

“PERFECT GOOD FAITH”*

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The question we are addressing in this essay is one that has bedeviled the evolution of Indian law from the beginning. How is colonialism to be reconciled with republican constitutionalism? We do not anticipate that we will be able to resolve the problems we surface, but we hope that we can, at minimum, provide another way of looking at the role of Indians in the evolution of American law and the troubling place that international legal ideas have played in the creation and assignment of a constitutional space for tribes and Indian people. We will make this inquiry within the context of two land disputes. The disputes lead us to quite different conclusions and reveal, we hope, the ways in which there can be no simple solution to the problem of domesticating international law within the context of Indian law, although it must remain a first question within it.

We begin with a discussion of the idea of unenumerated powers within the federal constitutional structure. We make the rather unexceptionable argument that the relationship between tribes and the states played a pivotal role in the evolution of the relationship between the federal government and the states. This relationship depended not so much on the allocation of powers as found in the text of the constitution, as on the structure of government the constitution required. Moreover, the international legitimacy of the rather radical experiment represented by the federal government depended, in large measure, on the powers asserted by the federal government in its management of Indian affairs. Indian affairs gave the central government primary authority over both security and foreign relations by excluding Indians from the polity, but it also asserted exclusive authority to deal with Indians and tribes to the exclusion of the constitutive states of the Union and the great colonial powers of Europe.¹

* The title is taken from an infamous line in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903). “We must presume that Congress acted in perfect good faith in dealing with the Indians.” The arguments advanced in the first section of this essay are their preliminary expression. They are developed further in a forthcoming essay.

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¹ As we will discuss later, the clear expression of this important relationship with European great powers was not reserved for Indian affairs, but arose squarely within the context of colonialism. Thus, President Monroe clearly stated what came to be called The Monroe Doctrine during his seventh annual message to Congress, December 2, 1823:

At the proposal of the Russian Imperial Government, made through the minister of the Emperor residing here, a full power and instructions have been transmitted to the minister of the United States at St. Petersburg to arrange by amicable negotiation the respective rights and interests of the two nations on the northwest coast of this continent. A similar proposal has been made by His Imperial Majesty to the Government of Great Britain, which has likewise been acceded to. The Government of the United States has been desirous by this friendly proceeding of manifest-

II. WHAT IT MEANS TO BE A NATION

Virtually everyone who studies Indian law begins with the so-called Marshall Trilogy² and it is for good reason. The trilogy (*Johnson v. M'Intosh*, *Cherokee Nation v. State of Georgia*, and *Worcester v. State of Georgia*) sets out the basic structure that has guided the development of Indian law (often by negative example) and it also provides a way of talking about Indian law that the doctrine reflects. Unfortunately, the way the courts have adopted the nomenclature of those cases often elides the radical shifts in Indian policy that belie the foundational structure of the original cases.³ Words that have a technical meaning are often reduced to their everyday usage⁴ or a usage derived from another area of law that flattens the complex relationship suggested by both Marshall's opinions, but equally importantly, by the interplay of the various opinions within each case and between the cases.⁵ Reading the cases, especially those with multiple opinions, reveals a complex and divisive set of views concerning both the juridical status of the tribes as well as the empirical foundation for any claims made either for or about them. The background for the arguments was the status of the central government itself.

It is useful to remember that what made the emergence of the United States so threatening to the great powers of Europe was that it turned the question of legitimacy inside out. As Professor Bobbitt puts it: "For the Americans, sovereignty itself was to be limited and the rights retained by the People were infinitely numbered."⁶ The federal government was to be a government of limited powers, those ceded to it by the states and those necessitated by the structure of sovereign relationships contemplated by the design of the constitution. Yet if the legitimacy of the United States was still in question, then the first tasks of the central court was to sketch out the implied relationships and to locate, *in law*, the contours of the essential unenumerated powers. But where was the law to come from? It is not enough to say that the states necessarily

ing the great value which they have invariably attached to the friendship of the Emperor and their solicitude to cultivate the best understanding with his Government. In the discussions to which this interest has given rise and in the arrangements by which they may terminate the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers . . .

Available at <http://www.yale.edu/lawweb/avalon/monroe.htm> (on file with Avalon Project of the Yale Law School).

² *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

³ For an excellent discussion of the use and misuse of the Marshallian structure see, Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993). Professor Frickey develops the international themes in *Federal Indian Law in Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996).

⁴ Words like "dependent" and "trust" leap most quickly to mind.

⁵ Professor Frickey makes these points brilliantly in Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997).

⁶ Philip Chase Bobbitt, *Foreward to* CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED* ix (1997).

ceded those aspects of sovereignty that were essential to a government worthy of the name (the failure of the Articles of Confederation showed that the states needed to yield more) and at the time of the Cherokee cases we were still more than a generation away from the war that would remake our constitutional structure and firmly fix in law, if not in politics, the nature of national citizenship.⁷

In *Johnson v. M'Intosh*, the question was not difficult. Should a claimant who derived his title from a purchase from the Piankeshaw tribe and claimed priority of purchase prevail in an action in ejectment against another claimant to the same parcel of land who derived his title from a federal patent? Although the opinion was, perhaps, longer than was strictly necessary, Justice Marshall in announcing the holding explained why:

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the Court is decidedly of opinion, that the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States; and that there is no error in the judgment which was rendered against them in the District Court of Illinois.⁸

What explained the "magnitude of the interest?" Surely it was not interest in the question of superiority of federal power to that of the Indians. What Justice Marshall makes sure to assay is the genealogy of the federal power. He viewed this first from the perspective of what the states ceded to the federal government in the making of the union. But equally important he also asserted a dignity of the federal government equal to the great powers of Europe who still had, as Marshall termed it, "pretensions" in the Americas.

How the European powers came to have both title to the land and sovereignty over the inhabitants of the land they found was a question of law. It was the settled law among nations that provided for accommodations in the Americas between European powers. For Marshall, the question became one of consistency with existing law.

[A]ll the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?⁹

Marshall follows this inquiry with an examination of the status of the States with regard to the powers claimed by Britain. The States out of which the union was formed were the colonial expressions of the power of the crown, thus the law announced by Britain that underlay the Proclamation of 1763 represented both the positive law and the theoretical structure for the sovereignty of the states. Again, if you forgive another long quotation from the opinion,

⁷ It seems to me that Professor Black has this argument exactly right in his book, *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED*. BLACK, *supra* note 6. We also appreciate that it is not an uncontroversial position. There is embedded in his argument the claim that politics trumped law, as the basis of analysis, in the early cases on the civil war amendments.

⁸ *Johnson v. M'Intosh*, 21 U.S. 543, 604-05 (1823).

⁹ *Id.* at 584.

Marshall explained British constitutionalism to which the states were heirs as follows:

According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown, that this principle was as fully recognised in America as in the island of Great Britain. All the lands we hold were originally granted by the crown; . . .

So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the king, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the king had a right to grant, or to reserve for the Indians.

According to the theory of the British constitution, the royal prerogative is very extensive, so far as respects the political relations between Great Britain and foreign nations.¹⁰

According to Marshall, the crown exercised this power both to secure the land and to exercise, to the extent possible, peaceable jurisdiction over the Indians.¹¹ What the states ceded to the federal government, according to Marshall's analysis was not just the territory beyond boundaries agreed upon as the territorial reach of the states, but with it all of the sovereign power over those territories that came to the states from the crown. This power gave to the federal government all of the powers regarding Indians that the crown held, but the monopoly on this power fixed the relationship between the United States and the European powers as one of juridical equality. All of these conclusions would hold whether the land and the entire legislative jurisdiction of sovereignty that the territorial claims implied had come into the hands of the British and from it to the states and from them to the federal government via discovery or conquest. What should not be lost in this discussion, however, is that all of the "law" that Marshall applied was derived, ultimately from the international law that tied territory and sovereignty together. This includes the seeds of the plenary power that was later to yield such bitter fruit.

Yet, if *Johnson v. M'Intosh* fixed the genealogy of the supremacy of national power over the tribes, it did not fix the status of the tribes.¹² Given the next two cases in the trilogy, it is not clear that *Johnson v. M'Intosh* even resolved the exclusive nature of the federal power. The lack of clarity about the status of tribes as a matter of constitutional law was not resolved by locating

¹⁰ *Id.* at 595-96.

¹¹ Marshall concluded the quoted passage with the following assessment:

The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for the preservation of peace; and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites; and the power to do this was never, we believe, denied by the colonies to the crown.

Id. at 596.

¹² Of course, the Constitution gives to the Congress under the commerce clause and to the President under the treaty power the primary authority for dealing with the tribes, but it does not fix the constitutional position of the tribes and it does not suggest how expansive the legislative power might be. See U.S. CONST. art. I, § 8, cl. 3; art. II, § 2, cl. 2.

the legitimacy of the federal power in international law (and through that to the constitutional tradition that gave the states their own legitimacy). Yet it was to this source that Marshall again turned as the status of the tribes in relationship to the states was made the central issue. The cession of the territory carried with it the cession of legislative jurisdiction to the federal government. However, this authority was not without limits. In *Johnson*, Marshall adverted to the law of nations that limited the prerogatives of the conqueror and gave to the federal government the power to control the actions of those who would interfere with the national government's exercise of that basic power.

In *Cherokee Nation v. State of Georgia*,¹³ the Cherokee Nation sought an injunction against the State of Georgia to restrain them from executing or otherwise enforcing state laws within the Cherokee territory. The Cherokee attempted to invoke the original jurisdiction of the Supreme Court. Thus before the Court could attend to the merits of the case it had to determine if the parties were properly before it.¹⁴ Because the original jurisdiction of the Supreme Court can be invoked in cases where a state is a party, the only question the Court felt it had to answer was whether the Cherokee fell within the enumerated parties to whom the Article III limitation applied. How should the Cherokee Nation be styled? Were they a foreign state? Were they a nation at all in any constitutional sense?

In a relatively short opinion, Justice Marshall notes that, while

[t]he counsel have shown conclusively that they are not a state of the union, and have insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.

This argument is imposing, but we must examine it more closely before we yield to it. The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.¹⁵

The remainder of the opinion is aimed at marking out what those "peculiar and cardinal distinctions" are. By holding that the Court does not have jurisdiction, but that the tribe was not at the mercy of the State, Justice Marshall was treading a very careful line. In attempting to describe the status of the tribe, Justice Marshall retained the idea of their foreign-ness as an empirical matter while rejecting it as a legal matter. Nonetheless, the tribes occupied a juridical position somewhere between the states and foreign nations, but they were clearly under the protection of the federal government. This obligation of protection was embedded in the international law that justified the assumption of sovereignty over the tribes.

It is here that Justice Marshall proposed a formulation that was both rooted in an established political thought as well as redolent of feudal relations. By claiming a status that was *sui generis* Justice Marshall suggested a relationship

¹³ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

¹⁴ The State of Georgia was, in fact, not before the Court since they declined to make an appearance.

¹⁵ *Cherokee Nation*, 30 U.S. at 16.

between the federal government and the tribes that would temper the plenary legislative jurisdiction that was suggested in *Johnson*. If they are not foreign in the constitutional sense, how might their legal status be understood? In *Johnson*, Justice Marshall was clear about the continued political existence of the tribes, that their political choices were circumscribed by the superior political authority of the central government. But their status suggests limitations on that superior political authority.

[Tribes] may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.¹⁶

Read in light of his analysis in *Johnson*, what is interesting is his reiteration of the juridical genealogy of the status of tribes as well as a reformulation of the idea of incorporation. Both seem to color his choice of metaphor. Read as a colloquy with his fellow Justices, his formulation becomes richer. Unlike Justice Johnson, who would have rejected the assertions of jurisdiction on the grounds that the Cherokee were neither foreign nor a state, Justice Marshall uses the designation "nation" to describe the tribe. To this Justice Johnson can only heap scorn:

They have in Europe sovereign and demi-sovereign states and states of doubtful sovereignty. But this state, if it be a state, is still a grade below them all: for not to be able to alienate without permission of the remainder- man or lord, places them in a state of feudal dependence.¹⁷

Of course, Justice Marshall does invoke the feudal imagery. But his referent is, of course, a referent of restraint as well as of power. Though thought to be among the most important of the feudal incidents, what it did was to bind power to obligation even if the power ran in the direction of the guardian. Similarly, Justice Baldwin expresses disbelief that there is any power in the court to change the existing relations between the tribes and the states. By

¹⁶ *Id.* at 17, 18.

¹⁷ *Id.* at 17. (Johnson, J. concurring). Early in the opinion, Justice Johnson express his outraged incredulity:

Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state? We should indeed force into the family of nations, a very numerous and very heterogeneous progeny. The Catawbas, having indeed a few more acres than the republic of San Marino, but consisting only of eighty or an hundred polls, would then be admitted to the same dignity. They still claim independence, and actually execute their own penal laws, such as they are, even to the punishment of death; and have recently done so. We have many ancient treaties with them; and no nation has been more distinctly recognized, as far as such recognition can operate to communicate the character of a state.

Id. at 25.

parsing the treaty language he is clear that the rule of law that gave the crown and through the crown, the colonies and then the union, sovereignty over the territory cannot be divested because the President chose to use the language of nationhood in the treaty.¹⁸ There are no magic to words if the facts do not support them. Justice Baldwin thought that by taking jurisdiction over the case the Court would be ascribing to the Cherokee a status they may have once had, but no longer retained. Moreover, they would be arrogating to themselves a political power not contemplated by the constitution and one that would, in all events, be lawless.

In his dissent, Justice Thompson, joined by Justice Story, looked at the same facts and yet saw a completely different picture. Rather than beleaguered savages, barely above the beasts of the forest that Baldwin and the others had them hunting, they were a society that was ruled by their own codes and sovereign in their own territory. This was not a romantic vision, but rather one based on both the facts of the encounter and the law that governed the evolving relations between whites and Indians.

The majority was wrong, according to Thompson, first, because the Court had to recognize that the law of nations under which the United States itself claimed sovereignty was itself the law that forced the Court to recognize the sovereignty of the Cherokee. Second, the mere fact of military weakness is insufficient to divest a state of its attributes of nationhood. He found apt the analogy to tributary states of Europe. The tribes, like those small states, may make alliances with stronger nations, but it is in the nature of the alliances that the weaker states preserve as much of their sovereign independence as is possible.¹⁹ According to Thompson, the nature of the dependence to which Justice

¹⁸ *Id.* at 34. (Baldwin, J., concurring):

I will next inquire how the Indians were considered; whether as independent nations or tribes, with whom our intercourse must be regulated by the law of circumstances. In this examination it will be found that different words have been applied to them in treaties and resolutions of congress; nations, tribes, hordes, savages, chiefs, sachems and warriors of the Cherokees for instance, or the Cherokee nation. I shall not stop to inquire into the effect which a name or title can give to a resolve of congress, a treaty or convention with the Indians, but into the substance of the thing done, and the subject matter acted on: believing it requires no reasoning to prove that the omission of the words prince, state, sovereignty or nation, cannot divest a contracting party of these national attributes, which are inherent in sovereign power pre and self existing, or confer them by their use, where all the substantial requisites of sovereignty are wanting.

¹⁹ *Id.* at 52-53 (Thompson, J. dissenting):

The terms *state* and *nation* are used in the law of nations, as well as in common parlance, as importing the same thing; and imply a body of men, united together, to procure their mutual safety and advantage by means of their union. Such a society has its affairs and interests to manage; it deliberates, and takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Vattel, 1. Nations being composed of men naturally free and independent, and who, before the establishment of civil societies, live together in the state of nature, nations or sovereign states; are to be considered as so many free persons, living together in a state of nature. Vattel 2, § 4. Every nation that governs itself, under what form so ever, without any dependence on a foreign power, is a sovereign state. Its rights are naturally the same as those of any other state. Such are moral persons who live together in a natural society, under the law of nations. It is sufficient if it be really sovereign and independent: that is, it must govern itself by its own authority and laws. We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these une-

Marshall adverts is almost purely a political concept, although like all politics it has its roots in the empirical reality of military inferiority. The relations between the colonies and later with the U.S. were not lawless. Quite the contrary and the fact of disparities in military strength does not change the obligation to establish relations subject to law. This is the point the majority concedes, despite the attempts by Johnson and Baldwin to structure the argument otherwise. Justice Thompson summarized this view as follows:

They have been admitted and treated as a people governed solely and exclusively by their own laws, usages, and customs within their own territory, claiming and exercising exclusive dominion over the same; yielding up by treaty, from time to time, portions of their land, but still claiming absolute sovereignty and self government over what remained unsold. And this has been the light in which they have, until recently, been considered from the earliest settlement of the country by the white people. And indeed, I do not understand it is denied by a majority of the court, that the Cherokee Indians form a sovereign state according to the doctrine of the law of nations; but that, although a sovereign state, they are not considered a foreign state within the meaning of the constitution.²⁰

The point is that while the power of the sword may set the ground for a relationship to emerge and heavily structure its form, it is ultimately the background to legitimacy, not the expression of it. The next year, the Cherokee would be back, not as parties, but as sovereigns.

In *Worcester v. State of Georgia*, the Court was confronted with an attempt by the State of Georgia to regulate activity within the Cherokee territory, to prohibit the tribe from exercising its governmental authority and expressly forbade anyone from entering into the Cherokee territory without a license from the State of Georgia.²¹ Samuel Worcester, a Vermonter, was arrested for preaching the gospel to the Indians within their lands without a license. He was convicted and sentenced to four years at hard labor for his crimes. The question for the Court was whether Worcester was subject to the jurisdiction of the State of Georgia for actions undertaken in Cherokee country. Or put more bluntly, did Georgia have any legitimate authority in Cherokee territory?

Justice Marshall answered "No," in terms that more expressly melded the arguments advanced in Thompson's dissent in *Cherokee Nation* with the conclusion reached in the opinion he wrote for the court.²² The Cherokee while not

qual alliances may be infinitely varied; but whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self government, and sovereign and independent authority is left in the administration of the state. Vattel, c. 1, pp. 16, 17.

²⁰ *Id.* at 53-54 (Thompson, J. dissenting).

²¹ *Worcester v. Georgia*, 31 U.S. 515 (1832).

²² *Id.* at 560-61.

The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These arti-

completely independent, because of their political dependency on the United States, were sovereigns in the nature of the tributary states of Europe, which while needing the protection of a stronger state, did not cede any of their sovereignty except as they agreed to in the treaties of protection. The cession to the stronger state created in the superior power the obligation to defend the powers and independence of the weaker state against the predations of all others, including the states from whom the federal government received its power. This power was ceded to the central government from the states and the constitution cleared up any confusion on that point that might have been left over from the infelicitous language of the articles of confederation.²³ In addition to the power that the states had willingly ceded, the nature of the central government implied a genealogy of unenumerated powers that were constitutive of all national states. The states could no more reclaim the power to legislate in Indian country than they could claim to enter into political arrangements with the French. The tribes maintained complete legislative jurisdiction within their territory subject only to the supervision and limitations negotiated between them and the agents of the federal government. This was a power upon which the states could not trench. It was a form of internal organization that was independent of the federal government and the power it claimed, both by lineage and by constitutional grant.

Central to all of these stories is the question of territory and law. The great legal historian S.F.C. Milsom put the broad outlines this way: "Lordship was property, the object of legal protection from above, just as it was jurisdiction, the source of legal protection for rights below."²⁴ This conception framed the ideas of legitimacy, title, and legitimate jurisdiction in the international law story that the Court told about the genesis of the current political status of tribes. It is no accident that the opinions are redolent with feudal ideas. Land, territory, jurisdiction, and power were all still being unwound. The idea of the tribes standing in some kind of feudal hierarchy through which control of territory and thus jurisdiction (broadly speaking) were being worked out makes sense. It also made sense for the national government to use that trope within the context of an argument that made central government the legitimate successor to the powers of the crown. The individual states thus also stood in a modified feudal hierarchy, orthogonal to the tribes, but subordinate to the federal

cles are associated with others, recognizing their title to self government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.' At the present day, more than one state may be considered as holding its right of self government under the guarantee and protection of one or more allies.

²³ *Id.* at 559. "That instrument [the Constitution] confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians."

²⁴ S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 99 (2d ed. 1981).

government. The relationship depended not at all on the text giving the federal government exclusive jurisdiction to treat with the tribes, but on the nature of the state itself, on the genealogy of the idea of nationhood.

II. LAND IN THE WEST — THE DANN CASE

Lordship is distinct, historically, from proprietorship and because control of land carried with it control over the occupants of the land, the evolution of the relation between the lord and his subjects (even where they became citizens) is, in some important measure, the evolution of claims over territory.²⁵ The following sections detail two land disputes, both of which suggest limitations of federal power over tribes and one of which raises, explicitly, the role of international law as a boundary on the exercise of federal supervisory or trust obligation. Because the authority exercised by the trustee traces its legitimacy not to power, but to law, its foundations in the law of nations suggests that there is some role to play for international norms. As suggested earlier, however, the role that international law *ought* to play is different in each case.

The saga of the Dann sisters and the Western Shoshone tribe that trail through the federal courts to the Inter-American Commission on Human Rights began in 1951.²⁶ The Congress created the Indian Claims Commission to resolve the myriad land and other claims outstanding between the tribes and the federal government. The Western Shoshone had obtained a final settlement from the Indian Claims Commission for \$26 million. Yet the tribe did not receive the money in satisfaction of the land claims because a distribution had not been approved. Nonetheless, the tribe labored under the holding that the deposit of the funds in a Treasury trust account for the tribe was sufficient to discharge all claims and to preclude any member of the tribe from asserting an ownership interest in the land.²⁷

In 1974, the United States brought an action in trespass against Mary and Carrie Dann. According to the United States, the Dann sisters were grazing their cattle and horses on public land without a permit from the Bureau of Land Management. The Dann sisters raised a claim of right through aboriginal title as a defense to the trespassing claim. The Dann sisters made two claims: first that the interest of the tribe in the land was not settled because payment had not been made under the ICC settlement, and second, that they had an independent claim to the land based on their individual aboriginal title. The second claim was premised on the ways in which the tribe held land. The U.S. responded that the: "(1) that the aboriginal title of the Western Shoshone had been extin-

²⁵ Much of modern Indian law can be understood this way.

²⁶ *U.S. v. Dann*, 470 U.S. 39, 42 (1985):

This case is an episode in a longstanding conflict between the United States and the Shoshone Tribe over title to lands in the western United States. In 1951 certain members of the Shoshone Tribe sought compensation for the loss of aboriginal title to lands located in California, Colorado, Idaho, Nevada, Utah, and Wyoming. Eleven years later, the Indian Claims Commission entered an interlocutory order holding that the aboriginal title of the Western Shoshone had been extinguished in the latter part of the 19th century, *Shoshone Tribe v. United States*, 11 Ind. Cl. Comm'n 387, 416 (1962), and later awarded the Western Shoshone in excess of \$26 million in compensation.

²⁷ *Id.* at 50.

guished, and (2) that the extinguishment had been conclusively established in proceedings before the Indian Claims Commission."²⁸ The district court agreed with the government and the Ninth Circuit reversed. The Supreme Court reversed, but left the following question open:

The Danns also claim to possess individual as well as tribal aboriginal rights and that because only the latter were before the Indian Claims Commission, the "final discharge" of § 22(a) does not bar the Danns from raising individual aboriginal title as a defense in this action. Though we have recognized that individual aboriginal rights may exist in certain contexts, this contention has not been addressed by the lower courts and, if open, should first be addressed below. We express no opinion as to its merits.²⁹

On remand, the Ninth Circuit rejected the claim to aboriginal title and claimed to find a contradiction between the two positions advanced by the Dann sisters. Once the Supreme Court held that the trust account precluded the claim by the Danns, the Ninth Circuit reasoned that the since the sisters were claiming through the tribe, once the tribe's interest was eliminated, the sisters' claim went with it.

That should have been the end of it, but the sisters' claimed that the statutes under which the case was decided violated their rights as created by the Shoshone and further that the United States' application of the statutes to their claim violated international norms to which the U.S. should be bound. The sisters were taking a controversial position that the Ninth Circuit characterized as anachronistic. The court's construction of the general notion of aboriginal land rights put the sisters' claim on the tenuous basis of implied consent of the government. Yet this construction misapprehends the claim the sisters were making. Although it might be correct that the Taylor Grazing Act withdrew "unappropriated lands" for settlement, the sisters were claiming that their title pre-dated any withdrawal made by the U.S. Thus the claims that were settled by the ICC did not include the claims asserted by the sisters since they were distinct from those made by the tribe, although they were aboriginal Indian title nonetheless.

It was in this posture that the Dann sisters took their appeal to the Inter-American Commission on Human Rights. They were, in essence, critical of the tribal government that they felt settled a claim on their behalf that it had no warrant to settle. They were primarily critical of the United States for setting in train a process that commanded a specific way of dealing with Indian property whether the tribe in question conformed to the model that animated the settlement process. Once the Congressionally mandated procedure was underway, none of the objects raised by the Dann sisters were cognizable, especially because the Ninth Circuit, which had given some space for the sisters to make their claim, closed off that avenue in its subsequent review.

Before the Commission, the Dann sisters claimed that the United States interfered with the use and occupation of their ancestral lands by virtue of the ICC proceedings and by removing and threatening to remove the sister's livestock from the lands covered by the settlement. Moreover, according to the

²⁸ U.S. v. Dann 865 F.2d 1528, 1529 (1987).

²⁹ *Dann*, 470 U.S. at 50.

Danns, the U.S. had acquiesced in trespassing by gold prospectors within the Western Shoshone traditional territory. All of these activities constitute a violation of the American Declaration of the Rights and Duties of Man, the "American Declaration."

Under the American Declaration, the Dann sisters made four specific charges. First, that the actions of the United States government violated the sisters' right to property. Second, the settlement procedures violated their right to equal treatment under the law. Third, the failure to take into account the landholding rules of the tribe by the U.S. violated their right to cultural integrity. Finally, the violation of their right to cultural integrity also constituted a breach of the Shoshone right to self-determination.

Article XXII of the American Declaration provides that:

Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.³⁰

The Dann sisters argued that the failure of the ICC to take into account the full aboriginal claims of both the tribe and the individual members of the tribe violated international property rights norms. The norms operate as a constraint on the actions that Congress can take with regard to tribal property. It is not answered by resort to the plenary power because the outside limits of the plenary power were always circumscribed by the trust responsibility and the international norms relied on by the Dann sisters represent a substantive reading of that obligation.

It was not just the American Declaration that commanded this result, according to the Danns. Article 26 of the Draft United Nations Declaration on the Rights of Indigenous Peoples necessarily informs the reading of the American declaration as well as providing an independent basis for the Danns' claim. Under that article, aboriginal peoples have the right to full recognition of their laws, traditions and customs, land tenure systems and other institutions to develop and manage their resources. Moreover, the state is under an obligation to protect those rights.³¹

Yet, even if the Congress could determine the ultimate contours of the property rights held by the Shoshone and the Danns, that power is not unconstrained in its execution. It is bounded by due process and equal protection norms that form the background for the constitutional authority to act. The right to property that the Danns claimed was violated, was jeopardized not just by the substantive ruling, but by the procedural obstacles that the Danns claimed made it impossible to assert their claim within the framework of the ICC settlement process.

Of course, sorting out the procedural defects from the substantive defects is especially difficult when the obligation is to harmonize radically different legal systems, nonetheless, the Danns argued that the ICC permitted the non-consensual transfer of Shoshone land to various non-indigenous trespassers. While some of the transfers may have been consistent with U.S. law, even that conclusion is not clear. What is clear is that the transfers were accomplished

³⁰ Case 68, Inter-Am. C.H.R. 860, OEA/ser. L/V/II.117 doc. 5 rev. 1 (2002). [hereinafter "Dann case."]

³¹ *Id.*

without regard to the underlying land tenure system of the Western Shoshone. Because the U.S. was under an obligation to protect and defend the Shoshone interests, for the ICC to recognize these later claims is little more than abandonment of a legal obligation incumbent upon the state. In addition, if the U.S. had undertaken its duty to the tribes, it would have, at minimum, subjected the ICC determination to the constitutional requirements that would have supported a taking.

Even if the taking of the tribal property was deemed constitutionally permissible (taking into account the international norms against which those constitutional obligations have to be read) the monetary award was calculated on the basis of an arbitrary extinguishment date that, without interest from that time did not provide the tribe with the same measure of just compensation that would be imposed in the taking of non-indigenous property.

Because the Danns, among others, were not permitted to intervene in the ICC proceedings, they claimed that the result was irremediably defective because their interests were different from the tribe and thus could not have been adequately represented by them. This denial of the right to participate in addition to the other procedural defects rendered the ICC settlement fundamentally in violation of the international norms of equality under the law.

Because the denial of their land claim would require the Danns to surrender their way of life, the ICC decision entailed more than the mere loss of value. It required the Dann sisters to abandon their livelihood that was intimately integrated to their lives as Shoshone. It is one thing for someone to lose their livelihood because of a government decision that happens all of the time. It is entirely another to try and transform one culture into another. That is the lesson of the failure of the Dawes Act (putting, admittedly, the best possible reading on the intentions of the allotment plans). The destruction of the capacity to continue to live a culturally integrated life was an even greater affront because, according to the Danns, it was done in a way that ignored the internal political life of the Western Shoshone.

What the action before the IACHR aimed to do was to force the United States to reckon with the international obligations that it has participated in designing. The recent case involving the Awas Tingni community in Nicaragua, demonstrated that the Commission, among willing states, had the authority to force a reconsideration of domestic definitions of indigenous property rights.³² Here, the Danns successfully got the Commission to agree with their claims and to demand that the United States respond in a substantive way. At minimum, the United States ought to consider what their domestic law ought to look like if it took into account the web of international obligations within which it participates. The increasingly inter-connected legal systems designed to facilitate trade demonstrate that there is both the capacity and will to submit local law to international norms. The question posed by the Danns is really the question raised by the Marshall trilogy: Is the trust doctrine and the plenary power a rule of law or the merest expression of power?

³² I/A Court H.R., Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001 (Merits), at <http://www.oas.org/main/main.asp?sLang=E&sLink=/documents/eng/oasissues.asp>.

III. A BITTER PILL: ASSESSING THE SUCCESS OF THE 1996 NAVAJO-HOPI SETTLEMENT ACT

The Hopi and Navajo tribes have fought over a 1.8 million acre piece of land in Northern Arizona for over one hundred years. The dispute was already termed "the greatest title problem of the West" in 1962, when the decision in its first major litigation, *Healing v. Jones*, was handed down.³³ Since that time it has sparked massive legal battles, several efforts at Congressional intervention, and the distribution of millions of federal dollars.

By the early 1990s, two different attempts at a solution had ended in failure. *Healing* created a joint tenancy on the disputed land. When that proved unworkable, the federal government and courts tried to partition the area. This plan relied upon forced relocations, which many of the Navajo families living on the Hopi side of the partitioned land desperately resisted. The ensuing standoff prompted government negotiators to attempt one last mediation.

The mediation has met with mixed success. Rather than impose another ill-fitted mandate on the parties, this negotiation was structured to allow them to fashion their own resolution of the conflict, with as little government intercession as possible. However, many resisters were unhappy with the eventual agreement and several have refused to sign it. They argue that the terms of the agreement violate fundamental rights protected under domestic and international law. Nevertheless, it is unlikely that if they brought their case before the Commission it would find for them. Unlike the Dann case, this involves a fight between tribes (or, more accurately, between one tribe and members of another). Upholding indigenous rights for one side would undermine those of the other, for this fight over control of a single, overstressed portion of land is the classic zero-sum game.

A. *The Background of the Dispute*

Hopi religion relates that the tribe emerged onto the earth into the region between the four corners of their world (Navaho Mountain, the Little Colorado River, the San Francisco Mountains and the Luckachukas) at the beginning of time.³⁴ Most archeologists agree that the tribe and its ancestors have inhabited this territory for up to 10,000 years.³⁵ One of their towns, Oriabi, is deemed the oldest continuously-occupied settlement in North America.³⁶ They have developed a system of agriculture dependent on natural aquifers and rainfall that has proved to be sustainable for centuries, despite the aridity of the land.³⁷ The Hopi claim all of Northeastern Arizona—18 million acres—as their *tut-*

³³ 210 F. Supp. 125, 129 (1962).

³⁴ FRANK WATERS, *BOOK OF THE HOPI* 11-22 (1963).

³⁵ Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J.L. & PUB. POL'Y 761, 762 (2000).

³⁶ See *Hopi*, <http://www.cpluhna.nau.edu/people/hopi.htm> (last visited Oct. 27, 2004).

³⁷ John W. Ragsdale, Jr., *Law and Environment in Modern America and Among the Hopi Indians: A Comparison of Values*, 10 HARV. ENVTL. L. REV. 417, 446-47 (1986).

squa, or ancestral sacred homeland.³⁸ They retain a deep attachment to the many sacred sites that now lie beyond the reservation's borders.³⁹

Navajo beliefs also teach that the Navajo have always lived in the region (alongside the Hopi), although the Hopi as well as archeologists dispute this. Most scholars estimate that the Navajo entered the region sometime in the mid-1500s to late 1600s⁴⁰; some place their arrival as late as the end of the 18th century.⁴¹ They quickly adopted many Hopi customs and religious traditions, although they preferred ranching to farming and maintained large flocks of sheep.⁴² They also depended heavily upon raiding both neighboring Indians and whites.⁴³ In 1863, Kit Carson led an army expedition that removed 8,500 Navajo and interned them at Bosque Redondo, New Mexico.⁴⁴ This is known as "The Long Walk." The relocation and subsequent confinement exacted a terrible toll; nearly a quarter of the population died.⁴⁵ By 1868 the government found the internment too expensive, and it granted the tribe a large reservation east of Hopi lands.⁴⁶ Their population grew rapidly, and they soon wandered outside the unmarked boundaries of the reservation. Many settled near the Hopi.⁴⁷ Navajo histories suggest that the tribes lived peacefully together.⁴⁸ Contemporaneous U.S. government reports, however, assert that Navajo overwhelmed the Hopi, raiding their possessions and claiming the best land.⁴⁹ The Hopi agree with this assessment, claiming that "[t]he Navajo appropriated for their own use rangeland, farm fields and water resources, formerly used and depended upon by the Hopi."⁵⁰ The Hopi assert that it was in reaction to this "harassment" that they withdrew from the lower lands and moved to the tops of the mesas—a withdrawal that Navajo and whites both pointed to as indicative of Hopi disinterest in and disuse of the land. The Hopi have characterized Navajo expansion into their territory as "Navajo Manifest Destiny."⁵¹

Concerns about Navajo and Mormon encroachment on Hopi land (as well as a desire for the authority to throw off "white intermeddlers" who supported Hopi traditionalist resistance to boarding schools) prompted the U.S. government to create a Hopi reservation.⁵² On December 16, 1882, President Chester

³⁸ See *Tutsqua Ancestral Land*, http://www.hopi.nsn.us/ancestral_land.asp (last visited Oct. 27, 2004) [hereinafter "*Tutsqua Ancestral Land*"].

³⁹ *Id.*

⁴⁰ Compare EMILY BENEDEK, *THE WIND WON'T KNOW ME: A HISTORY OF THE NAVAJO-HOPI LAND DISPUTE* 58 (1992), with RICHARD O. CLEMMER, *ROADS IN THE SKY: THE HOPI INDIANS IN A CENTURY OF CHANGE* 33 (1995).

⁴¹ *Healing v. Jones*, 210 F. Supp. 125, 134 (1962).

⁴² BENEDEK, *supra* note 40, 63-64.

⁴³ *Id.* at 65-66.

⁴⁴ See L. KELLY, *THE NAVAJO INDIANS AND FEDERAL INDIAN POLICY* 5 (1968).

⁴⁵ UNITED STATES COMM. ON CIVIL RIGHTS, *THE NAVAJO NATION: AN AMERICAN COLONY* 15 (Sept. 1975).

⁴⁶ *Healing*, 210 F. Supp. at 135-36; WATERS, *supra* note 34, at 273-74, 281-82.

⁴⁷ *Id.*

⁴⁸ Eric Cheyfitz, *Theory and Practice: The Case of the Navajo-Hopi Land Dispute*, 10 AM. U. J. GENDER SOC. POL'Y & L. 619, 622 (2002).

⁴⁹ See *Healing*, 210 F. Supp. at 136.

⁵⁰ See *Tutsqua Ancestral Land*, *supra* note 38.

⁵¹ *The Taking of Hopi Land: A Hopi Perspective*, Hopi Press Release, April 10, 1997.

⁵² *Healing*, 210 F. Supp. at 135-37.

A. Arthur signed an Executive Order granting a 2.5 million acre area to the Hopi as well as to "such other Indians as the Secretary of the Interior may see fit to settle thereon." Dispute about the meaning of this phrase, boilerplate language in treaties of the time, animated the subsequent land conflict. Navajo argued that it gave them the right to occupy the land, while the Hopi claimed it referred to other tribes, like the Tewa, who have lived peacefully on the Hopi reservation from its foundation.⁵³

The U.S. did not initially view the "such other Indians" clause as establishing the right of Navajo to live on the Executive Order lands.⁵⁴ Indeed, after Hopi complaints of Navajos' "continual intrusions and depredations" that destroyed Hopi crops and grazing lands, the Interior Department twice requested that an expeditionary force be sent to expel the Navajo from Hopi land. Both times the troops arrived in the middle of winter, and for humanitarian reasons decided to warn, not expel, the trespassers.⁵⁵ Gradually, however, acquiescence turned to acceptance, and by the 1920s the Commissioner of Indian Affairs seemed to (erroneously) believe the Navajo had been settled on the Hopi reservation, and thus had the right to remain.⁵⁶ In fact, government officials even took steps to exclude Hopi settlement on land within their own reservation, so that the Navajos' occupancy could continue undisturbed.⁵⁷ Failed attempts to share and subdivide the land led to the 1962 landmark case of *Healing v. Jones*. That litigation resulted in a decision granting the Hopi exclusive control over land management district 6, which at 650,013 acres encompassed most of the area of extensive Hopi use, and "joint, undivided and equal interests" with the Navajo on the remaining 1.8 million acres of the Executive Order reservation.⁵⁸

Unsurprisingly, this decision did not resolve the conflict, and seven years later, the Hopi again brought suit to compel their admittance onto the Joint Use Area (JUA).⁵⁹ The district court that heard the case found that the Navajo had continued to exercise almost complete control over the JUA. The exclusion of the Hopi was encouraged by the Department of the Interior, which systematically denied to Hopi tribal members grazing permits on the Hopi Partitioned Lands (HPL) that the Navajo routinely received.⁶⁰ The court also found that the Navajo had severely degraded the grazing land.⁶¹ It ordered the Navajo to reduce their number of animals, reformulate their grazing policies, and take

⁵³ *Id.* at 140.

⁵⁴ *Id.* at 138-39.

⁵⁵ *Id.* at 146-48.

⁵⁶ *Id.* at 153.

⁵⁷ *Id.* at 171-73.

⁵⁸ *Id.* at 132.

⁵⁹ See *Hamilton v. Nakai*, 453 F.2d 152 (9th Cir. 1972) (finding that the district court had jurisdiction to enforce the 1962 judgment), *cert. denied*, 406 U.S. 945 (1972).

⁶⁰ See *Hamilton v. MacDonald*, 503 F.2d 1138, 1146 (9th Cir. 1974) (affirming the district court's findings and concluding that "the Navajo expectation of exclusive possession of the area, and reliance thereon, has been fostered by a long history of governmental inaction and tolerance of Navajo settlement in the area, and by official illegal restraint of Hopi settlement.").

⁶¹ The government was complicit here too, for the permits that the Hopi were denied and that were granted to the Navajo allowed far more intensive use than the land could support. The result was near-total degradation. "The district court found that [Navajo tribal mem-

measures to enhance Hopi participation in the use of the JUA.⁶² Two years later, Congress partitioned the JUA via the Navajo and Hopi Indian Land Settlement Act of 1974.⁶³ The division was effectuated by a federal district court, which apportioned 900,000 acres each to the Navajo and Hopi tribes, creating the Hopi Partitioned Lands and the Navajo Partitioned Lands (NPL).⁶⁴

Pursuant to the settlement, all of the few Hopi families residing in the Navajo part of the JUA, as well as most of the many Navajo families on the Hopi side of the line, were relocated.⁶⁵ The relocation effort was undermined, however, by the lack of nearby rural land suitable for accommodating the families.⁶⁶ This forced many traditionalist families into mostly white American cities, where they had few skills to survive.⁶⁷ The problem was compounded by corruption and opportunism among members of the Relocation Commission, who directed the Navajo families to contractors who produced substandard housing.⁶⁸ The families that resisted relocation were forced to live in ever-declining conditions, as a strictly-enforced building freeze prevented new construction. By the mid-1990s, some elderly women were living in caves scratched out of hillsides.⁶⁹

In 1988, a group of Navajo still living on the HPL brought another lawsuit, this time for declaratory judgment and injunctive relief. They claimed that the Settlement Act violated rights generated by statutory, constitutional, and

bers] have so extensively overgrazed the range that 80% of the joint use area is producing only 0% - 25% of its maximum forage, and that the range is still deteriorating." *Id.* at 1147.

⁶² Specifically, the court ordered:

Navajo stock reduction; a program to restore the badly overgrazed range; a restriction of Navajo construction; a division of all income from rental or exploitation of the joint use area, including mineral resources; issuance of an equal number of grazing permits to members of each tribe; the issuance of a writ of assistance; and development of more specific plans to implement the broad outlines of the Order of Compliance.

Id. at 1142 n. 2.

⁶³ Pub. L. No. 93-531, 88 Stat. 1712 (1994) (codified as amended at 25 U.S.C. §§ 640(d) et seq.).

⁶⁴ See *Sekaquaptewa v. MacDonald*, 626 F.2d 113 (9th Cir. 1980) (affirming the partition).

⁶⁵ Congress found that:

As of July of 1996, 4,432 Navajo and Hopi families have applied for relocation benefits. Of those, 3,373 have been certified eligible and 2,730 have received relocation benefits. Approximately 643 eligible families continue to wait for relocation benefits. Many of those Navajo families waiting for benefits have long ago complied with the law and voluntarily left the homes they had on lands partitioned to the Hopi Tribe [T]here are [also] estimated to be between 50 and 100 Navajo families residing on lands partitioned to the Hopi Tribe who have never applied for relocation benefits under the law.

S. REP. NO. 104-363, at 5 (1996).

⁶⁶ "The Navajo Reservation is a paradox. It is an area of low population density which is severely overcrowded and has been for decades. The kind of free land that has been talked about simply does not exist." BENEDEK, *supra* note 40, at 71 (quoting Anthropologist David Aberle, testifying before the House Indian Subcommittee). Those already living on the Navajo Reservation itself were consequently leery of welcoming the families (and their flocks) who were relocated from the HPL. Telephone interview with Peter Steenland, former lead negotiator of the 1996 Settlement (Mar. 26, 2003) (on file with author).

⁶⁷ See BENEDEK, *supra* note 40, at 200-37.

⁶⁸ *Id.* Some of these claims eventually made it to the courts, with limited success. See, e.g., *Begay v. United States*, 16 Cl. Ct. 107 (1987).

⁶⁹ Telephone interview with Peter Steenland, *supra* note 66.

international law, and sought a declaration of "the right for themselves and their heirs in perpetuity, to reside on the Hopi Reservation on what they consider their extensive customary use areas, with unlimited grazing privileges, the right to construct such buildings as they wish, and to utilize unlimited water claimed necessary to their needs."⁷⁰ The district court dismissed the case, finding that the Navajos' rights had not been violated, and that therefore they had not demonstrated either a likelihood of success on the merits or that the balance of hardships tipped in their favor. On appeal the Ninth Circuit, instead of deciding the case, ordered the tribes and the United States to enter into mediation. Out of this mediation emerged the Navajo-Hopi Land Settlement Act of 1996.

The decision to turn to the parties for solutions was unique in the history of the dispute. Previous proposals seemed to come from everyone – district and appellate judges, congressmen, Indian agents, Secretaries of the Interior, Superintendents, Acting Solicitors, Indian Inspectors, Commissioners of Indian Affairs, and others – but the parties themselves.⁷¹ Neither the tribes nor the affected individuals remained passive during the 100-year conflict, but their advocacy passed through a filter of government officials' opinions and agendas. This reluctance to turn to the parties probably arose for a variety of reasons: paternalism and racism; a sense that the polarization of the conflict would render futile any attempt at mediation; officials' value judgments, and consequent beliefs about which side should prevail; and a sense that the solution should be rooted in legal doctrine and political exigencies, both of which could be best directed by the U.S. government.

B. *The Positions of the Parties*

The parties themselves offer widely different accounts of the conflict's causes and potential solutions. The Hopi blame Navajo encroachment and U.S. acquiescence. The Navajo accuse the U.S. of inventing the conflict. The federal negotiators for the 1996 Settlement adopted a Solomonic approach, abandoning assignments of responsibility and attempting to give each party at least a portion of what was most important to it – and thereby encouraging concessions from both parties, each of whom felt wronged.

The Hopi claim a right to complete control over the HPL on the basis of both historical possession and spiritual responsibility. The Hopi have not traditionally thought of their presence on their land as representing ownership so much as caretaking.⁷² They relate that they are

bound to the *tutsqua* not only by a long history, but also by their belief that they entered into a sacred pact with *Massau*, guardian of this world. As long as the Hopi follow *Massau's* teachings and care for the land they are allowed to remain in their *tutsqua*. Hence land is intricately interwoven with Hopi religion, culture and daily life. To the Hopi, taking away the land for which they serve as stewards is tantamount to the destruction of the Hopi themselves.⁷³

⁷⁰ *Manybeads v. United States*, 730 F. Supp. 1515, 1516 (D. Ariz. 1989). For a detailed description of these claims, see Part III.B, *infra*.

⁷¹ See historical survey in *Healing v. Jones*, 210 F. Supp. 125, 134-179 (1962).

⁷² *Ragsdale*, *supra* note 37, at 465 n.120.

⁷³ *Tutsqua Ancestral Land*, *supra* note 38.

Their emphasis on careful maintenance and balance has allowed them sustainably to practice agriculture in a desert environment for centuries.⁷⁴ Indeed, Hopi myths teach that they chose this land precisely because of its harshness, so that they would not become self-concerned, acquisitive, and aggressive, as had happened on other worlds.⁷⁵

Hopi culture is marked by egalitarianism on the one hand, and a tightly integrated normative community life on the other. Although each village has religious and political leaders, they do not try directly to regulate individual behavior.⁷⁶ Rather, compliance with the Hopi way is achieved through lateral pressure – the desire of individuals to maintain the good opinion of their neighbors, and the gossip and changed attitudes of the community when that good opinion is lost.⁷⁷ Identity between community and individual values is furthered by the abhorrence of competition and individual gain.⁷⁸ Material wealth should not be hoarded but shared throughout the community.⁷⁹

Many Hopi view Navajo culture as diametrically opposed to those values. To the Hopi, the Navajo are materialistic,⁸⁰ aggressive and untrustworthy, willing to raid the property of their neighbors and friends when it suits them.⁸¹ Moreover, they see them as latecomers and poor land managers, who can claim no rightful possession of the land either by virtue of history⁸² or responsible husbandry.⁸³ They also see the Navajo as succeeding politically – to the

⁷⁴ Ragsdale, *supra* note 37, at 446-47. The Hopi engage in dry-land farming in a region that receives an average annual rainfall of eight to ten inches. See *The Importance of Farming to the Tribe*, <http://www.hopi.nsn.us/farming.asp> (last visited Oct. 27, 2004) [hereinafter "*Importance of Farming to the Tribe*"].

⁷⁵ WATERS, *supra* note 34, at 36, 11-22.

⁷⁶ Ragsdale, *supra* note 37, at 443-44.

⁷⁷ *Id.*

⁷⁸ *Id.* at 444-45.

⁷⁹ BENEDEK, *supra* note 40, at 47.

⁸⁰ Hopi point to the mention of wealth in many Navajo names: Manybeads, Manygoats, etc. Telephone interview with Peter Steenland, *supra* note 66. The Navajos' greater tolerance of individual wealth, as it is closer to Anglo-American custom, may partly account for their white allies' strong support. See, for example, Benedek's account of Indian agents' preference for Navajo "industriousness" compared to the "Hopis' lackadaisical attitude toward animal husbandry and establishing a presence on the land," BENEDEK, *supra* note 40, at 35, as well as her own suspicion of Hopi egalitarianism. *Id.* at 43-44.

⁸¹ BENEDEK, *supra* note 40, 105-07.

⁸² The Hopi, who repeatedly refer to the Navajo families' interest in the JUA as "squatters' rights," see them as encroachers. They describe the transfer of Hopi land to these individuals as "a devastating loss." See generally the articles posted by the Hopi tribe, <http://www.hopi.nsn.us/> (last visited Oct. 26, 2004). They attribute the creation of the JUA to an ignorant belief by the *Healing* court that the two tribes had the same culture and could live peacefully together. They retort, "Nothing was further from cultural reality. For the Navajo, 'Joint Use' meant 'No Hopi Use' and they continued to claim all of the land for themselves." *Tusqua Ancestral Lands (Continued)*, http://hopi.nsn.us/ancestral_land2.asp (last visited Oct. 27, 2004) [hereinafter "*Tusqua Ancestral Land(Continued)*"].

⁸³ The charge that the HPL Navajo are poor stewards of the land is supported by a variety of observations from various sources. The *Hamilton* court found the land severely overgrazed following Navajo occupation. See *Hamilton v. MacDonald*, 503 F.2d 1138, 1147 (9th Cir. 1974). Peter Steenland, arriving nearly 20 years later and after massive cuts in Navajo stock had been enforced, found the land still stressed by overuse. Telephone interview with Peter Steenland, *supra* note 66.

Hopis' detriment – through astute lobbying. Peter Steenland, one of the government's lead negotiators on the 1996 settlement, remarked:

The Hopi had lost almost a third of their land in an earlier judicial partition. Unlike the Navajo, they had no interest in sitting down to resolve this matter, because the Hopi believed they would be out-muscled by the better connected Navajo Nation [T]hey felt the Navajo had denigrated Hopi sovereignty, overgrazed their lands with Navajo sheep, disrespected their culture and concern for the land, and acted as if [the families that had resisted relocation] were the victims instead of the Hopi.⁸⁴

For the Hopi, therefore, the problem arose with the Navajo, and was perpetuated by U.S. complacency and inaction.⁸⁵ Only regaining complete control of their land would satisfactorily solve the conflict.

The Navajo tell a different story. Their creation myths, related in the *Dine bahane'*, describe the Navajo as emerging onto this land from the earth at the same time as the Hopi.⁸⁶ They maintain that, while tensions have arisen at times, their coexistence with the Hopi has generally been peaceful.⁸⁷ It was the involvement of the United States that created the conflict, through engendering competition for land and encouraging the exploitation of natural resources in ways that would benefit white speculators.⁸⁸ The Navajo claim that the Hopi reservation was created not to protect the Hopi from Navajo encroachment, but to eliminate the resistance of Hopi traditionalists and their few white allies to American cultural imperialism.⁸⁹ Subsequent conflicts, including the *Healing* litigation, were inspired by self-interested lawyers with connections to businesses eager to extract the reservation's resource wealth for below-market compensation.⁹⁰ For the Navajo, the problem could be resolved if the United States, along with self-interested white individuals and corporations, withdrew from the area, and allowed the Navajo families to remain.

Traditional Navajo live in relative isolation, in family groupings. Historically transhumant, most now are sedentary, due to increased population density on the reservation.⁹¹ Navajo culture is matrilineal and matrilocal.⁹² Traditionalist mothers expect to pass on their areas of customary land use to their daughters. This tradition creates an important sense of continuity through the generations.⁹³ Daughters' settlement near their mothers also allows for the care

⁸⁴ Telephone Interview with Peter Steenland, *supra* note 66. See also *Tutsqua Ancestral Land(Continued)*, *supra* note 82.

⁸⁵ See *Tutsqua Ancestral Land(Continued)*, *supra* note 82. In fact, the U.S. was at times quite active in the exclusion of Hopi from the JUA and the degradation of the land. See *supra* notes 65-66 and accompanying text.

⁸⁶ Cheyfitz, *supra* note 48, at 621.

⁸⁷ *Id.* at 622.

⁸⁸ *Id.* at 622-23.

⁸⁹ *Id.* at 623.

⁹⁰ *Id.* at 625-28. This the Hopi vehemently deny, at least as regards the litigation in the latter part of the 20th century. They characterize the conflict as purely an intertribal dispute over land. They do level a claim of white interference at the resisters, asserting that the dispute has been encouraged and exacerbated (and made violent) by "outside agitators." See generally Hopi press releases, <http://www.hopi.nsn.us/Pages/Tutsqua/releases.html>. (last visited Oct. 27, 2004).

⁹¹ BENEDEK, *supra* note 40, at 64.

⁹² *Id.* at 84-84.

⁹³ *Id.*

of elderly Navajo with a minimum of dislocation.⁹⁴ The Navajo families' attachment to their land is rooted in both practical and religious considerations. Families who have lived there for generations possess an intimate and crucial knowledge of the locations of water and edible plants, which will be lost with any relocation.⁹⁵ Moreover, gods, to the Navajo, are local. Shrines must be placed, and petitions made, only at certain locations. Traditional Navajo worry that if they move they will lose that entire religious infrastructure.⁹⁶ Navajo also feel a deep emotional connection to their sheep, which are considered to represent a whole way of life, and are honored as individuals.⁹⁷ The relocation effort, which forced huge stock reductions and sought to move traditionalist families from their customary use lands, thus is seen by them as an absolute assault on their culture and way of life.

Any attempt to arrive at a solution that would be acceptable to both tribes must at least address those perceptions. Enlisting the support of both parties was, and is, critical. The United States spent over a third of a billion dollars on relocation efforts alone from the 1960s to 1999.⁹⁸ Diverting still more resources to a buy-out or another elaborate compensation scheme may not be possible. Nor may strict enforcement. Both the Hopi tribe and the federal government have been and remain unwilling to confront the political outrage that would be inspired by directing federal marshals to evict old women from their homes. Without the prospect of ultimate force to carry out a decree, the government has been forced to rely at least to some degree on voluntary participation by the parties.

1. The 1996 Settlement

a. The settlement process

The 1996 settlement negotiations were marked by a degree of tribal involvement not previously seen in the scope of this conflict. From the first, the negotiators saw their role as that of facilitators only. Steenland observed:

As trustee for both tribes, and defendant in numerous suits filed by each of them against us, we had a common obligation. Early on . . . I established three rules for the federal parties in the mediation. One: we would not force any resolution on any party. A settlement had to be totally voluntary. Two: we would not use money to "buy out" any party, because BIA had a very limited budget and it would have adversely affected tribes in other parts of the country if we took money intended for them to distribute in northern Arizona. Three: we would favor neither side, but work with the mediator to develop settlement options for consideration by all.⁹⁹

⁹⁴ Telephone interview with Britt Clapham, former counsel for the Navajo Nation (Apr. 22, 2003) (on file with author).

⁹⁵ BENEDEK, *supra* note 40, at 103.

⁹⁶ See *The Right to Development, Written Statement Submitted to the UN Commission on Human Rights by the International Indian Treaty Council for the Commission's 59th Session*, U.N. Doc. E/CN.4/2003/NGO/124 (Mar. 12, 2003); *Economic, Social, and Cultural Rights, written statement submitted to the UN Commission on Human Rights by the International Indian Treaty Council for the Commission's 58th Session*, U.N. Doc. E/CN.4/2002/NGO/48 (Jan. 24, 2002).

⁹⁷ BENEDEK, *supra* note 40, at 83-84.

⁹⁸ Telephone interview with Peter Steenland, *supra* note 66.

⁹⁹ *Id.*

Interior Department officials met extensively with members of the Hopi and Navajo tribal governments. Just as important, negotiators dealt directly with members of the Navajo families affected, for they recognized that the families' position was not identical to that of the Navajo Nation. (The families also employed their own lawyers throughout the process.) Katherine Hazard, the lead negotiator after Steenland left, lived on the reservation for nine months, trying to establish among the Navajo families the degree of trust necessary to participate.¹⁰⁰ The Hopi were, if anything, more reluctant. They saw official attempts to resolve the conflict as threatening Hopi control over their lands. Therefore, while they might be forced by the court to enter the mediation, they would not necessarily participate in working toward a solution. To gain their trust, the negotiators tried to find ways to demonstrate that they might come away with positive changes. Early on, they discovered that the Hopi were encountering some harassment as they moved through the reservation to collect eaglets for their religious ceremonies. The negotiators were able to procure a pledge from Navajo President Peterson Zah that such harassment would cease. That allowed the delegates to report to the tribe that they had achieved some success from the process. After three meetings, the Hopi produced a list of ten additional preconditions for the Navajo to meet in order to demonstrate their willingness to enter the negotiations in good faith. These included such points of contention as grazing, fencing, and vandalization. These were issues that the Hopi "considered to be infringements upon their life, sovereignty, and ability to manage their land in a sustained, responsible manner."¹⁰¹

After five years of negotiations and two scuttled proposals, the parties finally reached a compromise. The terms of the Settlement Act provide that the Navajo families may lease from the Hopi Tribe, free of cost, a three-acre home site and ten acres of farmland – the same size of parcel available to Hopis.¹⁰² The lease term is seventy-five years and was understood to be renewable.¹⁰³ The injunction against new home building was lifted, and grazing privileges

¹⁰⁰ *Id.*

¹⁰¹ *Id.* Steenland remarked:

Some of the items . . . had major political significance for the Hopi people, and accomplishment of the preconditions was seen by us as helping to create a climate where the people affected by the talks could begin to think about settlement. For example, the statute partitioning the land gave the Hopi the right to fence their reservation. Since it is located entirely inside the Navajo reservation [the Hopi refer to their reservation, bounded on all sides by the much larger Navajo reservation, as "landlocked"], it was a matter of tribal sovereignty to be able to construct such fences, especially to keep out Navajo sheep and horses. However, every time the Hopi tried to construct another mile of fence, the Navajo would invoke some historic preservation claim, asserting the fence was passing over religiously significant land, and get a temporary restraining order from a federal judge in Phoenix. Our ability to get the fence finished demonstrated to the Navajo that the Hopis would not be pushovers, to the Hopi that the Navajo could be dealt with successfully by them, and showed the families that they needed to get serious about this process.

Id.

¹⁰² See S. REP. NO. 104-363, at 47-54 (1996).

¹⁰³ Telephone interview with Peter Steenland, *supra* note 66. Renewal was not written into the lease, in case the Hopi continue to find Navajo use unacceptable. The Hopi have reminded the Navajo families, however, that other Indians, most notably members of the Tewa tribe, have lived without conflict on the Hopi reservation.

were expanded.¹⁰⁴ The government agreed to construct new housing for families that chose to relocate. Families were given until March 31, 1997 to sign the Accommodation Agreement or agree to move off the HPL. Those that refused would face eviction by the year 2000.¹⁰⁵

The two major restrictions placed on HPL Navajos are the inability to vote in Hopi government, despite the fact that they are subject to Hopi regulation, and the prohibition against creating new sacred sites, such as burials. The Hopi tribe insisted on the latter provision, asserting, "From bitter experience the Hopi have learned that the Navajo use so-called sacred sites to prevent Hopi from using areas of their own land, and use them in legal disputes to claim Hopi land."¹⁰⁶ They characterize the voting restrictions as normal incidents of different citizenship, no different from the status of immigrants under U.S. law.¹⁰⁷

Upon the implementation of the Agreement, the Hopi were to receive financial compensation from the United States.¹⁰⁸ The Act also sets out new

¹⁰⁴ Navajo families that sign the AA are entitled to graze as many animals as Hopi families. Permitting is determined every four years, after a determination of sustainability based on the level of forage, water and wildlife. Any individual (Hopi or Navajo) that exceeds the limits faces the impoundment of livestock. See Letter to the United Nations, High Commission for Human Rights, May 9, 2001, by Cedric Kuwaninvaya, Chairman of the Land Team (on file with author) [hereinafter "Kuwaninvaya letter"]. Although the tribe recognizes that "in some circumstances permitted animal units may be below subsistence levels," it asserts that such management is necessary to restore the range, and is therefore the only way to maintain economic stability for all HPL residents. See *Livestock Permitting is Good Land Stewardship*, Hopi Press Release, June 12, 2001.

¹⁰⁵ S. REP. NO. 104-363, at 8 (1996). Though eviction notices were served within a year of the finalization of the AA, none have been carried out, due to a reluctance by Hopi and federal officials to appear as "the bad guy." Telephone interview with Wilbert Goy, Navajo/Hopi Land Commission, Apr. 6, 2004 (on file with author).

¹⁰⁶ Kuwaninvaya letter, *supra* note 104.

¹⁰⁷ See *Taking of Hopi Land: A Hopi Perspective*, *supra* note 51.

¹⁰⁸ This was to take place through a tiered structure of contingent payments:

Phase 1: payment of \$2.4 million in settlement of Hopi claims against the United States in *Secakuku v. Hale*, 108 F.3d 1386 (9th Cir. 1997).

Phase 2: payment of \$22.7 million in settlement of Court of Federal Claims cases for damages caused by federal actions prior to 1982, following Congressional authorization for the tribe to offer 75-year leases (preexisting law limited the tribe to offering 25-year lease terms with one 25-year renewal).

Phase 3: payment of \$10 million in settlement of Court of Federal Claims cases for livestock trespass damages against the U.S. from 1983 to 1988, if or when sixty-five percent of the Navajo heads of household eligible to sign the AA either do so or relocate.

Phase 4: payment of \$15.1 million in settlement of the third and final portion of the Court of Federal Claims Cases, if or when seventy-five percent of the eligible Navajo heads of household have signed the AA or relocated.

Additionally, since "The continued occupation of the Hopi Partitioned Lands by the Navajo families deprives the Hopi Tribe of certain uses of its lands," and "the acreage made effectively unavailable for Hopi use is greater than a simple calculation of the homesite and farmsite acreage would suggest," additional lands, purchased with Hopi funds, will be taken into trust for the tribe. Furthermore, if by Phase 4 seventy-five percent of Navajo heads of household have signed on to the AA or left the HPL, up to 500,000 acres of rural fee lands or combined fee and State lands, purchased (without condemnation procedures) by the tribe would also be taken into trust. The federal government will also condemn certain state

water use arrangements¹⁰⁹ and the establishment of Hopi jurisdiction over the HPL. This last point was crucial to the Hopi, for they felt that it was upon it that all the rest of their rights (to limit grazing, occupancy, and term) depended.

The Navajo Nation ultimately withdrew from the process. It may have received mixed signals from its diverse constituency, and it was under significant pressure from the resisters.¹¹⁰ The Council encouraged the families to make their own individual decisions about whether to sign, but it concluded that the hardship of the terms fell disproportionately on the Navajo, and passed a resolution registering its disapproval.

b. Results

The Settlement Act has in large part been successful. The majority of the Navajo families have entered into leases under the Accommodation Agreement or have accepted newly-built houses off-reservation, and the Hopi are thus qualified to receive the full compensation awarded them by the terms of the Act.¹¹¹

Many of those who have signed the Accommodation Agreement have pointed to significant practical problems with its implementation, however. Representatives of the Navajo claim that the Accommodation Agreement has not been fully implemented.¹¹² For example, while families were told they could adjust the size of their home site leases, the mechanism for doing that was never clearly laid out. Service distribution has also been problematic. The Navajo Nation distributes services through local chapterhouses. Most Navajo services do not reach to the HPL. The Hopi have stepped in to provide many services the Navajo cannot – in fact, they may be providing more than the Navajo Nation.¹¹³ Still, since the Hopi reservation, unlike the Navajo Nation, is not organized into chapters, many of the families do not know where they can access the services provided by the tribe.¹¹⁴ More information to facilitate that process has not been forthcoming.¹¹⁵ Even the services that the Navajo families know how to access from the tribe may not be claimed, as many

lands, with the state's permission and using Hopi funds, in order to minimize checkerboarding.

This agreement was ratified by Congress, after raising the percentage of compliant Navajo heads of households required under Phase 4 to 85 percent. *See Navajo-Hopi Land Dispute Settlement Act of 1996*, Pub. L. No. 104-301, 110 Stat. 3651 (1996); *see also Clinton v. Babbitt*, 190 F.3d 1081, 1084 (9th Cir. 1999).

¹⁰⁹ To accommodate the slurry line from Peabody Coal, itself a major source of conflict. *See The Water Crisis*, <http://www.hopi.nsn.us/water.asp> (last visited Oct. 28, 2004) [hereinafter "*Water Crisis*"].

¹¹⁰ Interviews with Steenland and Goy, *supra* notes 66 and 105.

¹¹¹ *See Manybeads Case Dismissed*, Hopi Press Release, Apr. 18, 2000.

¹¹² Telephone interview with Britt Clapham, former counsel for the Navajo Nation (Apr. 22, 2003) (on file with author).

¹¹³ Much of this is financed by federal money, which carries with it prohibitions on restricting who may receive the services based on ethnicity (or other characteristics of a protected class). Goy, *supra* note 105.

¹¹⁴ Telephone interview with Britt Clapham, *supra* note 112.

¹¹⁵ *Id.*

remain wary of the Hopi, due to what they feel was a "scorched earth" policy of enforcing the building freeze in the 1970s.¹¹⁶

An organization representing Navajo families from every region of the HPL has grown up. The group is working with lawyers (financed by the Navajo Nation) to incorporate into 501(c)(3) status, so that it may provide services such as water, electricity, housing, and meeting facilities, without the assistance of either tribe. Individuals have even looked into incorporating as a chapter and sending representatives either to the Hopi or Navajo tribal councils, though legal hurdles have blocked the proposal.¹¹⁷

The compliance of signing families with the terms of the Accommodation Agreement is less than ideal. Grazing remains an important point of contention, as do other regulated activities such as solid waste disposal and woodcutting. In many cases, educating the families about Hopi ordinances has solved the bulk of the problems. Nevertheless, many families have criticized the relocation policy for not providing a way for family members to obtain adjacent home sites, which is problematic because it erodes the traditional Navajo settlement patterns.¹¹⁸ It also provides relocation benefits only to those whose heads of households applied for those benefits previously. That does not accommodate the situation of those individuals whose parents did not sign, but who now would like to take advantage of the program.¹¹⁹ The progress of implementation has progressed quite slowly, at least in part because of the Navajo Nation's disapproval of the Settlement terms.¹²⁰

There is also a small group of traditional Navajo families that have refused either to sign or relocate. They reside in every section of the HPL, but one group, centered around the Big Mountain area, was particularly vocal through the 1980s and 1990s and became a representative for Navajo resisters.¹²¹ In 1979, these individuals broke away from the Navajo Nation, forming an organization they call the Sovereign Dineh Nation (SDN). They claimed that they were being ousted to make way for coal exploitation in the HPL, and characterized the grazing policy and other enforcement of the Settlement Acts as terrorization designed to undermine their resistance.¹²² They viewed relocation as

¹¹⁶ *Id.*

¹¹⁷ Goy, *supra* note 105.

¹¹⁸ Telephone interview with Britt Clapham, *supra* note 112.

¹¹⁹ *Id.*

¹²⁰ Telephone interview with Kevin Gover, former counsel for the Navajo Nation, Mar. 9, 2004 (on file with author).

¹²¹ For the past two or three years, it has turned its attention to other issues and has become less involved with the land dispute. Goy, *supra* note 105.

¹²² One article went so far as to compare the grazing policy to eradication campaigns by the United States in its aggression against Western Indian tribes in the 1800s. See *Terror in Arizona: Bureau of Indian Affairs Seizes Elderly Indians' Livestock in Push to Final Solution on Black Mesa, Reports Sovereign Dineh Nation*, PRNEWswire, Mar. 11, 1999 ("A campaign of livestock confiscation intended to starve and frighten the residents of Black Mesa into abandoning their homes was resumed recently by the U.S. Bureau of Indian Affairs (BIA), reports Sovereign Dineh Nation. These actions follow the government's historic pattern of destroying food sources and using fear to force Indians off their lands.").

utterly devastating, and likened it to a second Long Walk.¹²³ These individuals waged an extensive international media campaign and brought a number of lawsuits, all directed at maintaining their presence on the HPL without acknowledging Hopi jurisdiction.

The number of individuals involved is not large. Only 7 families as a whole have refused to sign the Accommodation Agreement or leave; the total number of individuals is less than 30.¹²⁴ But the resistance has had a significant effect. The Hopi complain about an influx of political activists and political rallies, and have brought several ejectment actions and charges of criminal trespass.¹²⁵ Activists have engaged in civil disobedience, such as cutting the fence between the Hopi and Navajo reservations, building unauthorized structures, and holding politicized religious ceremonies on the HPL without Hopi approval.¹²⁶ Threats of violence have arisen.¹²⁷ Furthermore, the Hopi fear that under the pressure of this conflict, the alliances between the two tribal governments may unravel.¹²⁸ The strain has been evident. Representatives from the two tribal governments used to meet monthly to discuss common issues, but the Navajo Nation ended the meetings in 2001, after the Hopi tribe shut down a Sundance organized by the Big Mountain group without a permit.¹²⁹ The Hopi tribe saw the ceremony as essentially a political rally for the resisters.¹³⁰

The resisters have repeatedly petitioned the United Nations (UN) to intervene in the dispute. Both sides have appeared before UN bodies to plead their side of the issue. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, an advisory body to the UN Commission on Human Rights, responded by authorizing two members of the Sub-Commission's Working Group on Indigenous Populations to visit the United States and prepare a report on relocation efforts under the 1974 Settlement.¹³¹ Personnel changes delayed the trip until the following year. The delegates prepared two

¹²³ See *Statement by Roberta Blackgoat, Dineh Elder, Big Mountain Arizona*, <http://www.nativeartists.org/BigMountain/RobertaBlackgoat.html> (Apr. 14, 1999) (last visited Oct. 27, 2004).

¹²⁴ Goy, *supra* note 105. The number of individuals includes members of other families as well. Every individual over the age of 18 must sign the AA to remain legally on the HPL. In some cases, family members have made different decisions about signing.

¹²⁵ See Hopi Press Releases: *Hopi Jury Finds Crittenden Guilty of Criminal Trespass*, Mar. 27, 2002; *Hopi Tribe Disappointed with Dismissal of Trespass Charges*, Mar. 4, 2002; *Exclusion Order Upheld*, Nov. 14, 2001; *Hopi Tribe Asserts Its Jurisdiction over the HPL: Camp Anna Mae Dismantled*, Aug. 17, 2001; *Kee Shay Hearing Plagued by Delays*, June 27, 2000; *Hearing Finds Arlene Hamilton Violated Hopi Laws*, Apr. 26, 2000.

¹²⁶ See Hopi Press Releases: *HPL Navajo Families Support Hopi Exclusion*, Mar. 29, 2000; *Exclusion Hearing Concluded: Tribal Sovereignty at Heart of Case*, Mar. 21, 2000; *Hopi Tribe Asserts Its Jurisdiction over the HPL: Camp Anna Mae Dismantled*, Aug. 17, 2001.

¹²⁷ See Hopi Press Releases: *Bomb Scare at Hopi*, Oct. 2, 2001; *Shooting at Village of Oraibi*, Oct. 3, 2000; *Sacred Ceremony is Used for Political Motives*, July 12, 2001.

¹²⁸ See Hopi Press Releases: *President Kelsey Begay Pledges to Trample the Rights of Hopi People*, Sept. 18, 2001; *Hopi Sovereignty is the Crux of the Issue*, July 20, 2001.

¹²⁹ Goy, *supra* note 105.

¹³⁰ *Hopi Tribe Asserts Its Jurisdiction over the HPL: Camp Anna Mae Dismantled*, *supra* note 125.

¹³¹ See *Hearing Before the Select Committee on Indian Affairs of the United States Senate on the Views and Concerns of the People of Northern Arizona Regarding the Navajo-Hopi*

reports and a draft for a Sub-Commission resolution, which warned "that human rights and fundamental freedoms must be respected by institutions of local, internal or autonomous self-government, no less than by States;" the Sub-Commission eventually issued a number of resolutions encouraging the participation of the affected families in the settlement process.¹³² The UN Special Rapporteur, on a 1998 visit to the United States to assess its protection of religious rights generally, also drew special attention to the Hopi-Navajo conflict.¹³³

c. Challenges

When they brought suit in 1988, the *Manybeads* plaintiffs claimed that the relocation effort and the restrictions placed on HPL Navajos in the 1970s violated fundamental rights. They asserted that they possessed "the right for themselves and their heirs in perpetuity, to reside on the Hopi Reservation on what they consider their extensive customary use areas, with unlimited grazing privileges, the right to construct such buildings as they wish, and to utilize unlimited water claimed necessary to their needs."¹³⁴ Their seven claims complained of: violation of religious rights protected under the free exercise clause of the United States constitution, the American Indian Religious Freedom Act, the equal protection clause, customary international law and the United Nations Charter; violation by the United States of its federal trust responsibility; deprivation of the families' rights under Article 73 of the United Nations Charter as a Non-Self-Governing People; and genocide.¹³⁵

The district court denied the plaintiffs' request for a declaratory injunction establishing these claims and injunctive relief enjoining the U.S. from relocating plaintiffs or attempting to constrain their management of livestock and housing. The court found that the plaintiffs' free exercise claims were foreclosed by *Lyng*, which upheld facially neutral government actions that threatened to impair or destroy religious exercise, for fear of creating "religious servitudes" on government property.¹³⁶ The court noted that the analysis was particularly compelling in this case, as protecting Navajo autonomy would limit Hopi sovereignty. "The rights claimed by plaintiffs in Hopi lands are in total derogation of Hopi rights in and to their reservation."¹³⁷

Agreement in Principle, 103d Cong. 103-47 (1993) (written testimony of Russell Lawrence Barsh).

¹³² See Sub. Comm. Res. 1996/36, U.N. Sub.-Comm. on Prevention of Discrimination and Protection of Minorities, 47th Sess. (Aug. 29, 1996); *Final Report on the Study "Indigenous Peoples' Permanent Sovereignty Over Natural Resources,"* U.N. Sub-Comm. on Human Rights, 56th Sess., U.N. Doc. E/CN.4/Sub.2/RES/2004/9 (2004); *Prevention of Discrimination and Protection of Indigenous Peoples, Indigenous Peoples' Permanent Sovereignty over Natural Resources, Final Report of Erica-Irene A. Daes*, U.N. Sub.-Comm. on Human Rights, 56th Sess., U.N. Doc. E/CN.4/Sub.2/2004/30 (July 13, 2004); Sub-Comm. Res. 1994/44, 46th Sess., U.N. Sub.-Comm. on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 102-03 (Aug. 1994).

¹³³ See Report by Special Rapporteur Abdelfattah Amor, U.N. Doc. E/CN.4/1999/58/Add.1 (1998).

¹³⁴ *Manybeads v. United States*, 730 F. Supp. 1515, 1516 (D. Ariz. 1989).

¹³⁵ *Id.* at 1516-17.

¹³⁶ See *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

¹³⁷ *Manybeads*, 730 F. Supp. at 1518.

Regarding their equal protection claim, the plaintiffs reasoned that since white settlers in prior cases were permitted to remain on public lands, while the Indians who had used the land were awarded only monetary compensation, Navajo families should likewise be allowed to remain. This claim, surprising for a lawsuit seeking to uphold indigenous rights, was dismissed on the grounds that this was a political decision by Congress. The court spent even less time with the plaintiffs' international claims, which it termed frivolous. After asserting that international law did not apply, the court concluded that in any case it would not condemn a settlement designed to strike a balance between competing indigenous rights. It quoted *Hamilton's* description of the trade-off:

This is poor men against other poor men, fighting against a long historical backdrop for an over-grazed, harsh, and inhospitable area which yields little above a subsistence living. Both tribes have historical claims to the area, and both undoubtedly have present economic need. Any solution is inevitably bound to cause suffering. The Order of Compliance and implementation plans attempt to minimize the economic dislocation caused the Navajo shepherders, but the district court obviously cannot at the same time implement the decree protecting Hopi interests and not visit hardships on the Navajo, who presently use the entire area.¹³⁸

It went on to state "only the most partisan of advocates would argue that the Navajo-Hopi Land Settlement Act or subsequent amendments violate in word or spirit the Genocide Implementation Act of 1987," and noted that the Act created no enforceable rights.¹³⁹ In a later opinion, the court dismissed plaintiffs' complaint for failure to state a claim. It was on appeal from that decision that the Ninth Circuit ordered the mediation that produced the Accommodation Agreement.

The *Manybeads* plaintiffs came back before the Ninth Circuit in 2000, resisting the Accommodation Agreement and challenging the constitutionality of its predicate, the 1974 Settlement Act, on the basis of religious freedom. The court affirmed the dismissal of the case after it found that the Hopi tribe, which had refused to waive its sovereign immunity, was a necessary and indispensable party.¹⁴⁰

The same result was reached in an earlier case, in which resisting families attempted directly to challenge the 1996 Settlement. In *Clinton v. Babbitt*, plaintiffs claimed the Settlement violated the equal protection clause of the Fifth Amendment.¹⁴¹ The court also affirmed the dismissal of this action on the basis of Hopi sovereign immunity, though it noted in passing

the apparent lack of substance to the claim. First, the plaintiffs admit they are in the unique position of being offered free leases to remain on land to which they have no right, and fail to allege that they are being treated less favorably than any similarly situated individuals. Second, even if the plaintiffs make the threshold showing of disparate treatment they fail to show that this treatment is not rationally related to legitimate legislative goals, such as the peaceful settlement of the Navajo-Hopi land dispute.¹⁴²

¹³⁸ *Id.* at 1521 (quoting *Hamilton v. McDonald*, 503 F.2d 1138, 1145 (9th Cir. 1974)).

¹³⁹ *Id.*

¹⁴⁰ See *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000).

¹⁴¹ *Clinton v. Babbitt*, 180 F.3d 1081, 1086 (9th Cir. 1999).

¹⁴² *Id.* at 1087.

The Ninth Circuit acknowledged in both cases that the sovereign immunity bar may prevent these plaintiffs' claims from ever being heard.¹⁴³ This presents the question of whether the assertion of sovereign immunity by one tribe may impermissibly infringe the rights of members of another. The answer seems to be, like most answers in this dispute, a balance of the equities.

Congress has expressly limited the ability of incorporated tribes to exercise their authority in ways that would violate certain fundamental rights.¹⁴⁴ Those rights relevant to the instant dispute include the free exercise of religion; the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures; freedom from takings without just compensation; equal protection and due process. Although the language was taken from the Bill of Rights, the interpretation of these rights is not the same as that applied to actions taken by the state and federal governments.¹⁴⁵ Specifically, the limitation on tribal power should "be applied with recognition of the tribe's unique cultural heritage, its experience in self-government, and the disadvantages or burdens, if any, under which the tribal government was attempting to carry out its duties."¹⁴⁶ Individual rights should be balanced against the right of tribal self-government.¹⁴⁷

Freedom of religion is well recognized as a fundamental right in international law. The international community has endorsed it since the General Assembly of the United Nations produced the Universal Declaration of Human Rights in 1948.¹⁴⁸ This right is echoed in the third article of the American Declaration of the Rights and Duties of Man. However, many of the same treaties that promote this right acknowledge that it may be limited by laws "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."¹⁴⁹ The Hopi, of course, claim that their interest in sovereignty over lands long recognized as theirs is paramount. Self-determination by indigenous peoples is another fundamental right, recognized both by the United Nations¹⁵⁰ and by the Organization of American States.¹⁵¹

¹⁴³ *Id.* at 1090; *Manybeads*, 209 F.3d at 1166.

¹⁴⁴ See Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (2000).

¹⁴⁵ See *Janis v. Wilson*, 385 F. Supp. 1143, 1150-51 (D.S.D. 1974), *remanded on other grounds* 521 F.2d 724 (8th Cir. 1975).

¹⁴⁶ *Id.* at 1150-51.

¹⁴⁷ *Id.* at 1150.

¹⁴⁸ Declaration on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res., U.N. GAOR 36th Sess., Supp. No. 51, U.N. Doc. A/36/684 (1981), art. 1(3).

¹⁴⁹ See, e.g., *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A16136 (1967), art. 18(3).

¹⁵⁰ See *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994), art. 3: "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;" art. 31: "Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including . . . social welfare, economic activities, land and resource management, the environment and entry by nonmembers"

¹⁵¹ See *Proposed American Declaration on the Rights of Indigenous Peoples*, OEA/Ser/L/V/II.95, Doc. 6 (Feb. 26, 1997) art. XV: Right to Self Government: "Indigenous peoples have the right to freely determine their political status and freely pursue their economic,

The claims made by the Dann sisters may be levied here as well: the right to equality before the law, the right to religious freedom and worship, the right to property, the right to cultural integrity, the right to self-determination. The American Declaration embraces the right of equality before the law, the right to the inviolability of the home, and the right to a fair trial.¹⁵² The Preamble emphasizes "it is the duty of man to preserve, practice and foster culture by every means within his power." Yet it is not clear on whose behalf the claims would weigh most heavily. Both sides have important religious and cultural concerns at stake.

The interests here are significant and opposed. The Navajo families have maintained a connection to this land that extends throughout the generations. Family members are buried here, and traditionally the land passed on through the family from mother to daughter.¹⁵³ The land also represents a link to a religious and cultural history that cannot, should not, be broken. As one of the members of the holdout families reports,

Selling your life, that's what you're doing when you're relocating. You sell your land and whatever you believe in, your parents' religion. You're even selling the bones of your relatives I don't want it on my conscience that I sold everything [the Holy People] put down for us way back in the beginning of time.¹⁵⁴

The resisters see themselves as caught between two laws: the obligation to relocate, and the spiritual laws requiring them to remain. They see their occupation as protecting the land against coal and other resource extraction. Roberta Blackgoat, one of the more vocal of the resisters, asserted,

What we've been told is that you, the Diné people are gonna sit on the Mother Earth's liver and the heart and the lung [natural resources]. This is where you have to hang on tight, real, real tight. This is what the sacred prayer and the sacred song is telling you. Can't break it, can't leave it behind and go to another place. This is gonna keep you here. You gonna be strong enough to hold this song and carry it on to your children, grandchildren, on, on through the generations.¹⁵⁵

These individuals pledge "to stay there until they die, because that is where they have lived forever. An important part of the Navajo cultural ethos is that when they die they go back to the place where they are from."¹⁵⁶

Nevertheless, sovereignty is an important right in itself, and while the Hopi have typically endorsed the settlement, they too have relinquished many of the elements most important to them. They are still faced with the uncertainty and indignity of watching others inhabit land they believe to be theirs. During those lease terms they may not use that land, and it may be difficult to control the Navajos' use. While they have jurisdiction to enforce tribal man-

social, spiritual and cultural development and accordingly, they have the right to autonomy or self-government with regard to *inter alia* culture . . . social welfare, economic activities, land and resource management, the environment and entry by nonmembers"

¹⁵² *Id.* arts. II, IX, XVIII.

¹⁵³ BENEDEK, *supra* note 40, at 70, 79.

¹⁵⁴ BENEDEK, *supra* note 40, at 90 (quoting Ella Hatathlie).

¹⁵⁵ Quoted in B.J. Bergman, *Wrong Side of the Fence*, MOTHER JONES, Jan/Feb. 2000, at 68. Claiming religious authority for their presence, she suggests that those in favor of relocation of the traditionalist Navajo families should "sue the Creator." *Id.*; see also *The Right to Development*, *supra* note 96.

¹⁵⁶ Telephone interview with Herb Becker, (Mar. 2003) (on file with author).

dates, the continued presence of families who have refused to enter into lease terms demonstrates the practical limits of such rights. Friction has also arisen over Hopi access to these lands.¹⁵⁷ Finally, many Hopi resent the settlement's insistence that they rely upon outside water pumped in from elsewhere while the Peabody coal company depletes the aquifer they have traditionally relied upon for their agriculture.¹⁵⁸ The Hopi characterize the offer of the leases as a gesture of goodwill that was offered "at great sacrifice to their interests."¹⁵⁹

If brought before the Commission, these rights would have to be balanced, just as they have been balanced domestically. It would surely influence the analysis that this conflict has been extensively (and expensively) litigated, and that the families were fully drawn into the settlement process. As described above, the mediators made every possible effort to draw the families into the negotiation process and to ensure that their perspective was included. And yet, the second *Manybeads* case appealed the settlement, claiming that it did not represent the families' interests. The plaintiffs asserted that the majority of the families remaining on the HPL opposed the settlement, and signed the Accommodation Agreement only to protect their interests while continuing to pursue the lawsuit.¹⁶⁰ This raises the question of whether the families' voices were indeed heard in the negotiations. The Dann case tells us that if they were not, then the settlement might not be valid under international law.

The voices of the resisting families may have been somewhat muffled by the participation of the Navajo tribe. The intermediary role of the Navajo Nation was already at issue before the 1996 Settlement, where resisters seeking to challenge range restoration measures were found not to have standing on issues implicating tribal interests.¹⁶¹ The withdrawal of the Navajo Nation from the process should remove these doubts, however.

Charges have also been leveled (by non-Hopi) that the Hopi tribal council is influenced by the extraction industry and poorly represents the interests of its traditionalist members, who are more sympathetic to HPL Navajos. In particular, many commentators have noted the questionable circumstances under which the Hopi tribal government was constituted. Under the Indian Reorganization Act, tribes were urged to create governments that mimicked the United States' model. These were often ill-suited to indigenous cultures. The establishment of such governments may have been motivated at least in part by a desire to open Indian lands to natural resources extraction, which a tribal government sympathetic to federal policy and susceptible to federal influence

¹⁵⁷ *Id.*

¹⁵⁸ See *The Water Crisis*, *supra* note 109.

¹⁵⁹ See *Tutsqua Ancestral Land*, *supra* note 38.

¹⁶⁰ See Brief for Petitioners at 9, *Manybeads* (No. 00-0886) ("Prior to the fairness hearing, only five of the eligible homesites had agreed to sign an agreement [but after being assured that they could continue the appeal] . . . an additional seventy-seven (77) of the ninety-six (96) eligible occupied homesites signed Agreements with the understanding that the Ninth Circuit would decide Petitioners' constitutional challenge to the Relocation Act").

¹⁶¹ See *Attakai v. United States*, 746 F. Supp 1395 (D. Ariz. 1990) (finding that the plaintiffs lacked standing to pursue free exercise claims regarding religious sites of significance to the tribe as a whole or to litigate grazing rights, though they did have standing to litigate religious claims regarding individual religious sites as well as claims concerning historical, archeological, and cultural artifacts).

could both authorize and legitimate. A sense of culturally determined idealism undoubtedly also played a role. Oliver LaFarge, sent to create a Hopi Tribal Council by John Collier, the BIA Commissioner under Franklin Roosevelt, pushed acceptance of the new government against his better judgment and in the face of opposition from the bulk of the tribe. The Council was ultimately certified by Collier, despite heavy resistance by the village heads, because of a final vote tally of 651 to 104 – with 1800 abstentions. LaFarge warned Collier that abstention was a traditional method of showing opposition, but Collier, eager to create an institution that he thought would protect Hopi interests and culture, disregarded that advice.¹⁶² What resulted was a system of shadow government, with the traditional and new leadership bodies coexisting uneasily.

Over time, these problems have abated. The tribe has worked out an accommodation that allows the traditionalist leaders to register their opposition within the system. Each village sends a representative to the Tribal Council. The constitution requires that the Kikmongwi, or chief, of traditionalist villages certify that village's representative. If the Council acts in a way the traditionalists do not approve, they may revoke their representative's certification, and the Council may lose its quorum, and unable to conduct business.¹⁶³ Generally, reports of this process have been satisfactory.¹⁶⁴ That the Council has not dramatically changed the Hopi way of life is evidenced by the fact that traditional culture remains quite strong.¹⁶⁵

It is important to note that there have been no specific allegations of HPL Navajos' exclusion from the settlement process. Under the reasoning of the Commission, the measures that were taken are probably enough. The Dann case instructs that:

Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole.¹⁶⁶

The court goes on to say, "This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to par-

¹⁶² Charles F. Wilkinson, *Home Dance, The Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, B.Y.U. L. REV. 449, 456-57 (1996).

¹⁶³ Sekaquaptewa, *supra* note 35, at 765.

¹⁶⁴ *See id.* at 783-84; telephone interview with Peter Steenland, *supra* note 66:

Hopi council members cannot run for office unless they have been approved by the most traditional and religious leaders of the Hopi tribe. As a result, when the Hopis were asked to make a major concession to move the talks along, one or two council members would resign, thereby depriving the Council of a quorum, and necessitating further consultation with the religious leaders on the merits of the compromise before any movement could be achieved. . . . Legitimacy wasn't a problem in Hopi. It was smaller, less populated, concentrated; everyone knows everyone. It was also organized in accordance with religious societies. I analogized dealing with the Hopi to dealing with a turtle. When it got scared, it went in its shell, and if you kick it, it gets more scared. These guys would quit. And then you'd wait months, reassure them, they'd have another election, and boom – you were back in business.

¹⁶⁵ Ragsdale, *supra* note 37, at 451-52.

¹⁶⁶ *Supra* note 30, at ¶ 140.

ticipate individually or as collectives."¹⁶⁷ A finding of extinguishment of title must be "based upon a judicial evaluation of pertinent evidence."¹⁶⁸

The extensive litigation and the elaborate settlement process surely qualifies to meet these minimum standards. The Commission does not indicate what more might be required, but it seems doubtful that it would find this case to present a human rights violation. The resisters were included in the settlement, but were uninterested in settling, for settling requires compromise, and they have made clear that they will accept nothing short of complete control over the land.¹⁶⁹ It is unlikely that the Commission will ratify this stance that the courts all too familiar with the conflict have asserted is "in complete derogation of Hopi rights." After all, the Commission prefers to leave "complex issues of law and fact . . . to the State for determination."¹⁷⁰ In the end, it is best to leave the resolution of this zero-sum game where it stands: with neither side facing a complete loss. Any other solution may prove to be illusory for the simple fact that each party wants the same thing: complete control over the same piece of land.

IV. CONCLUSION: ADJUDICATING DIFFERENCE

What we hope these two stories illustrate is that the question of when international law matters is not one that can be answered with reference to any absolute principle. There are those occasions when as a matter of principle domestic law ought to trump. Nonetheless, the overriding principle is fairness to indigenous people, an issue on which international law is hardly silent. It is these norms of fairness (both substantive and procedural norms) that ought to be guiding principles in all Indian law disputes. As recent Supreme Court decisions illustrate, thinking about tribes solely within the categories of ordinary constitutional law does violence both to the efforts to define a constitutional space for tribes that is consistent with our best values as well as to our commitment to be part of an interlaced international legal system.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at ¶ 137.

¹⁶⁹ See Brief for Petitioners at 7, *Manybeads* (No. 00-0886) ("Specifically, Navajo residents of HPL object to the lack of a permanent right to remain on their sacred land, the Hopi Tribe's prohibition on Navajo burials on HPL, limitations and restrictions on Navajo grazing")

¹⁷⁰ *Supra* note 30, at ¶ 171.