COMPLIANCE OR EVASION?

An Assessment of Tribal Sovereignty in the United States on the 10th Anniversary of the UN Declaration on the Rights of Indigenous Peoples

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Abstract

On September 13, 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples. Initially, the United States voted against adoption of this accord, one of only four countries to do so. In December 2010, however, the United States reversed course (as did the other "no" voting countries) and elected to endorse it. In this essay, I contend that, at best, the United States has an uneven record in terms of compliance with the Declaration. Nonetheless, in endorsing it in 2010, the United States purported to align its long-standing recognition of tribal nations as "political entities that have inherent sovereign powers of self-governance," with the goals and aspirations of the Declaration. For the sake of brevity, this assessment will examine only a select number of articles from the Declaration, with the aim of analyzing those articles whose subject matter has given rise to important developments in the federal-tribal political and legal relationship.

Résumé

Le 13 septembre 2007, l'Assemblée générale des Nations Unies adoptait la déclaration sur les droits des peuples autochtones. Les États-Unis faisaient initialement partie des quatre États à s'être opposés à l'adoption de cet accord. Cependant, en décembre 2010, les États-Unis renversèrent leur position (à l'instar des autres États ayant voté « non ») et choisirent de la supporter. Dans cet essai, nous soutenons que les États-Unis ont, au mieux, un bilan partagé en termes de conformité avec la déclaration. Néanmoins, en la signant en 2010, les États-Unis ont entendu s'aligner avec leur tradition séculaire de reconnaissance des nations tribales comme « entités politiques ayant des droits souverains inhérents à l'auto-administration, » avec les objectifs et aspirations de la déclaration. Par soucis de brièveté, cette étude examinera seulement un nombre restreint d'articles de la déclaration, avec l'objectif d'analyser ceux dont l'objet a donné lieu à d'important développements dans le cadre de la relation politique et juridique entre les tribus et le gouvernement fédéral.

ABOUT N. BRUCE DUTHU

N. Bruce Duthu is the Samson Occom Professor and former Chair of Native American Studies at Dartmouth College, which he joined in 2008. Prior to that, he was Professor of Law at Vermont Law School, where he served as Vice-Dean for Academic Affairs.

A tribal member himself (he is an enrolled member of the United Houma Nation of Louisiana), Pr. Duthu is an internationally recognised scholar on Native American Law and Policy. He has been an invited Professor at Harvard Law School, the University of Sydney (Australia), the University of Wollongong (Australia), and the University of Trento (Italy). He has lectured on indigenous rights throughout the globe, from Russia, China, and Bolivia to New Zealand and Canada, amongst others. He also practiced law as an attorney prior to beginning his academic career and regularly serves as a consultant on Native American questions for tribes, governmental entities, universities, and private institutions.

Amongst Professor Duthu's prolific work, it is worth mentioning *Shadow Nations: Tribal Sovereignty and The Limits of Legal Pluralism* (Oxford University Press, 2018) and *American Indians and the Law* (Viking/Penguin Press, 2008). He was also a contributing author of F. S. Cohen's *Handbook of Federal Indian Law* (Matthew Bender Co., 2005), the leading treatise in the field of federal Native American law. N. Bruce Duthu's analysis in this field can also be appreciated on screen with *Dawnland,* a 2018 documentary film on the legacy of Maine's Indian child welfare system which he co-produced with Adam Mazo.

Pr. Duthu visited the Sorbonne Law School in October 2017, where he gave a lecture on the assessment of tribal sovereignty in the United States in light of the UN Declaration on the Rights of Indigenous People. This was no easy task, for he was faced with an audience mostly composed of European students and researchers (the author of these lines included) with close to no prior knowledge in the field of indigenous rights and Native American Studies in particular. Pr. Duthu did not shy away from the challenge and, insofar as it is permitted for a young fellow to assess the work of a distinguished Professor, his two-hour lecture was quite fascinating. It is this conference that constitutes the basis of the present essay, which the Sorbonne Student Law Review is honoured to publish in its inaugural issue. We hope that our readers will find here a broad yet detailed insight into the field of indigenous rights and Native American Studies.

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À PROPOS DE N. BRUCE DUTHU

Bruce N. Duthu est Professeur Samson Occom et ancien titulaire de la chaire d'études des natifs américains à l'Université de Dartmouth, qu'il a rejointe en 2008. Il était, avant cela, Professeur de droit à l'École de droit du Vermont, ou il fut vice-doyen des affaires académiques.

Lui-même membre d'une tribu (il est membre enrôlé de la Nation Unie Houma de Louisiane), Pr. Duthu est un universitaire internationalement reconnu dans le domaine du droit et de la politique des natifs américains. Il a été Professeur invité à l'École de droit de Harvard, l'Université de Sydney (Australie), l'Université de Wollongong (Australie) et à l'Université de Trente (Italie). Il a donné des conférences sur les droits autochtones à travers le monde, de la Russie, la Chine ou la Bolivie à la Nouvelle-Zélande ou au Canada, entre autres. Il a également exercé la profession d'avocat en droit privé avant d'entamer sa carrière universitaire et intervient régulièrement comme consultant sur les questions relatives aux natifs américains à la fois auprès de tribus, d'entités gouvernementales, d'universités et d'institutions privées.

Parmi les travaux du Professeur Duthu, on peut mentionner *Shadow Nations: Tribal Sovereignty And The Limits Of Legal Pluralism* (Oxford University Press, 2018) et *American Indians and the Law* (Viking/Penguin Press 2008). Il a également contribué à l'ouvrage de F. S. Cohen, *Handbook of Federal Indian Law* (Matthew Bender Co., 2005), traité de référence sur le droit fédéral des natifs américains. L'analyse de Bruce Duthu dans ce domaine peut également être appréciée à l'écran avec *Downland*, un documentaire sorti en 2018 sur l'héritage du système de protection des enfants indiens dans le Maine, qu'il a coproduit avec Adam Mazo.

N. Bruce Duthu a été invité à l'École de droit de la Sorbonne en octobre 2017 ; il y a donné une conférence sur l'évaluation de la souveraineté tribale aux États-Unis au regard de la déclaration sur les droits des peuples indigènes. La tâche n'était pas simple puisqu'il faisait face à un public d'étudiants et de chercheur (l'auteur de ces lignes compris) n'ayant presque aucune connaissance dans ces domaines. Pr. Duthu n'a pas reculé devant ce défi et, s'il est permis à un jeune chercheur d'évaluer le travail d'un Professeur renommé, ces deux heures de conférence furent fascinantes. C'est cette présentation qui constitue la base du présent essai, que la Revue juridique des étudiants de la Sorbonne est honorée de publier dans son numéro inaugural. Nous espérons que nos lecteurs y trouveront un aperçu varié tout en étant détaillé du domaine des droits des peuples indigènes et de l'étude des natifs américains.

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INTRODUCTION

On September 13, 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (hereinafter Declaration)[1]. Initially, the United States voted against adoption of this accord, one of only four countries to do so. In December 2010, however, the United States reversed course (as did the other "no" voting countries) and elected to endorse the Declaration[2].

The United States' initial reluctance to sign on to the Declaration may seem puzzling, especially in light of the fact that international declarations are typically viewed as aspirational accords, lacking the legally binding force of international conventions or treaties. A partial explanation for the United States' behavior was concern that its approval of the Declaration might give rise to legal claims by tribal nations seeking to exercise their inherent sovereign powers beyond the extant limits recognized under federal policies of self-determination. Since 1970, the United States' official policy in Indian affairs has been to support forms of tribal self-determination within tribal lands. The precise "metes and bounds" of tribal self-determination have never emerged fully formed but instead have been worked out gradually and laboriously over the years, largely through federal legislation and litigation.

Until the adoption of the United Nation's Declaration, there were no formal external measures by which tribal nations, or the United States, could chart the evolution or progress of tribal self-determination. In that regard, the tenth (10^{th}) anniversary of the UN's adoption of the Declaration provides an opportune occasion to provide at least a tentative assessment of the state of tribal self-determination in the United States.

In this essay, I contend that, at best, the United States has an uneven record in terms of compliance with the Declaration. To be sure, the historical and legal record of formal engagement between the federal government and tribal nations in the United States is a long and complicated one, spanning centuries and marked by inconsistent, even contradictory, federal policies in Indian affairs[3].

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[1] Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007).

[2] Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples (Dec. 16, 2010) at 3, available at http://usun.state.gov/documents/organization/153239.pdf.

[3] The literature on the political and legal relations between the tribal nations and the United States is voluminous. The following is merely a partial listing of the leading source material: N. Newton, F. Cohen, R. Anderson, *Cohen's Handbook of Federal Indian Law*, Lexisnexis, 2012; B. Duthu, *American Indians and the Law*, Viking Penguin Press, 2008; B. Duthu, *Shadow Nations: Tribal Sovereignty and the Limits of Legal Pluralism*, Oxford University Press, 2013; F. Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution*, Oxford

Nonetheless, in endorsing the Declaration in 2010, the United States purported to align its long-standing recognition of tribal nations as "political entities that have inherent sovereign powers of self-governance," with the goals and aspirations of the Declaration. In offering this assessment, we will focus attention primarily on developments from the so-called "modern era," (i.e. since the dawn of the United States policy of self-determination in the early 1970s) but on occasion, it will be necessary to provide a bit of historical context and background information. For the sake of brevity, this assessment will examine only a select number of articles from the Declaration, with the aim of analyzing those articles whose subject matter has given rise to important developments in the federal-tribal political and legal relationship.

I. THE RIGHT OF SELF-DETERMINATION

> Article 3
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> 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.
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> Article 4
>
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Among the cardinal doctrines in federal Indian law is the principle that Indian tribes exist as political bodies, separate and distinct from the United States and its associated states. The beginning point for that understanding comes from the United States Constitution. Article I of the Constitution enumerates the powers of Congress, including the power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes."

Subsequent cases of the United States Supreme Court, from the famous *Cherokee Cases*[4] of the early 1830s down through the present day, have reaffirmed this principle. Importantly, though, the courts have also characterized the inherent powers of tribal self-government as existing in a state of subordination to an overarching and dominant federal authority. The courts have employed various rationales to justify this dominant federal power

University Press, 2009; D. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*, University of Texas Press, 1997; C. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, Yale University Press, 1987; R. Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America*, University of Minnesota Press, 2005.

[4] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

in Indian affairs – often referred to as the "federal plenary power" doctrine - but most scholars agree that it essentially represents the legacy of settler colonialism as codified in law. The tempering influence on this federal power, at least in theory, is the existence of a trust relationship that obligates the federal government to ensure the political status and territorial integrity of the tribal nations and their lands. The historical record would suggest that the United States has been, at best, a temperamental, opportunistic and self-serving trustee. At least one justice of the current Supreme Court, Associate Justice Clarence Thomas, has noted the inherent tension in the court's Indian law jurisprudence and has questioned the legitimacy of the federal plenary doctrine[5]. His concern, however, is less about protecting tribal sovereignty and more about federal power operating unmoored from its constitutional foundations.

In its signing statement endorsing the Declaration, the United States affirmed the legal status of tribal nations as political entities with inherent sovereign powers of self-government. Significantly, though, the United States took pains to characterize the right of self-determination for Indigenous Peoples as being fundamentally different from the existing right of self-determination in international law. The UN's Declaration, according to the United States, promotes the "development of a new and distinct international concept of self-determination *specific to indigenous peoples*." (emphasis added). In support of this view, the United States referenced Article 46 of the Declaration that states the right of self-determination for Indigenous Peoples "does not imply any right to take any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." This characterization of the right of self-determination for Indigenous Peoples thus allowed the United States to declare that its recognition of and relationship with the tribal nations as distinct political entities is entirely "consistent" with the Declaration.

In similar fashion, the United States offered its own interpretation of the protections afforded in Article 10 for Indigenous Peoples to remain secure in their ancestral homelands, free from the threat of forcible removal. The Declaration provides that relocation shall only take place in accordance with "the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible with the option of return." In its signing statement, the United States construed this provision as a "call

[5] "The court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty. The Court cites the Indian Commerce Clause and the treaty power. I cannot agree that the Indian Commerce Clause 'provide[s] Congress with plenary power to legislate in the field of Indian affairs'. At one time, the implausibility of this assertion at least troubled the Court, and I would be willing to revisit the question." (citations omitted). *United States v. Lara*, 541 U.S. 193, 224 (2004).

for a process of meaningful consultation with tribal leaders, but *not necessarily the agreement of those leaders*, before the actions addressed in those consultations are taken." (emphasis added). In these and other provisions of the signing statement, the United States makes clear its intent to maintain the existing regime of domestic federal Indian law, including the entrenched (but constitutionally questionable) paramount authority of Congress in Indian affairs. At least in regard to the fundamental right of self-determination, therefore, the Declaration has provoked no meaningful change in the United States' relationship with tribal nations.

II. FREEDOM AGAINST GENOCIDE OR OTHER FORMS OF STATE VIOLENCE

> Article 7
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> 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
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> 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

The historical record is replete with accounts of state-sponsored violence directed at the Native peoples of the United States. A few of the more notorious episodes can easily be recalled by many Americans – e.g. the Trail of Tears, the Long Walk, Wounded Knee, Sand Creek. Other comparable events are less known in the popular culture but were no less destructive to tribal cultures and peoples. Whether these various forms of state-sponsored violence can be characterized as genocide is a matter of some scholarly debate[6], though historian Benjamin Madley builds a powerful case for exactly that in his recent history on California's efforts to exterminate its Indigenous population during the mid-19th century[7]. The overt forms of state-sponsored violence against the tribal nations that spilled over into warfare or at least armed subjugation were mainly confined to the earlier years of the nation's history and were largely (though not entirely) concluded by the end of the 19th century. This is not to suggest that other, more covert forms of state-sponsored violence did not continue to operate within tribal communities well into the 20th century. The principal example of this activity included the forcible removal of Indian children from their tribal homes and relocation to government or church-run boarding schools. The ultimate goal of the boarding schools was to assimilate Indian

[6] See e.g. G. Anderson, *Ethnic cleansing and the Indian: The crime that should haunt America*, University of Oklahoma Press, 2015.
[7] B. Madley, *An american genocide: The United States and the california indian catastrophe*, Yale University Press, 2017.

children into the majority mainstream white American culture. Government agents and educators, primarily Christian missionaries, working in Indian country embraced the prevailing mantra to "kill the Indian, save the man," with disturbing zeal and efficiency. During the 1950s and early 60s, with most of the federally-supported boarding schools closed or closing, federal Indian policy makers turned to the Indian child welfare system to encourage the adoption of Indian children by white families. While the means were different, the ends were the same: the assimilation of Indian children into white society. The results were staggeringly successful, at least from the perspective of state and federal officials. In a short period of time, the rate of outplacement of Indian children from their tribal homes into predominantly white homes far outpaced the rate at which children of other racial or ethnic groups were removed. One study estimated that in this period, between 25 and 35 percent of all Indian children had been removed from their families and tribal cultures and placed in non-Indian homes or institutions[8].

In the aftermath of the federal shift to a policy of tribal self-determination in 1970, tribal leaders urged Congress to enact legislation to reform the Indian child welfare system. The result was the *Indian Child Welfare Act* of 1978, a law that allowed tribal governments to play an important, sometimes decisive, role in decisions about whether, when and where to remove an Indian child from their tribal home.

Notwithstanding this legislation, several states continued to operate their child welfare systems in violation of the legal interests recognized in the ICRA. Among them was the state of Maine in far northern New England. At the urging of an Indigenous social service organization in Maine, the tribes of that state – the Penobscot, Passamaquoddy, the Maliseet and Micmac - joined with the state government in 2012 to form a Truth and Reconciliation Commission, the first of its kind in the United States, to investigate the state's child welfare system practices and to propose necessary reforms.

The Commission visited every tribal community in Maine and obtained statements from nearly 160 individuals, Native and non-Native, with the vast majority of the witnesses electing to have their names attached to their statements, "so that this does not happen again." The Commission's final report, submitted in 2015, concluded, in significant part, that Maine's Indian child welfare system operated in a form that constituted "cultural genocide" as defined

[8] J. Williams, *et al*., *Indian Child Welfare Act: Measuring Compliance*, Casey Family Programs, March 2015, available at https://www.casey.org/media/measuring-compliance-icwa.pdf.

by the Convention on the Prevention and Punishment of the Crime of Genocide (1948)[9]. The Commission based this finding on evidence of systemic state resistance to the mandates of the federal *Indian Child Welfare Act*, and other state practices that ignored, marginalized, discriminated against or disparaged indigenous family structures and tribal sovereignty. According to the commission, "Given the long history of practices that have removed Native children from their families, ranging from boarding schools to adoption movements, it is critically important to note this connection."[10].

Maine is not alone in operating a dysfunctional Indian child welfare system. Indian children across the United States remain disproportionately represented in the foster care system, at more than double the rates of the general US population[11]. Unlawfully severing the connections between Indian children and their tribal families and communities poses existential threats to the socio-cultural and political integrity of tribal nations. Ensuring greater state compliance with the mandates of the *Indian Child Welfare Act*, at minimum, would help minimize these threats, though there is no federal oversight body to monitor and enforce such compliance. More broadly, there is a need for broad-based education on the legacy of state-sponsored violence against tribal nations and their children that continues to disrupt tribal families and lead to the separation of Indian children from their Indigenous cultures. Until those efforts can be fully realized, the United States will remain complicit in the erasure of Indian culture by condoning this quiet form of cultural genocide.

III. RIGHTS OF RELIGIOUS FREEDOM AND CULTURAL PROTECTION

> Article 12
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> 1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
>
> 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms

[9] *Beyond the mandate/continuing the conversation*, Report of the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission, June 14, 2015, p. 68.
[10] *Ibid.*
[11] J. Williams, *et al.*, *op.cit.*, p.6.

In contrast to the previous subject matter, the United States earns slightly better marks in the modern era for ensuring protection of Native American religious expression and cultural practices. To be sure, the historical record is marred by systemic government efforts to eradicate Indigenous religious, spiritual and cultural practices, including sacred ceremonies like the Sun Dance, the Ghost Dance, or the sacramental use of peyote. Contemporary federal legislation and presidential acts, on the other hand, present a more sanguine disposition toward Indigenous rights in these areas, although Native religious practitioners still encounter challenges in the courts when it comes to protecting sacred sites.

A federal law from 1990, entitled the *Native American Graves Protection and Repatriation Act* (NAGPRA) affords protection for human remains and associated items of cultural patrimony that are located on federal or tribal lands or are in the custody of federal agencies or institutions that receive federal funds (including museums). Among its most notable features, the law imposes an obligation on institutions to repatriate human remains and associated cultural items to tribes that so request it and can demonstrate cultural affiliation with those ancestors and cultural items.

Likewise, federal statutes and/or executive orders now afford protection for the sacramental use of peyote, as well as the ceremonial use of animal parts like eagle feathers that would otherwise violate federal law.

Tribal religious practitioners have encountered more challenges, however, when it comes to protecting sacred sites, in particular, those that are located on public lands outside the boundaries of tribal lands. While federal statutes (like the *National Historic Preservation Act*, as amended in 1992) and executive orders (like President Bill Clinton's 1996 Executive Order 13007) require federal officials to consult with tribal leaders and otherwise seek to accommodate their religious interests in certain circumstances, the tribes do not have veto power to block activities on public lands that have otherwise been sanctioned by the federal government. Thus, under an accommodation with tribal religious practitioners, the National Park Service regulates, but does not prohibit, rock climbers from ascending Devil's Tower or the Lodge of the Bear, in Wyoming, during summer, the period when neighboring tribes traditionally conduct the Sun Dance at this site.

The Constitution's First Amendment guarantee of religious freedom has proven to be of little value in protecting sacred sites located on public lands. In the only case to reach the United States Supreme Court on this issue, *Lyng v. Northwest Indian Cemetery Protective*

Association (1988)[12], the court held that the Constitution only protects against government action that either compels an individual to engage in actions that are proscribed by their religious tenets or punishes them for having acted in conformity with their religious beliefs. A subsequent federal statute, the *Religious Freedom Restoration Act* (RFRA) has been interpreted by the lower federal courts as affording essentially the same narrow protections that exist under the Constitution. Thus, tribal leaders relying on RFRA were unable to prevent the federal government from allowing treated sewage water to be used in snowmaking at a ski resort located on federal forest lands in Arizona. Those lands are considered sacred by the Navajo, Hopi and other Native peoples of the southwest. Tribal medicine people and elders had argued, unsuccessfully, that the spraying of treated sewage water on even a small portion of the mountain would result in spiritual contamination ("ghost sickness") of the whole, much as a human body injected by an infected needle is at risk of biological contamination[13].

More recently, tribes of the southwest United States have encountered yet another threat to their sacred lands – the issuance of an executive order (by President Donald Trump) shrinking the acreage of national monuments established by a prior administration. The president's order, if allowed to stand, would reduce by 85% the territory of Bears Ears National Monument, a spectacular landscape that contains several sites considered sacred by the Navajo, Zuno, Hopi, Ute Indian Tribe and Ute Mountain tribes. The order exposes a number of sacred sites to development by extractive industries since the lands would no longer be under federal protection. The president's action has triggered a number of lawsuits contesting, on statutory and constitutional grounds, the power of the executive branch unilaterally to alter the boundaries of a national monument established by a prior president.

The legal challenges involving sacred sites illustrate the continued vulnerability of Indigenous religious practices that require private access to spaces located on public lands. Part of the challenge, of course, as recognized by the Supreme Court in the *Lyng* case, is the risk of creating Indigenous rights to religious servitudes on potentially vast swaths of public lands. The present regime of consultation with and accommodation for tribal members provides a measure of protection but ultimately, it does not account for the gross disparity in bargaining power between tribes and the federal government. Still, as illustrated above, this is an area of law and

[12] *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).
[13] See generally, *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008).

policy wherein the United States can legitimately advance a claim of meaningful compliance with the terms of the Declaration.

IV. RIGHTS OF ECONOMIC DEVELOPMENT

> Article 20
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> 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
>
> 2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

One of the starting points in assessing the contemporary state of economic development in Indian Country is to recognize the legacy of past government policies that devastated traditional tribal economies, dramatically reduced the size of ancestral homelands and imposed constraints on the tribes' capacity to participate fully and fairly in market economies. From the decimation of buffalo herds in the Upper Plains in the 19th century, to the industrialization of fishing in the Pacific Northwest and the diversion of limited fresh water supplies in the Great Southwest during the 20th century, tribal traditional economies were dealt a crushing, and sometimes fatal, blow by a rapidly growing nation eager to displace and dispossess tribal nations in favor of white, Christian homesteaders[14].

The federal policy of opening Indian lands for white settlement operated for nearly half a century (from 1887 to 1934), by which time tribes had lost about two-thirds of their extant reservation lands or, if they retained at least a portion of their reservation lands, tribes were often sharing them with newly arrived white neighbors. Federal law imposed severe constraints on what tribes and their members could do with tribal lands, a fact that continues to hamper entrepreneurship and development at the local level.

Genuine improvement in this state of affairs did not begin in earnest until the federal policy of tribal self-determination in the 1970s. Over the ensuing decades, federal census data has shown marked improvement in a number of socio-economic measures, including reductions in poverty levels, increases in educational achievement levels and improvements in

[14] For an insightful account of the history and modern developments in this area, see R. Miller, *Reservation, "Capitalism:" Economic Development in Indian Country*, Praeger Press, 2012.

employment. Still, despite those marginal gains, American Indians continue to lag the national population on most census-measured indexes.

For their part, and against this backdrop, tribal governments have employed a variety of means to stimulate their local economies. Some tribal nations have effectively used their inherent sovereign powers of taxation to derive revenue from extractive industries operating within tribal lands, sometimes in conjunction with contractually-based royalty revenue. Others have worked cooperatively with state and local governments or the private sector to attract businesses onto reservation lands or otherwise invest in tribal enterprises. The Navajo Nation recently attempted, without success, to purchase the Remington gun company, among the oldest and largest gun manufacturers in the United States. The tribe planned to shift the company's operations away from private consumers and toward supplying police forces and defense contracts[15].

None of those activities, however, have rivaled the revenue generating capacity of the gaming industry that exploded in Indian country starting in the 1980s. In 1987, the United States Supreme Court ruled in *California v. Cabazon Band of Mission Indians*[16] that tribal gaming enterprises were not subject to state gaming laws so long as the tribes' activities were consistent with state public policies regarding gaming. That ruling spurred Congress finally to enact federal legislation to provide a comprehensive regulatory structure for the gaming industry in Indian country. While the *Indian Gaming Regulatory Act* of 1988 (IGRA) substantially advanced tribal interests in self-government and economic development, it also provided significant roles for states in decisions regarding the nature and scope of certain gaming operations. Tribal casinos, for example, can only operate pursuant to a compact negotiated between the tribe and the state.

In the three decades since the passage of the IGRA, gaming in Indian country now generates over $30 billion dollars (US) annually ($32.4 billion in 2017 according to federal sources[17]), with over 500 gaming enterprises owned and operated by nearly 250 different tribal nations spread across 29 states. This income, however, is unevenly distributed, with the majority of revenue generated by a handful of tribes located close to major population centers.

[15] A. Sorkin, "A Surprising Bid for Remington, and an Unsurprising Rejection", *New York Times*, July 16, 2018, available at https://www.nytimes.com/2018/07/16/business/dealbook/remington-sale-navajo-nation.html.
[16] *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987).
[17] See National Indian Gaming Commission, at https://www.nigc.gov/news/detail/2017-indian-gaming-revenues-increase-3.9-to-32.4-billion.

In addition, an increasing number of states are approving gaming operations outside of Indian country, a development that will inevitably cut into tribal revenues.

Some tribal ventures into the market economy have raised concerns about possible misuse of the tribe's sovereign status and the associated rights of governmental immunity that come with that status. In 2017, the Saint Regis Mohawk Tribe struck a deal with Allergan, a major pharmaceutical company, allowing the tribe to take ownership of patents for an eyedrop product (Restasis) and in turn, giving the company an exclusive license to continue to make and profit from the drug. Allergan paid the tribe nearly $14 million dollars up front with provisions for annual royalties of about $15 million dollars. Allergan generated about $1.5 billion annually from this product so the payments to the tribe, while substantial, paled in comparison. This arrangement allowed the tribe to invoke its sovereign immunity in proceedings before the US Patent and Trademark Office (PTO) where generic drug makers had brought challenges to Allergan's patents. Allergan's ultimate objective was to delay market competition from lower-cost generic versions of drugs like Restasis[18]. While the PTO has rejected the tribe's arguments in this particular matter, a bill in the US Senate would permanently strip all tribes of their sovereign immunity in these types of proceedings[19]. This outcome exposes the risks and limits of tribes seeking to maximize – or, for some observers, allowing outsiders to exploit – their sovereign powers of self-government.

The legacy of historical dispossession of tribal lands, resources and opportunities casts a long shadow in contemporary Indian country. The rebuilding of tribal economies continues to be painstaking work and recent efforts have yielded uneven results. For a nation still contending with or adjusting to the reality of tribes as sovereign nations, it may be an even greater challenge for the United States to conceive of and support tribes as genuine forces in the broader market economy.

V. PROTECTIONS FOR INDIGENOUS WOMEN AGAINST VIOLENCE AND DISCRIMINATION

> Article 22
>
> 1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

[18] G. Ablavsky, L. Larrimore Ouellette, "Selling Patents to Indian Tribes to Delay Market Entry of Generic Drugs", *JAMA Internal Medicine*, Jan. 2, 2018 (online).
[19] S. 1948, 115th Cong. (2017).

> 2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

According to the US Department of Justice, Native women in the United States experience the highest rates of sexual violence in the country. The overwhelming majority of perpetrators are non-Native men, particularly white men[20]. Typically, crimes of domestic or sexual violence are resolved by local governments. Indian tribes, however, lack the inherent sovereign power to prosecute non-Indians, at least according to US Supreme Court. While Congress acted to provide a partial corrective, major gaps in law enforcement remain. Congress can and should act to resolve these gaps so that tribal nations, as the governments closest to and best equipped to respond to these crimes, can provide justice for the victims of sexual violence.

In 1978, the Supreme Court held in *Oliphant v. Suquamish Indian Tribe*[21] that Indian tribes lacked inherent sovereign power to prosecute non-Indian defendants for violations of tribal law. The decision has been widely criticized by scholars and tribal leaders for employing reasoning unfounded in law and for its reliance on outdated views about tribal justice systems. In 2013, Congress finally enacted legislation, in the form of amendments to the *Violence Against Women Act* (or VAWA), that partially overruled the *Oliphant* ruling in limited situations involving violence against women. The legislation recognizes and affirms inherent tribal authority to exercise "special jurisdiction" over any defendant, regardless of race or ethnicity, for a narrow class of crimes. In order to exercise this power, however, tribes must adjust (or remake) their justice systems so that they operate, in structure and practice, essentially like their state or federal counterparts. For example, tribal judges in these cases must be law-trained (not all tribal courts have this requirement); defendants must be provided an attorney at the tribe's expense (some tribes already provide for this, others do not, or they provide alternative forms of advocacy); and defendants are entitled to a jury that is largely representative of the local tribal community. While these legal protections are not objectionable in and of themselves, their imposition on tribal governments by federal fiat presumes that existing tribal justice systems are inadequate. In other words, the legislation seeks to accomplish

[20] See generally, S. Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America*, University of Minnesota Press, 3rd ed, 2015.
[21] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

a form of *judicial assimilation* of tribal justice systems as the *quid pro quo* for allowing tribal courts to adjudicate criminal actions against non-Indian defendants.

In the five years since this legislation was enacted, at least eighteen (18) tribes have been authorized by the federal government to exercise this special jurisdiction. According to a recent study by the National Congress of American Indians, there have been nearly 150 arrests by these tribes with about 74 convictions, 5 acquittals and several cases still pending[22].

Despite these developments, there are still significant problems in tribal law enforcement because of limitations or gaps within the federal legislation. The legislation defining the tribe's "special jurisdiction"does not apply to children or to law enforcement officials who may be harmed by the offender. It also does not apply to offenders who are unknown to the victim (i.e. the "stranger" offender). Beyond these technical flaws, there are lingering questions about whether Congress even has the constitutional power to enact legislation that subjects non-Indian US citizens to criminal tribunals operated by governments (tribal nations) that are not subject to the constraints and protections of the US Constitution (including its guarantee of individual liberty). Given the current composition of the US Supreme Court, there is a strong possibility that a majority of the justices would find this legislation unconstitutional. This was the conclusion of the Congressional Research Service, a non-partisan team of legal advisors to members of Congress, when it reviewed this legislation in 2012[23].

Congress has another opportunity to review and make adjustments in this area of law since the VAWA is up for reauthorization in 2018. It remains to be seen whether Congress will focus narrowly and redress only the existing flaws within the law or whether it will act more boldly and do what many tribal leaders and scholars have urged from the start: enact legislation that overrules *Oliphant* completely and reaffirms the powers of tribal courts over all criminal matters arising within their territory, regardless of the offender's race or ethnicity. Individuals within the tribe's jurisdiction already have access to the federal courts under existing legislation to challenge the legality of their detention in tribal courts. That expression of government-to-

[22] National Congress of American Indians, *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report*, March 20, 2018, http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf.
[23] See J. Smith, R. Thompson II, "Tribal Criminal Jurisdiction over Non-Indians in the Violence Against Women Act (VAWA) Reauthorization and the SAVE Native Women Act", *Congressional Research Service*, April 18, 2012.

government relationship in the administration of criminal justice in Indian country would come closest to meeting the aspirations of the UN's Declaration.

VI. PROTECTION OF THE ENVIRONMENT

> Article 29
>
> 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
>
> 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
>
> 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

One of the iconic images from the dawn of the nation's environmental movement during the late 60s and early 70s was a public service television campaign urging Americans to stop pollution. The ad featured a male figure presented as an American Indian who serves as nature's witness to the despoliation of the natural world. A voice solemnly intones, "Some people have a deep, abiding respect for the natural beauty that was once this country. And some people don't." The figure then turns facing the camera, a solitary tear running down his cheek, while the voice intones, "People start pollution; people can stop it."[24].

The campaign builds upon a long-standing trope, if not stereotype, of Native peoples as the first, true environmentalists. That image is flawed in some ways. After all Native peoples, like all human societies, engage in and with the natural world and consequently, their activities invariably exact some toll on its ecosystems[25]. Nonetheless, there are also profound truths embedded in this imagery, most notably in the form of an Indigenous land ethic or what the celebrated Kiowa writer, N. Scott Momaday has called, a "moral comprehension" of the earth and air[26]. Underlying this land ethic or moral comprehension is the notion of *reciprocity* that operates in the manner of a sacred covenant between Indigenous societies and the natural world.

[24] It was later revealed that the male figure in the campaign was not actually a Native person but an actor of Italian descent, Espera Oscar de Corti, whose stage name was Iron Eyes Cody.
[25] See generally, S. Krech III, *The Ecological Indian: Myth and History*, W.W. Norton and Co, 2000.
[26] S. Momaday, *The Man Made of Words: Essays, Stories, Passages*, St. Martin's Press, 1997, p. 49.

For Anishinaabe scholar and activist Winona LaDuke, the value of reciprocity represents an understanding that "you take only what you need and leave the rest."[27].

The federal government has recognized the important role that tribal nations have and must continue to play in managing their lands and natural resources. In 1984, the federal Environmental Protection Agency (EPA) announced its policy for working with Indian tribes, the first federal agency to do so in the era of tribal self-determination. The EPA's policy, in pertinent part, states the following:

> "In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace."[28]

Shortly thereafter, Congress amended a number of the major environmental statutes, including the *Clean Air Act*, the *Clean Water Act* and *Safe Drinking Water Act*, to provide opportunities for tribal nations to participate in the nation's system of environmental federalism and to serve in regulatory roles comparable to the states.

The Pueblo of Isleta in New Mexico became the first tribe in the country to gain authorization to work with federal environmental regulators under the Clean Water Act. Not surprisingly, they were also involved in the first legal challenge to this environmental regulatory regime when the City of Albuquerque in New Mexico challenged the authority of the federal government to accord this sort of power to tribal nations. The federal courts upheld this regulatory structure and, in the process, provided important vindication for the tribal interests in protecting their lands and natural resources. The practical outcome of the case was that Albuquerque was required to comply with the Pueblo's water quality standards that were set at levels to protect, among other things, the tribe's ceremonial uses of the Rio Grande River[29].

Following the example of the Pueblo of Isleta, nearly 60 other tribes are similarly eligible to administer water quality programs for water bodies under their jurisdiction. Of these

[27] W. LaDuke, *Foreword to The New Resource Wars: Native Struggles Against Multinational Corporations,* South End Press, 1993, p. xi.
[28] US Environmental Protection Agency Policy for the Administration of Enviromental Programs on Indian Reservations, 1984, available at https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf.
[29] See *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996).

tribes, about 44 of them have established water quality standards that have been approved by the EPA[30].

In addition to this network of federal statutes, treaties are another source of legal protection for tribal environmental and natural resource interests. In 2016, for example, the United States Army Corps of Engineers denied a construction permit for a proposed export terminal to be constructed north of Seattle because of the likely negative impacts on treaty-based fishing rights of the Lummi Tribe of Indians. The terminal was designed to export dry bulk commodities, principally coal destined for Asian markets. In the memorandum of decision by the Army Corps, the deciding officer cited the well-established principle that Indian treaties constitute a form of property rights under US law:

> "The rights defined in Indian treaties were not a grant of rights from the United States to the tribes, but were instead a reservation of rights held by the tribe as a sovereign people from time immemorial. Indian treaty rights are property rights which may not be taken without an act of Congress."[31]

In sum, the federal record in terms of compliance with this provision of the Declaration is comparatively strong. Clearly, this is an area where there is practical and ideological convergence between the interests of tribes and the broader society. Beyond that, tribes have a proven track record in terms of acting effectively to protect their local environments and natural resources. William H. Rodgers, Jr., among America's preeminent legal environmental scholars, wrote the following assessment about the tribes' role as environmental stewards:

> "Count me among the believers that the U.S. Indian Tribes are the most creative and effective agents for positive environmental change in play today. Evidence is everywhere. Tribes have the better laws and they expect more of them. They are uniquely positioned to combat the corrosive influences that have undermined the modern environmental laws."[32]

[30] US Environmental Protection Agency, *Tribes Approved for Treatment as State (TAS*), available at: https://www.epa.gov/tribal/tribes-approved-treatment-state-tas.

[31] See US Army Corps of Engineers, Memorandum for Record, May 9, 2916, p. 19, available at: http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/160509MFRUADeMinimisDetermination.pdf. See also, K. Johnson, "US Denies Permit for Coal Terminal in Washington State", *New York Times*, May 9, 2016, available at: https://www.nytimes.com/2016/05/10/us/washington-state-army-corps-denies-permit-coal-terminal.html.

[32] W. Rodgers, Jr., "Tribal Government Roles in Environmental Federalism", *Natural Resources and Environment*, 2017, vol. 21, issue 3.

CONCLUSION

This brief and highly selective assessment of the United States' record of compliance with the UN's Declaration on the Rights of Indigenous Peoples reveals that while there have been notable achievements, there is also considerable room for improvement and progress. From the perspective of tribal nations, the formative arrangements between the federal government, embodied in the US Constitution and in innumerable treaties, statutes, executive orders and judicial opinions, embrace a commitment to a legally plural society, one in which multiple legal systems (Indigenous and non-Indigenous) co-exist peacefully among each other in shared territories. As seen in the US' reformulation of the meaning of self-determination relating to Indigenous Peoples, however, the United States seeks to preserve the existing hierarchical political and legal structures that secure its position of supremacy and domination over the tribal nations. Nonetheless, the Declaration serves as an important moral template by which the tribal nations may continue to advance their interests and hold the United States accountable for its Indian policies and to its formative commitments to a legally plural society.