau of Indian Affairs (BIA) created a massive program, as its top priority, to "relocate" Indians from the reservations to cities where they would assimilate into urban life. The BIA's program was administered by BIA Commissioner Dillon S. Myer, who was appointed in 1950. No better relocation czar could be found than Myer: he was fresh from the Japanese-American relocation program. As Director of the War Relocation Authority, he ran detention camps for interred Japanese-American citizens, and during his reign, the BIA had little sympathy for preserving the Indians' identity, culture, or society.²⁹

Termination became official policy in 1952, when Congress asked the administration for proposals "designed to promote the earliest practical termination of all federal supervision and control over Indians."³⁰ In House Concurrent Resolution 108 (1953), Congress declared a national policy to subject Indians to state jurisdiction and end federal wardship "as rapidly as possible."³¹ Many laws quickly followed to terminate specific Indian tribes. These statutes liquidated the assets of more than 70 tribes, terminated federal supervision over them, and turned the Indians over to the jurisdiction and control of the states. Those draconian measures were taken against the free, prior, and informed consent of the targeted tribes. They produced tragic results that worsened the socio-economic conditions of terminated Indians. The termination laws were intended

26 The 1955 Tee-Hit-Ton decision sanctioned one of the largest land-grabs in American legal history: the same court that freed black America from enforced segregation in *Brown v. Board of Education* (1954) ruled that Indians are "savage tribes" living in a conquered land and allowed government confiscation of aboriginal land without compensating tribal owners.

27 The Termination Era is described in Cohen's (2012), 51.06, pp. 84-93.

28 The ICC was established in 1946 to hear claims by Indian tribes for unfair dealings, historical wrongs, and the taking of Indian lands. See Cohen's (2012), pp. 87-88.

29 *Ibid.*, pp. 88, 85.

30 *Ibid.*, p. 89 (citing H.R. Rep. No. 82-2503 (1952).

31 *Ibid.*, p. 90.

to destroy tribal sovereignty and make Indians disappear into a nation that saw no place for them, their cultures, or governments in its midst.

Modern indigenous activism was birthed to resist that fate. Native America faced a grave challenge: a struggle for bare survival in a nation poised to stamp out the last vestiges of tribal life and culture. The National Congress of American Indians (NCAI), an inter-tribal political organization, formed in 1944 to combat termination policies.³² D'Arcy McNickle (1904-1977), who helped found the organization, provided early leadership. He was a leading indigenous writer and anthropologist from the Flathead Reservation who left an impressive body of published work.³³ Schooled at Oxford University, he worked under Indian Affairs Commissioner John Collier during the 1930s and 1940s. For three decades, he was "the strongest and most eloquent Native public advocate for Indian nationalism."³⁴ Early on, McNickle conceptualized the tribes' plight as a decolonization problem since they shared "the world experience of other native peoples subjected to colonial domination."³⁵ His international outlook was shared by indigenous activists of the termination era: they viewed Indian tribes as communities emerging from colonialism. This intelligentsia included activist thinkers such as McNickle; NCAI executive director Helen Peterson (Northern Cheyenne/Lakota); anthropologists Sol Tax and Robert K. Thomas (Cherokee); and the Association on American Indian Affairs' (AAIA) Oliver La Farge and attorney Felix S. Cohen. Using conventional political methods, they collaborated with tribal leaders to oppose termination. They fought defensive battles; political survival was the order of the day. The activists grappled to survive, struggled to avoid immediate wholesale termina-

tion, and worked to coax the government into reshaping its destructive policies.

The Red Power Movement

By 1960, the on-rush of termination began to slow. A new international order began to emerge when the United Nations formally condemned colonialism, while John F. Kennedy was elected president at home. In that year, the NCAI battle cry of "Self-determination, not Termination" became the goal for the decade. The legacy left by D'Arcy McNickle's and his colleagues' work in the 1950s propelled advocacy forward: they trained a new generation of Indian activists. In workshops that inculcated Indian-style activism, they bred a movement of college-educated youths that emerged in the early 1960s as "the leading edge of an incipient Indian nationalist movement."³⁶ Its cadre coalesced into a new intelligentsia imbued with a more militant brand of leadership—one grounded in tribal values, influenced by the larger civil rights movement, and willing to take a warrior's stance to restore tribal sovereignty, lands, and pride through self-determination. In 1961 the workshop students formed the National Indian Youth Council (NIYC).³⁷ Its leaders and growing ranks rejected the Indian establishment and denounced the conservative ways of NCAI in favor of direct militant action: the Red Power Movement of the 1960s was born.³⁸

Clyde Warrior (1939-1968), a Ponca Indian traditionalist from Oklahoma, was one of the NIYC leaders. As NIYC's president, he was a fire-brand orator who rejected the stamp of inferiority placed upon American Indians by the media and mainstream society. He proclaimed

32 www.ncai.org.

33 Wilkinson (2005), p. 99.

34 Ibid.

35 Cobb (2008), pp. 9, 11.

36 Ibid., p. 27.

37 www.niyc-alb.org.

38 See Steiner (1968), for a contemporaneous examination of NIYC that investigates the education explosion among Indian students and the origins of the Red Power Movement.

that “the sewerage of Europe does not flow through these veins.”³⁹ The sharp militant edge of NIYC activism, as seen in the fish-in protests in the Pacific Northwest and elsewhere in the mid-1960s, invigorated older NCAI leaders, and more aggressive elected tribal leaders, such as Wendell Chino (Mescalero Apache), soon emerged from its member tribes. A changing of the guard at NCAI occurred in 1964 when Vine Deloria, Jr. (1933-2005) assumed the helm as executive director.

Deloria (Standing Rock Sioux) was a gifted leader, with a great sense of humor. As a powerful scholar, theologian, attorney, author, and political activist, he melded conventional NCAI political action on the national scene with increased militancy. Working with new and more aggressive tribal leaders from the Indian tribes, Deloria’s leadership of NCAI (1964-1967) was deeply rooted in an indigenous philosophy that provided ingredients for the modern tribal sovereignty movement. His intellectual foundation provided ideology to “justify overturning termination” while sidestepping the civil rights movement, with its emphasis on integration and equality under the law.⁴⁰ Instead, Deloria placed Indian tribes on a different path to the Promised Land, charting a course toward the universal indigenous aspirations of self-determination and cultural integrity. Through his leadership and his ground-breaking books, such as *God Is Red* and *Custer Died For Your Sins*, Deloria transformed the thinking of a generation. In all likelihood, he was the “single greatest inspirational leader” of his day;⁴¹ Warrior and Deloria epitomized Indian activism of the 1960s.⁴² Together, they offered a clear voice for change in the waning years of the termination era, as the new leadership came of age.

With self-determination as its goal, indigenous activism was distinct from the civil rights movement. During the 1960s, Native American activism was largely a self-contained social movement fighting its own fights: it arose from Indian country to resist federal termination policies bent on destroying Native America, and it fought to replace those policies with Indian self-determination principles. Under Deloria’s leadership, NCAI’s drive for self-determination was seen as a distinct indigenous aspiration, not to be confused with black America’s quest for equality under the law; however, Native America would use the new civil rights laws, policies, and programs as vehicles to bend the government toward Indian self-determination. By the late 1960s, however, the civil rights and Black Power movements began to exert greater influence on young indigenous activists. For example, the NIYC broke ranks from NCAI in 1968 to join the Poor People’s Campaign, and its leaders, drawing from Black Power oratory, used sharp edged Red Power rhetoric, which AIM leaders adopted in the 1970s. At its core, however, Native American activism in the 20th century was completely indigenous—even though *ad hoc* alliances were made with civil rights leaders from time-to-time on particular issues. For example, civil rights leaders gave needed support to the Native American religious freedom campaign of the 1990s, which resulted in the passage of the American Indian Religious Freedom Act Amendments of 1994, and Native American activists have demonstrated alongside others in civil rights marches from the Poor People’s Campaign until the present day. To be sure, these alliances should be strengthened and institutionalized, so that people of color can take their rightful seats at the table.

The seeds of self-determination were planted during the Kennedy and Johnson Administrations. In response to the demands of Indian people, there was gradual shift away from the termination era, with increasing support from

39 Wilkinson (2005), p. 110.

40 Cobb (2008), p. 125.

41 Wilkinson (2005), p. 106.

42 This is the author’s opinion, recognizing that many activists and tribal leaders formed the national tribal movement in the 1960s. They are far too numerous to mention.

each successive president.⁴³ In these years, the United States became more accountable to minorities and the poor as the civil rights movement agitated for new policies, such as the “New Frontier,” “Great Society,” “War on Poverty,” and “New Federalism.” Native American activists sought to influence these policies, increase tribal involvement and control over the new federal programs, and force agencies to recognize a government-to-government relationship between the United States and Indian tribes. The concept of tribal control over federal programs opened doors to the government’s recognition of the Indian self-determination principle. Increased tribal control was a significant factor in the struggle for self-determination because this concept rests on the principle “that Indian tribes are, in the final analysis, the primary or basic government unit of Indian policy.”⁴⁴

The policy shift toward self-termination gathered momentum under the Johnson Administration (1963-1969). The BIA strongly opposed increased tribal control over federal programs. It fought to retain agency control over tribes and to perpetuate paternalism as the touchstones for Indian affairs. Thus, control over federal dollars and programs became a battleground. In this struggle, tribal advocates hijacked the “War on Poverty” and converted it into a vehicle for promoting Indian self-determination. They wrested significant local tribal control over reservation antipoverty programs from the Office of Economic Opportunity (OEO) and for the very first time gained control over federal dollars in Indian communities. OEO thus became an engine for promoting Indian self-determination. OEO Director Sargent Shriver spoke at an NCAI convention and presented the agency’s antipoverty mission in the language of Indian self-determination. His talk marked a gradual policy shift:

43 Cohen’s (2012), §1.07, p. 93.
44 Ibid., p. 94.

*White imperialism, white paternalism cannot be replaced by the paternalism of experts, the imperialism of professionals. The money is yours—because the whole basis of the poverty program is self-determination—the right of people to decide their own course and to find their own way.*⁴⁵

In subsequent years, much of the Johnson Administration’s Great Society and War on Poverty legislation included Indians. New programs treated tribes as viable local governments, capable of delivering services to their constituents. This was a major policy breakthrough. It was accomplished by conventional indigenous advocacy, coupled with militant grassroots activism, and it broke the BIA monopoly on Indian reservations.⁴⁶

As the decade ended, militant Native American activism came to the national stage. In 1968, NIYC broke ranks with NCAI and took to the streets in Washington, D.C., as the Red Power component of the Poor People’s Campaign. It provided a strong Indian presence in the protests, demonstrations, and arrests that followed. In March, President Johnson proposed “a new goal for our Indian program: A goal that ends the old debate about ‘termination’ of Indian programs and stresses self-determination [as] a goal that erases old attitudes of paternalism and promotes partnership and self-help.”⁴⁷ He issued an executive order creating the National Council on Indian Opportunity (NCIO) to coordinate federal programs in Indian Country and to promote tribal participation in them. In the same year, Dennis Banks (Chippewa) and Clyde Bellcourt (Chippewa) founded the American Indian Movement (AIM) in the Twin Cities.⁴⁸ The nascent group worked on urban issues and patrolled city streets to protect In-

45 Cobb (2008), p. 122.
46 Cohen’s (2012), p. 96.
47 Ibid. (quoting Lyndon Johnson, Special Message to Congress, March 6, 1968, in: Public Papers of the Presidents of the United States: Lyndon Johnson, 1968-69, 1 Pub. Papers 336).
48 Wilkinson (2005), pp. 137-138. AIM’s history is recounted in Smith and Warrior (1996), n. 3, supra.

dians from police brutality. In December 1969, Bay Area activists occupied Alcatraz Island, the abandoned federal prison. The occupiers were a group called Indians of All Nations, led by Richard Oakes (Mohawk) and Adam Nordwall (Red Lake Chippewa). Their eighteen-month occupation dramatized Indian issues in the national media.⁴⁹ By then, the termination era lay on its deathbed.

Indian Self-Determination

The crowning success of 1960s indigenous activism came in 1970, when President Nixon formally announced the Indian self-determination policy.⁵⁰ Working with NCIO policymakers, the Nixon Administration listened to Indian Country as it reviewed Indian policy, and on July 8 the President ushered in a new era. The new policy ended years of termination, assimilation, and paternalism in favor of an enlightened commitment to self-determination that promotes and fosters tribal self-government. President Nixon decisively repudiated the failed policies of the past, and he recognized that excessive federal dominance over Indian tribes retards their progress and denies Indian people an effective voice in their affairs. The new policy sees tribal governments as the primary units of Indian policy and fosters expanded tribal government control over Indian affairs. It has been uniformly embraced by Indian tribes and every Administration and Congress since 1970.

At the dawn of the Indian Self-Determination Era, indigenous militancy reached its zenith. The heyday of AIM activism took place in the early 1970s.⁵¹ Russell Means (1939-2012) joined AIM in 1970; and it began staging numerous protests, confrontations, and demonstrations across the country. These activities includ-

ed the Trail of Broken Treaties that led to the takeover and sacking of the BIA headquarters in Washington, D.C., in 1972; the border town confrontations in Custer, Rapid City, Pine Ridge, Gordon, and Scotts Bluff in 1972; and the dramatic seventy-one day occupation of Wounded Knee in 1973, which highlighted the activist crescendo and captured rapt national attention.⁵² The Wounded Knee occupation led to 562 arrests, and the Justice Department initiated a massive prosecution campaign calculated to bring AIM to its knees, similar to the government's campaign to stamp out the Black Panthers. After this remarkable period, AIM began to fade under the weight of internal factions and the debilitating Wounded Knee trials that harassed, consumed, and hampered AIM leadership for several years.⁵³ Nevertheless, this activism helped propel the tribal sovereignty movement into the modern era as Indian tribes worked to implement the Indian self-determination policy in every Indian community across the land.

A couple years after Wounded Knee, AIM member Leonard Peltier (Chippewa/Lakota) was arrested in Canada and extradited to stand trial in the United States for killing two FBI agents in a shoot-out on the Pine Ridge Indian Reservation. Though represented by prominent attorneys, Peltier was convicted in 1977 and sentenced to two consecutive life sentences. Doubts surround his guilt and the fairness of his trial. Over time, his case became a *cause célèbre* among prominent activists worldwide who consider him a political prisoner. However, all appeals sustained the conviction. Peltier still sits in prison, where he continues his activism behind bars. Though largely forgotten in his own land, Peltier is remembered abroad, perhaps as the best known American Indian of all time.

In retrospect, every social movement has room for militant activism as one prong for

49 Wilkinson (2005), pp. 134-137.

50 Nixon Special Message to Congress, 213 Pub. Papers of the President: Richard Nixon 564 (July 8, 1970) pp. 564-567.

51 See Smith and Warrior (1996).

52 *Ibid.*, pp. 171-244.

53 *Ibid.*, p. 269.

social change, including the tribal sovereignty movement. NIYC provided a spark in the 1960s. In the 1970s, AIM brought strength to Native America in several ways. First, its leaders were excellent agitators for change and powerful orators. Second, AIM reached out to the traditional community to forge an alliance that melded political activism with the spiritual power of Native America. This synergy infused the tribal sovereignty movement with traditional values and pride and strengthened the will of every advocate for years to come. Finally, AIM effectively crossed over into mainstream consciousness and once there, if only for a moment, told America that its native people are still here and still relevant. Even though AIM unraveled before the end of the decade and NIYC faded after its potent Red Power leaders passed into the Spirit World, their legacy endures to the present.⁵⁴ Both activist organizations admirably fulfilled their duty and discharged their role as the militant prong of the tribal sovereignty movement. We are indebted to them. The more conventional work of elected tribal leaders, mainstream political advocacy groups, and their lawyers all benefited from the legacy of AIM and NIYC in doing the yeoman's chores since 1970 that led to the rise of modern Indian nations.

The Tribal Sovereignty Movement

Within the framework established by the Indian self-determination policy and federal Indian law, Indian nations have made great nation-building advances over the past two generations, leading to the rise of modern In-

dian nations. The tribal sovereignty movement emerged out of the activism of the 1950s and 1960s, and at every step along the way, the tribes and their advocates deployed both militant activism and more conventional political methods to coax all three branches of the federal government to implement Indian self-determination.

On the legislative front, Congress holds the responsibility to implement and promote meaningful self-determination at the federal level. Congress almost always enacts such laws at the urging of Indian advocates and lobbyists. These measures affect Indian life, property, governance, culture, and policy. A comprehensive statutory survey is beyond the scope of this study, as the laws fill volume 25 of the United States Code. However, a short list of some of the growing body of Indian statutes includes laws affecting the following sectors:

- ⇒ increased tribal control over programs and services to Indians (Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et. seq.*);
- ⇒ Indian children (Indian Child Welfare Act, 26 U.S.C. § 2801 *et. seq.*; Indian Tribal Justice Act, 25 U.S.C. § 3601 *et. seq.*);
- ⇒ education (Improving America's Schools, 20 U.S.C. § 7801 *et. seq.*; Indian Self-Determination and Education Assistance Act, *supra*; Tribally Controlled Schools Act, 25 U.S.C. § 2501 *et. seq.*; Tribally Controlled Community Colleges Act, 25 U.S.C. § 1801 *et. seq.*);
- ⇒ law enforcement and the administration of justice (Violence Against Women Reauthorization Act of 2013 (Title IX); Indian Law Enforcement Reform Act, 25 U.S.C. § 28011 *et. seq.*; Indian Tribal Justice Act, 25 U.S.C. § 3601 *et. seq.*);

⁵⁴ *Ibid.*, pp. 269-279. Despite well-earned praise for AIM's legacy, native commentators also observe two major weaknesses in AIM. First is its lack of clear goals, and second is its lack of a strong intellectual foundation, as compared to activists of the 1950s and 1960s. Another AIM legacy is its role in founding the International Indian Treaty Council (IITC) in 1974. The IITC is among the indigenous NGO's that labored for over twenty years in UN negotiations leading to UN approval of the landmark UNDRIP, discussed earlier in this essay.

- ⇒ housing (Native American Housing Assistance and Self-Determination Act, 25 U.S.C § 4101 *et. seq.*);
- ⇒ health (Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et. seq.*);
- ⇒ natural resource management (American Indian Agricultural Resource Management Act, 25 U.S.C. § 3701 *et. seq.*; National Indian Forest Resource Management Act, 25 U.S.C. § 3101 *et. seq.*);
- ⇒ religious freedom (American Indian Religious Freedom Act of 1978, 42 U.S.C. §1996; American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. §1996a);
- ⇒ protection of cultural and historical resources (National Historic Preservation Act, 16 U.S.C. § 470 *et. seq.*);
- ⇒ repatriation (Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001, *et. seq.*; National Museum of the American Indian Act, 20 U.S.C. §§80q-80q-15);
- ⇒ language (Native American Language Act of 1990, 25 U.S.C. §2901 *et. seq.*);
- ⇒ land return (Alaska Native Claims Settlement Act, 43 U.S.C. §1603 *et. seq.*; Maine Indian Land Claims Settlement Act, 25 U.S.C. §§ 1721 *et. seq.*);⁵⁵
- ⇒ economic development (Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721; Indian Tribal Government Tax Status Act, 26 U.S.C. §7871; Indian Financing Act, 25 U.S.C. § 1451 *et seq.*; Indian Self-Determination and Education Assistance Act, *supra*).

Many of these landmark laws were hard-fought legislative victories by Indian tribes and affected Native American sectors, often bringing

⁵⁵ In addition, there are several statutes returning particular sacred sites located on federal lands to Indian tribes.

forth issues from the grassroots level into the halls of Congress, where innumerable struggles, large and small, take place. The tribes and grassroots activists often rely on a small cadre of highly skilled Native American lobbyists inside the Beltway to guide them through the legislative waters, with assistance from tribal attorneys and political support by the NCAI and Washington-based AAIA organizations. Though many issues begin with grassroots activism, they are usually resolved at the national level in the legislative arena using conventional political methods, illustrating how militant activism can work with more conventional advocacy.

In the judicial branch, the Supreme Court has confirmed the self-government powers of Indian tribes derived from *Worcester v. Georgia* (1833) and its progeny. In the modern era of federal Indian law, the Supreme Court has recognized tribal government powers to tax, regulate persons and activities in Indian country, adjudicate disputes through tribal courts, and punish Indians (and sometimes non-Indians) who violate tribal law.⁵⁶ Social movements need lawyers of a certain kind, but the story of tribal lawyers remains untold.

Because courts are the “great equalizers” and the fate of Native Americans is highly dependant on the law (perhaps more than any other segment of society), litigation and legal advocacy played a key role in the rise of modern Indian nations. In 1970, there were fewer than

⁵⁶ A short list of Supreme Court cases that support the self-determination policy includes: *United States v. Lara*, 541 U.S. 193 (2004) (upholding the power of Congress to bolster the inherent power of Indian tribes to punish Indians of other tribes for violation of tribal law); *California v. Cabazon*, 480 U.S.207 (1987) (no state power to regulate gaming by an Indian tribe on its reservation); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (recognizing tribal self-government powers and sovereign immunity from suit); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (tribal regulation of hunting and fishing by non-Indians on the reservation upheld); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribal power to tax resource development on the reservation by non-Indians upheld).

a dozen Native American attorneys in the entire nation; only one or two law schools taught Indian law; and it was a top priority to recruit Indian law students. In this same year, the legal prong of the tribal sovereignty movement was born with the founding of the Native American Rights Fund (NARF).⁵⁷ NARF is governed by an indigenous board of directors, and most of its attorneys have been Native Americans. The first generation litigated with vision and the Great Spirit was at their side.⁵⁸ Since 1970, NARF engaged in over ninety Supreme Court cases, in various capacities, and provided extensive legislative advocacy. Over that span, NARF worked at the center of the movement, litigating alongside local counsel on behalf of Indian tribes, Alaska Natives, Native Hawaiians, and indigenous organizations. Most ranking law schools now offer a rigorous Indian law curriculum, and gifted native law professors provide vibrant scholarship. Today, legal ranks in Indian country are formidable: over two thousand indigenous attorneys practice law alongside non-Indian lawyers. Many tribes have “lawyered-up” to run their governments, operate businesses, and defend tribal interests.

In the executive branch, every president since 1970 has uniformly subscribed to the Indian self-determination policy. It is implemented through executive orders that promote the government-to-government relationship, require agency consultation with Indian tribes, and protect various indigenous rights. In this vein, President Obama argues for a “nation-to-nation relationship” between the United States and Indian tribes.

As a result of these successes, some 500 federally recognized Indian nations are embedded

in the American political landscape. The largest tribes are the Navajo Nation, with nearly 300,000 members and a territory that spans Arizona, New Mexico, and Utah, and the Cherokee Nation, with over 800,000 members in Eastern Oklahoma. Both have storied histories, vibrant cultures, and operate enormous, highly sophisticated governments. Other large Indian nations include the Great Sioux Nation, with over 150,000 members on several reservations on the northern plains; the Apache tribes of the American Southwest, with almost 100,000 members; and the Choctaw, Chickasaw, and Muscogee-Creek Nations, with 200,000 members in Oklahoma.⁵⁹ In the 21st century, modern Indian nations exercise government authority over their lands and peoples under federal and tribal law.⁶⁰ In the lower forty-eight states, most tribal governments are full-service indigenous institutions: they enact laws and levy taxes; operate courts, police forces, fire departments, medical facilities, businesses, colleges, schools, museums, and housing programs; and they provide jobs, infrastructure, social services, natural resource protection, and economic development.

During the Indian Self-Determination Era, Indian tribes have worked to implement the self-determination policy. They also collaborated with Alaska Natives on national issues of common concern and supported Alaskan struggles.⁶¹ NARF opened an Anchorage office to provide legal representation for native villages and

⁵⁷ www.narf.org.

⁵⁸ A partial list of the first generation includes: David H. Getches, John Echohawk (Pawnee), Bruce R. Green, Charles Wilkinson, F. Browning Pipestem (Oto-Missouri/Osage), Yvonne K. Knight (Ponca), Walter R. Echo-Hawk (Pawnee), Joe Brecher, Rick Collins, and Thomas Fredericks (Mandan-Hidatsa).

⁵⁹ Various maps for the American Indian population, distribution, and tribal location are published by government agencies: Census Bureau, www2.census.gov/geo/maps/special/AIANWall2010/AIAN_US_2010.pdf; BIA, www.bia.gov/cs/groups/public/documents/text/idc013422.pdf. See also <http://upload.wikimedia.org/wikipedia/commons/0/02/Bia-map-indian-reservations-usa.png>.

⁶⁰ Cohen’s (2012), §§4.01-4.07, pp. 203-379.

⁶¹ The Alaska Federation of Natives (AFN) (www.nativefederation.org) is the leading advocacy group for Alaska Natives; and the Alaska Native Brotherhood (ANB) and its counterpart Alaska Native Sisterhood (ANS) were founded in 1912 as the first and oldest indigenous civil rights group in the United States. See www.anbangsc.org.

peoples in Alaska. NARF also collaborated on Native Hawaiian issues and helped create the Native Hawaiian Legal Corporation.⁶² Native Hawaiians, American Indians, and Alaska Natives have collaborated on national issues affecting their interests during the modern era, including legislative work that led to the passage of the landmark Native American Graves Protection and Repatriation Act of 1990. In the 1980s, this activism expanded to the international level, when Native Americans joined the international indigenous movement that took shape at the United Nations during the mak-

ing of the UNDRIP.⁶³ The UN began drafting the UNDRIP in 1985. By the time it was approved by the General Assembly in 2007, a large Native American contingent had joined the movement to demand human rights for tribal peoples around the world—including the Navajo Nation, Six Nations Confederacy, Lummi Nation, Citizen Potawatomie Nation, Sac and Fox Nation, Cherokee Nation, Muscogee-Creek Nation, United Keetoowah Band of Cherokees, Inuit Circumpolar Conference, NCAI, NARF, International Indian Treaty Council (IITC), Indian Law Resource Center, and many others.

The Human Rights Era

Despite impressive nation-building advances under existing domestic law and policy during the Indian self-determination era, Native America has not reached the Promised Land. Indigenous activism has failed to root out the engrained legacy of conquest, as seen by hard-to-solve social ills in tribal communities, nefarious legal doctrines, and the Supreme Court's trend toward trimming back hard-won Native American rights.⁶⁴ These forces foster lingering inequities in at least nine major problem areas:

1. Congress can curtail self-determination and self-government at will.
2. The Supreme Court can trim tribal sovereignty at will.
3. Equality and non-discrimination under the law are beyond reach as long as notions of conquest, colonialism, and racism flourish in the law.
4. Survival and security are jeopardized in tribal communities, which are some of the most violent places in America, yet the law

prevents tribal governments from protecting their citizens from violence at the hands of non-Indians.

5. Tribal culture is under assault due to a failure by the government to effectively protect indigenous holy places, indigenous habitat, intellectual property rights, and endangered languages or to provide culturally appropriate education and an effective right to transmit culture to future generations.
6. Hard-to-solve social ills blossom in a just nation simply because public education and media are unaccountable to Native America.
7. The political relationship between the United States and Indian tribes falls short of the protectorate relationship mandated by *Worcester*, because indigenous participation in government decision-making fails to meet UNDRIP standards and because of the federal government's failure to recognize the self-determination rights of Native Hawaiians and Alaska Natives under the existing law and policy framework for these indigenous peoples.

⁶² www.nhlchi.org.

⁶³ Echo-Hawk (2013), pp. 27-38.

⁶⁴ *Ibid.*, pp. 99-132.

8. Until the United States takes the human rights duties prescribed by the UNDRIP to heart, deplorable Native American socio-economic conditions, shocking gaps in physical and mental healthcare, and other indicators of societal trauma will remain permanent fixtures.
9. Native America will continue to be plagued by second-class land rights and no indigenous habitat rights until the UN standards regarding these rights are fully realized in the United States.⁶⁵

These problems are end-products of the current legal regime. They bar the door to *self-determination* as defined by international human rights law and the UNDRIP. Self-determination is a fundamental principle of the highest order fixed in international law in two respects. First, it adheres to every sovereign nation and is also a core human right for all peoples of humanity.⁶⁶ Second, as a human right, it means that all peoples are entitled to be in control of their own destinies and to live within governing bodies and political orders that are devised accordingly.⁶⁷ This is a universal human right, accorded to the human family by the UN Charter, UN treaties, and international human rights law. Article 3 of the UNDRIP extends this right to indigenous peoples in the same language and without qualification: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." By contrast, U.S. law does not see Indian self-determination as an inherent human right. Instead, the

Supreme Court says it is not a fundamental right nor is it infeasible, because Congress may abolish tribal government outright.⁶⁸ Furthermore, there are disturbing shortfalls between extant U.S. law and policy and the UN standards.⁶⁹

Consequently, there is an urgent need to bring U.S. law into compliance with UN human rights standards. As stated earlier, several Indian tribes, along with the NCAI, NARF, IITC, and other NGOs, joined the international indigenous movement to secure UN approval of the UNDRIP. Now our task is to implement it in the United States. Advocates must turn to modern international human rights law and take Native America beyond the existing framework into the human rights realm. We have come far, but Native Americans can only advance so far under an unjust legal regime. Without a stronger and more just human rights foundation, our dignity, survival and well-being remain at stake. Indigenous advocates must inform themselves about international human rights law, overcome inertia, and set aside resources for a national campaign to implement the UNDRIP.⁷⁰ This march to justice is not unlike the pivotal times when our forbears girded themselves to halt termination and implement the Indian self-determination policy. We must take up their mantle and stride toward human rights, so tribal peoples can stand in the light of justice.

A good starting place is *The Situation of Indigenous Peoples in the United States of America* (2012) by S. James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples. This UN report provides recommendations for implementing the UNDRIP in the United States.⁷¹ He submitted the report after an official mission to the United States to examine

65 These nine problem areas are further elaborated on in Echo-Hawk (2013).

66 S. James Anaya, *Indigenous Peoples In International Law* (New York, Oxford: Oxford University Press, 1996), p. 75.

67 S. James Anaya, "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era," in: Claire Charters and Rodolfo Stavenhagen (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen, International Work Group for Indigenous Affairs, 2009), p. 187; Echo-Hawk (2013), pp. 43-45.

68 Echo-Hawk (2013), p. 184.

69 *Ibid.*, pp. 183-217.

70 *Ibid.*, pp. 221-279.

71 S. James Anaya, *The Situation of Indigenous Peoples in the United States of America*, U.N. Doc. A/HRC/21/54 (2012).

the state of indigenous rights in our nation, to consult with the federal government and Native leaders, and to identify barriers that impede compliance with the UNDRIP standards. The report is a catalyst for change that points the way to the Promised Land. It concludes that:

Indigenous peoples in the United States [...] face significant challenges that are related to widespread historical wrongs and misguided government policies that today manifest themselves in various indicators of disadvantage and impediments to the exercise of their individual and collective rights.⁷²

It made four major findings: (1) there is a present-day legacy of historical wrongs, which is apparent in conditions of disadvantage that are not happenstance, but which stem from a history of colonization, dispossession, discrimination, and acts of brutality committed against indigenous peoples;⁷³ (2) existing federal programs need to be improved upon and made more effective; (3) new measures are needed to redress persistent deep-seated problems related to historical wrongs, failed policies of the past, and continuing systematic barriers to the full realization of indigenous human rights and to advance the nation toward reconciliation with its indigenous peoples; and (4) the UNDRIP is an important guide for redressing the identified problems. The report expresses the need for a genuine movement to resolve historical trauma in a national program of reconciliation. Without closing the wounds, the report predicts, Native Americans will remain in

an unstable position—subjected to conditions of disadvantage and inequities—and the moral standing of the United States will suffer.⁷⁴

Finally, the UN report makes recommendations for all three branches of the federal government to bring U.S. law and policy into compliance with UN human rights standards.⁷⁵ It recommends that the president issue a directive to all executive agencies to adhere to the Declaration in all decision-making concerning indigenous peoples and asks the president to follow up on Congress's Native American apology with a program of reconciliation developed in consultation with them.⁷⁶

The report suggests that any legislation pertaining to indigenous peoples should be adopted in consultation with them and that Congress should act promptly on indigenous proposals to protect indigenous rights.⁷⁷ The lawmakers should also hold hearings to educate themselves about UNDRIP and consider special measures needed to implement these standards. It identifies specific legislative reforms necessary to achieve national reconciliation, including a congressional resolution affirming the UNDRIP as the policy of the United States. And it tells Congress that it should curb the exercise of legislative power over indigenous peoples by refraining from unilaterally extinguishing their rights, based upon the understanding that such power is morally wrong and contrary to the United States' international human rights obligations.⁷⁸

Finally, the report addresses the role of the courts in defining indigenous rights. It expresses concern over the limitation of those rights by the courts "on the basis of colonial era doctrine that is out of step with contemporary hu-

72 § 85, p. 20.

73 See §§ 30-66, pp. 10-16, listing conditions of disadvantage in ten areas: (1) poor socio-economic conditions; (2) violence against indigenous women; (3) indigenous land loss and exploitation, including habitat despoliation; (4) failure to protect indigenous holy places; (5) taking indigenous children from tribal families and settings; (6) failure to heal open wounds from historical events that still haunt tribal communities; (7) a need for courts to strengthen and protect, not diminish, self-government rights; (8) the lack of federal recognition of indigenous groups and inadequate recognition procedures; and special problems in securing indigenous rights in (9) Alaska and (10) Hawaii.

74 §§ 72-82, pp. 17-19.

75 §§ 94-106, pp. 21-23.

76 §§ 94-97.

77 § 98.

78 §§ 98-102.

man rights values.”⁷⁹ It urges the judiciary to discard such doctrines in favor of

*jurisprudence infused with the contemporary human rights values that have been embraced by the United States, including those values reflected in the United Nations Declaration on the Rights of Indigenous Peoples. Furthermore, just as the Supreme Court looked to the law of nations of the colonial era to define bedrock principles concerning the rights and status of indigenous peoples, it should now look to contemporary international law, to which the Declaration is connected, for the same purposes.*⁸⁰

The report asks the courts to “interpret, or re-interpret, relevant doctrine, treaties and statutes in light of the Declaration, both in regard to the nature of indigenous rights and the nature of federal power.”⁸¹

These sweeping recommendations require changes by all three branches of the federal government. Many areas of U.S. law and policy do not meet the UNDRIP standards.⁸² However, if the proposed changes are made, America can redress its inherited legacy of conquest. This will allow the nation to heal in several important respects and move beyond a painful past as a stronger, more just nation.

First, the hard-to-solve social ills and unhealed historical trauma found in tribal communities can be resolved in a human rights framework through the remedial measures prescribed by the UNDRIP. This national program of reconciliation is specifically designed to redress and heal such problems.

Second, if the courts embrace and apply UN standards, the law pertaining to indigenous peoples will be reformed, strengthened, and made more just. On the policy level, the hu-

man rights principle will stabilize the wide pendulum swings in Indian policy. As a result, the internal tensions in federal Indian law will be resolved and the finest in American legal culture will be strengthened and made more dependable.

Third, the vexing political question about the best way to incorporate indigenous peoples into the body politic can be answered: the belated nation-building steps called for by the UNDRIP are aimed at bringing Native Americans into the national community on a consensual, just, and equitable basis, with their indigenous human rights intact.

Fourth, recognizing and protecting indigenous cultures, ways of life, and habitats have a healthy environmental by-product: the development of a social ethic to guide the way that Americans look at the land (and animals and plants that grow upon it) and sea (and all life in the ocean).⁸³ Our nation sorely needs an ethical foundation with broad consensus to address and solve the growing environmental crisis, but it has been unable to find such an ethic. Traditional Native American religions and the value systems that emerge from their hunting, fishing, and gathering cosmologies provide necessary ingredients for this moral compass. This wisdom shows humans how to comport themselves to the natural world. There is a congruity between protecting the surviving cultures of the natural world and protecting the natural world itself.

Today, tribal peoples in the United States are studying the UNDRIP and evaluating its possibilities, but they have not yet mounted a focused national movement to implement the Declaration. The UNDRIP serves as the basis for a new Human Rights Era in federal Indian law and policy. We stand at the beginning of this era. It is the implementation of human rights in a national program of reconciliation

79 § 103.

80 § 104.

81 § 105.

82 See The Situation of Indigenous Peoples in the United States of America, supra; Echo-Hawk (2013), pp. 99-217.

83 Ibid., pp. 133-155.

that will inform the future of Native American activism. Why should grassroots activists from other social justice movements care about implementing the international human rights framework for the Red Indians of America? At its core, social justice activism springs from a truth rooted in long human experience: life is intolerable under unjust conditions. The redress of injustice has always propelled activism. This value gives birth to great social movements. The human rights situation of Native Americans is a case in point, according to the 2012 UN report. To be sure, the United States embarked on a path to strengthen the rights of its native peoples many years ago, when President Nixon announced the Indian self-determination policy. The UNDRIP helps complete the process. By extending these rights to Native

America, the U.S. can complete its nation-building process in the best chapter of the American Revolution. This cannot be done without widespread activism. Activists helped black America rid the law of racial segregation, gain equality under the law, and struggle for civil rights. The fruits of the civil rights movement are seen all around us. Modern-day activists can follow this tradition to support indigenous efforts to press for human rights in Native America.

On the international level, all activists have a direct interest in this matter: the United States cannot become the human rights champion that its ideals demand until it redresses its own legacy of conquest. From where the sun now stands, let us work toward these ends.

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