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Fragile Gain: Two Centuries of Canadian and United States Policy Toward Indians

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FRAGILE GAINS: TWO CENTURIES OF CANADIAN AND UNITED STATES POLICY TOWARD INDIANS

Ralph W. Johnson*

Abstract: The United States and Canada share a common history in their policies toward and legal treatment of the Native Americans that historically have occupied both countries. The Royal Proclamation of 1763 established a policy of recognizing Aboriginal title and treating with Indians that was binding on the colonies that preceded both countries, and influenced both governments in later dealings with tribes. Assimilationist themes are evident as well in the national policy toward Indians in both countries. Nevertheless, historically and in the present, national policies and laws of the two governments can be contrasted. This Article sets forth a detailed comparison of the historical events surrounding white settlement and displacement of Indians from their Aboriginal lands. It further describes trends in the creation and development of Indian law, in the United States Congress and the Canadian Parliament, and in the courts of both countries. United States Supreme Court Justice John Marshall first recognized tribal sovereignty in developing a federal common law that has been extremely influential in the Indian jurisprudence of both countries. Presently in the United States, however, the Supreme Court is hostile toward tribal sovereignty and will not review federal legislative actions toward tribes, while Congress is an increasing champion of tribal self-government and economic self-development. Conversely, the Canadian Parliament continues in its assimilationist legislative attitudes, refusing to recognize inherent powers of sovereignty in tribal government. Nevertheless, aboriginal rights of the Indigenous peoples of Canada were codified in the 1982 Constitution, and the Canadian Supreme Court has recently taken unto itself the power to scrutinize legislative action in light of those rights.

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INTRODUCTION

Native Americans¹ of Canada and the United States have struggled for more than 200 years, largely beneath the surface of mainstream history, to retain their cultural identity, to keep or recapture Aboriginal lands, and increasingly to protect their rights to self-determination and self-government.

1. In the United States the term "Indian" is normally used to describe aboriginal Americans. The term "tribe" (alternatively "nation") is used to describe both ethnological groups of Native Americans as well as the contemporary legal-political groups (often comprised of several ethnological tribes) that occupy and govern modern-day reservations. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 3, 19 (1982). An exception is Alaska where aboriginals are usually referred to as "Alaska Natives," and the legal-political groups of Natives are usually identified as "Villages," although at times the terms "tribes" and "bands" are still used. D. CASE, *ALASKA NATIVES AND AMERICAN LAWS* 10 (1984).

In Canada the term "Indian" is sometimes used to describe all Aboriginals, but not the Metis. The preferred terms now are "First Nation," Indigenous People, or Aboriginal. In the literature the term "band" is often used in Canada rather than "tribe." J. WOODWARD, *NATIVE LAW* 2-14 (1990). The above definitions are the most widely used in the literature and legislation, however the definition of these terms often depends on the legislative intent of Congress or Parliament. The precise meaning must be determined by context, and requires a particularized analysis.

Douglas Sanders has said that if there is a legal definition of the word "Metis," it must mean the people who took "half-breed" grants under the Manitoba Act of 1870 or the Dominion Lands Act, or the descendants of those people. Sanders, *Aboriginal Peoples and the Constitution*, 19 ALTA. L. REV. 410, 419-20 (1981). Other definitions can be found in J. WOODWARD, *supra*, at 54-55.

This is a comparative study of United States and Canadian policies and laws towards Native Americans. Both Canada and the United States share the same "mother country." Both are federations, with populations that share similar racial problems and social systems; both share the common law system; and, both share similar moral, ethical, and political values. Differences in the two nations' Indian policies are partly based on demographics. More often, however, they reflect conscious choices about dealing with the "Indian problem." This Article analyzes these choices and their impacts on the lives of Native Americans and non-Native Americans. The Article evaluates both successful and unsuccessful policies of the two countries. It is my hope that these comparisons will afford improved understanding and awareness of this complex subject and will contribute constructively towards the continuing debate about the enlightened and successful national policies that should be adopted towards Indians.

I. THE HISTORICAL SETTING

A. *Aboriginal Claims*

Historically, the conqueror governments of Canada and the United States have exhibited persistent, negative attitudes towards Indians and their aboriginal claims. For example, in 1855, Congress enacted a law allowing contract suits to be brought against the United States in the newly created Court of Claims.² When it became apparent that Indian tribes might file suit under this Act for treaty violations, Congress, in 1863, amended the Act specifically to deny Indians access to the new court.³ Thereafter, an Indian tribe had to obtain a special Act of Congress to bring suit for treaty violations. It was not until after the 1946 Indian Claims Act that the United States paid most claims, and then only partially.⁴ In 1955, the United States Supreme Court held that the taking of aboriginal title by the United States did not give rise to an Indian claim for fifth amendment⁵ compensation.⁶ In fact, until the 1930s, even the taking of title "recognized" by treaty, agree-

2. Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612 (currently codified as amended at 28 U.S.C. § 171 (1988)).

3. The 1863 statute was allegedly enacted to punish Indians for the hostilities of some tribes against the United States. See H.R. REP. NO. 1466, 79th Cong., 1st Sess. 2 (1945).

4. The Indian Claims Commission awarded judgments for the value of the land when it was taken by the United States in the 1800s, and refused to award interest on those sums for the years up to the date of the Commission award. The normal rule is that interest is awarded for fifth amendment takings. UNITED STATES INDIAN CLAIMS COMM'N, FINAL REPORT 11 (1978).

5. U.S. CONST. amend. V.

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

ment, or statute, by the federal government was not clearly compensable.⁷

Canada likewise refused to give credence to First Nation Aboriginal claims. From 1927 through the early 1930s, it was a crime to assist a First Nation in Canada to file suit against the government based on Aboriginal title.⁸ In 1969, a government white paper recommended that all Aboriginal claims be ignored and forgotten.⁹ It was not until the 1973 case of *Calder v. Attorney-General*,¹⁰ the Constitution Act of 1982,¹¹ and the 1990 decision in *Sparrow v. The Queen*,¹² that the Canadian government began recognizing Aboriginal rights.

B. National Policies v. Implementation

Early national laws and policies were sometimes directly damaging to Native American tribes. More often, however, it was the implementation of laws,¹³ or the lack thereof, that needlessly damaged or destroyed Indigenous peoples' culture, religion, health, and self-esteem.¹⁴ Time and again, the lofty statements and high policies of the two national governments were ignored or consciously thwarted: first, by avaricious prospectors and settlers who embraced Manifest Destiny as an excuse to take Indian land and resources, legally or otherwise; and second, by local politicians and land developers. The dominant society's belief in its own moral, cultural, and religious superiority was based on western conceptions of civilization, on attitudes of racial superiority, and on an often religious, ethnocentric view of life that denied validity to Native American cultures, religions, and lifestyles. The historical literature about Indian/White relations is replete with

7. See *United States v. Cook*, 86 U.S. (19 Wall.) 591 (1873); see also *Pine River Logging & Improvement Co. v. United States*, 186 U.S. 279 (1902); 19 Op. Att'y Gen. 710 (1890); 19 Op. Att'y Gen. 194 (1888).

8. See *infra* note 206 and accompanying text.

9. STATEMENT OF THE GOVERNMENT OF CANADA ON INDIAN POLICY (1969).

10. *Calder v. Attorney-General*, 1973 S.C.R. 313, *aff'g* 13 D.L.R.3d 64, 74 W.W.R. 481 (B.C. 1970).

11. Constitution Act, 1982, CAN. REV. STAT. app. II, No. 44 (1985).

12. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

13. See, e.g., *United States v. John*, 437 U.S. 634, 641-42 (1978):

The account of the federal attempts to satisfy the obligations of the United States both to those [Choctaws] who remained [in Mississippi] and to those who removed, is one best left to historians. It is enough to say here that the failure of these attempts, characterized by incompetence, if not corruption, proved an embarrassment and an intractable problem for the Federal Government for at least a century.

14. Some historians have chronicled the numerous disasters that occurred to Indians in the implementation of national Indian policies. See A. DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES (1970); B. DIPPLE, THE VANISHING AMERICAN (1982); W. HAGAN, AMERICAN INDIANS (rev. ed. 1979); F. PRUCHA, THE GREAT FATHER (abr. ed. 1986).

examples of this attitude.¹⁵ A typical problem for United States tribes was that when they would move to their assigned reservation they would find it already occupied by white settlers. The response of the national government was not to call out the troops and expel the white trespassers, but to coerce and cajole the Indians into ceding more land or moving to some other, usually less desirable, area.¹⁶ At other times, tribes who had been assigned and were already living on a reservation would discover settlers infiltrating, taking gold, water, and timber, and settling on reservation lands.¹⁷ Seldom did the United States require settlers to move. It was the Indians who had to move, adjust, and absorb the loss.

The history of treaty implementation¹⁸ is, unfortunately, not within the scope of this Article. But that history should be kept in mind as background against which to measure the choice and the impact of laws and policies.

C. *Knowledge of Indian History*

One of the sad truths about policies towards Indians is the fact that the public, as well as most political leaders, historians, and lawyers, have had very little knowledge of or interest in Indian history. For most of this century, school children have learned how the West was

15. See generally A. DEBO, *supra* note 14; FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (1942); F. PRUCHA, *supra* note 14; see also R. BERKHOFFER, JR., THE WHITE MAN'S INDIAN (1978); D. BROWN, BURY MY HEART AT WOUNDED KNEE (1970); V. DELORIA, JR., CUSTER DIED FOR YOUR SINS (1969); B. DIPPLE, *supra* note 14.

16. The history of the Puyallup Indian Tribe in Washington state, which recently negotiated a multi-million dollar land claims settlement, provides a good example of this problem. See Draft White Paper—Puyallup Indians Negotiations Project (on file with the *Washington Law Review*); see also Puyallup Tribe of Indians v. Port of Tacoma, 525 F. Supp. 65, 71-74 (W.D. Wash. 1981), *aff'd*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

17. See, e.g., F. PRUCHA, *supra* note 14, at 211-16; Report of Henry Knox on White Outrages (Secretary of War to the Continental Congress) (July 18, 1788), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 11 (F. Prucha 2d ed. 1990) [hereinafter DOCUMENTS]; see also United States v. Sioux Nation of Indians, 448 U.S. 371, 377-79 (1980) (describing events surrounding the dismantling of the great Sioux reserve).

18. The United States Congress banned further treaty signing with Indian tribes in 1871. Some 389 treaties were negotiated between the United States and various Indian tribes. Treaty making, however, has not been as dominant as often thought. "Of the 52 million acres of trust land now held by the tribes and individual Indians, only about 20 million were originally recognized by treaty." C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 8 (1987). Of the balance, 23 million acres were set aside by executive orders between 1855 and 1919, and the rest were established by agreements, which were approved by Congress, or by federal statute. Treaties and agreements covered nearly 95% of the United States public domain. U.S. INDIAN CLAIMS COMM'N, FINAL REPORT 1 (1978). After that date reservations were created by statute, congressionally approved agreement, or executive order. In Canada, treaties were still being signed after World War II, and treaties cover nearly half of the nation. NATIVE RIGHTS IN CANADA 13, 53 (P. Cumming & N. Mickenberg 2d ed. 1972).

“won” by pioneers, cowboys, gold seekers, and railroad builders. Indians play a minor role, being “bad” and impeding white “progress,” or, in some cases, being “good” and cooperating with whites.¹⁹ Rarely taught are historical events such as the Yakima War, fought for four long years, from 1855 to 1859, in which the vigilante Oregon “Volunteers,” independent of the United States Army, committed atrocities against Indian men, women, and children.²⁰ Eventually, of course, the industrialized, “civilized” society won. The war was a military, political, and economic disaster for the Indians.

This was a monumentally important event in the lives of the Yakima, Nez Perce, Walla, Cayuse, and Umatilla tribes. Similar cataclysmic events occurred with other Indian tribes throughout both nations, yet the dominant society treats these events as curiosities rather than significant historical events. This lack of understanding continues to contribute to legislative myopia in policymaking and unfair interpretations of statutes and treaties by courts and administrators.

The study of Native American history teaches that the overriding, but rarely articulated, policy of Canada and the United States towards Aborigines was to get them out of the way so their land could be settled and developed by whites.²¹ The second most pervasive policy, governmental action taken “for the good of the Indians,” effectively abolished Indian religion, culture, and lifestyle. These policies were sometimes motivated by altruism, to the extent that they were designed to do as little harm as possible to the Indians while achieving the overriding goal of eliminating Aboriginal occupancy, religion, and culture. In spite of high-toned rhetoric about tribes and First Nations freely signing treaties, the land acquisition policy was only occasionally accomplished by fair, arms-length transactions. Most of the time the government acquired lands by a combination of coercion, fraud, threat of force, or actual military force. While the earliest acquisitions by the British Crown along the eastern seaboard were made by purchase,²² later ones were produced by coercion. It is absurd to argue that Aboriginal tribes knowingly and voluntarily gave up their claims to these lands. If the westward-bound settlers in either Canada or the United States had asked the indigenous occupants whether they

19. P. LIMERICK, *THE LEGACY OF CONQUEST* 219–21 (1987). Older “westerns” are repeatedly replayed on television, with their stereotyped savage Indians on display.

20. W. BROWN, *THE INDIAN SIDE OF THE STORY* (1961).

21. See S. CORNELL, *THE RETURN OF THE NATIVE-AMERICAN INDIAN POLITICAL RESURGENCE* (1988).

22. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 545 (1832).

would prefer (1) to be removed from ancient homelands, hunting, fishing, and food gathering grounds, forced often to live on distant, strange, hostile lands,²³ be squeezed onto tiny reservations with other often incompatible tribes, made totally dependent on the white man for the most meager of rations,²⁴ even survival, and have their cultures, customs, and religions ridiculed, prohibited, and debased, or (2) remain on their ancestral lands, continue their traditional lifestyles, be treated with dignity and respect, and choose their own time, place, and method for adopting or rejecting industrialization and technological advances, does anyone doubt the answer?

Manifest Destiny, the Oregon Trail, and Westward Ho were not rallying cries for square-dealing with Aboriginal tribes. These concepts gave mythical and moral support to westward-bound settlers in both Canada and the United States, the Indigenous peoples be damned. These powerful ideas were based on the profoundly held faith that the West, in both countries, was there to be won by white men. The Aboriginals were savage heathens, obstacles to progress, to be battled if necessary and overcome, like wild animals, the weather, and the desert. It was inconceivable to whites that these natives had any "right" to stop the westward march of Christian civilization, carried by prospectors, farmers, and settlers.

In the late 1880s, the western United States had been largely "settled," boundaries had been set between Canada, the United States, and Mexico, and the Aboriginal peoples subdued and required to live on reservations. Most of the reservations to be created were in place by then. By 1887, the plight of the Native population was so bad it bothered the conscience of the white society and government. Something had to be done. That something proved to be the Dawes Act of 1887,²⁵ yet another disaster for Indigenous people.

23. After the early 1800s, when the British-Canadian and United States governments attained dominance over the less-developed native groups, many tribes in the United States were removed from their homelands and forced to live in distant places, thus opening their traditional lands to settlement by pioneers. Multiple tribes were often consolidated on a single confederated reservation, including tribes with diverse cultures and sometimes backgrounds of outright hostility towards each other. Traditional cultures, religions, and self-governance systems foundered. The Indians became the poorest and smallest minority in both Canada and the United States, conditions which prevail today. A. DEBO, *supra* note 14, at 117; F. PRUCHA, *supra* note 14, at 64, 78.

24. Historian Hagan concludes: "That starvation and near-starvation conditions were present on some of the sixty-odd reservations every year for the quarter century after the Civil War is manifest." Hagan, *The Reservation Policy: Too Little and Too Late*, in INDIAN-WHITE RELATIONS: A PERSISTENT PARADOX 161 (1976).

25. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 (1988)).

Indian Policies of the U.S. and Canada

Congress intended, through the Dawes Act, to break up reservations and make landowners of the Indians. At the same time, a new government policy was initiated declaring as surplus reservation land that was not parcelled out as allotments to individual Indians and arbitrarily opening that land to white settlement. Although Congress eventually stopped the allotment and surplus land practices, by 1934 these programs had transferred two-thirds of reservation lands from Indian to white ownership. Land ownership has remained in this pattern to the present self-determination era.

In Canada, Parliament never enacted a Dawes type of legislation. Frequently, however, land-hungry settlers pushed aside First Nations, which lost their Aboriginal lands without benefit of negotiations, cession, or reservation. Both countries have consistently promoted ethnocentric assimilation policies, overlooking or ignoring Native American traditions, lifestyles, religions, and cultures. Quite remarkably, instead of being assimilated and disappearing, Indigenous people have demonstrated surprising resilience and today are moving to reaffirm their history, religion, and cultural identity.

One contributing factor in this self-determination movement has been the accessibility of better legal talent for Indian tribes. For example, the University of New Mexico Indian Center student program has encouraged several hundred Indian lawyers to enter the law, and most of them now represent Indians and Indian tribes. The civil rights movement and especially the introduction of young lawyers to the field of Indian law through the Office of Economic Opportunity Program enhanced the competence of tribal representation. The creation of the Native American Rights Fund in 1968 markedly improved the competence of lawyering for Indian tribes. This enhanced legal representation has facilitated negotiation of Indian claims.

Historically, states, provinces, and local governments²⁶ ignored Indian claims of treaty, statutory, or other rights until tribes commenced litigation and secured court decisions affirming their legally enforceable rights. Typically, successful tribal lawsuits have convinced state or local governments to negotiate rather than litigate. This scenario plays out again and again. Officials of the State of Maine ignored the claim of the Passamaquoddy and Penobscot Indians to most of the state until court decisions put both respect and fear into

26. In *United States v. Kagama*, 118 U.S. 375 (1886), the Court remarked: "Because of the local ill feeling, the people of the States where they [Native Americans] are found are often their deadliest enemies." *Id.* at 384.

the hearts of these officials.²⁷ Non-Indian water users ignored Indian water rights claims until litigation was under way, or concluded with an Indian victory.²⁸ Washington also refused to recognize Indian treaty fishing rights until the federal courts ruled that the tribes were entitled to catch fifty percent of the harvestable fish under treaties of the 1850s.²⁹ The State of Washington refused to negotiate settlement of the Puyallup Tribe's ownership claims to tidelands and a river bed in the City of Tacoma until various suits were filed, and some brought to conclusion.³⁰

In Canada, the national and provincial governments paid little attention to First Nation Aboriginal land claims until the 1973 case of *Calder v. Attorney-General*³¹ raised a realistic possibility that Aboriginal rights might receive favorable consideration by the courts. National policy toward Aboriginal claims changed from open hostility in the 1930s, to recommending they be ignored in the late 1960s, to recommending recognition and settlement of these claims after *Calder*.

27. In *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), the court held that the United States had a trust obligation to the Passamaquoddy tribe. This led the United States to file suit against the State of Maine under the Trade and Intercourse Act of 1789. Even the filing of suit did not initially get the attention of Governor James Longley who "refused to consider the Indian land claim a serious matter." P. Brodeur, *Annals of Law: Restitution*, NEW YORKER, Oct. 11, 1982, at 102. Ultimately, a Justice Department opinion frightened state officials sufficiently that they engaged in serious negotiations and settled the Indian's claims. *Id.* at 104-05.

28. This issue is highly divisive. Negotiation is especially difficult because the waters of many streams are already fully allocated. Recognizing the Indian claim, even though legally prior in time, will likely reduce the water available to lower priority non-Indians. Even an Indian victory in court, however, does not necessarily produce "wet" water for the Indians. The cost of construction and the impact on water and land areas off the reservation normally require that Congress enact a law to implement the Indians' rights. Congress is loathe to do this if it will deprive non-Indian irrigators of essential water. See McCool, *Indian Water Rights: Negotiation; Agreement; Legislative Settlement*, in INDIAN WATER RIGHTS AND WATER RESOURCES MANAGEMENT 127 (1989).

29. See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). Sports and commercial fishermen in the Pacific Northwest criticized the Indians for years, in the 1950s and 1960s, about demonstrations and "fish-ins" in support of their treaty rights. The Indians should use the court system like civilized people, the critics said. The Indian tribes finally did go to court—a federal court, not an Indian court—and won the right to harvest 50% of the fish under their treaties, instead of 3% which is the amount the state had limited them to in the past. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

After the Indian victory some non-Indians said the Indians were being greedy. But let us assume that a non-Indian corporation was advised by its lawyers that if it filed suit against the state on a property right issue it might win a judgment of hundreds of millions of dollars. Would we expect the corporation to voluntarily forego filing such a suit? Hardly!

30. See *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984).

31. 1973 S.C.R. 313.

Other historical factors condition contemporary negotiations with Indian tribes. In Canada, the British North America Act of 1867 and the Constitution Act of 1930 bestowed on the provinces ownership of the natural resources within their borders, including rivers.³² The provinces thus hold title to public lands not yet conveyed to private owners. The Canadian national government owns relatively little land in comparison to the United States federal government, which owns approximately one-third of the United States, including half of the land in the eleven western states, and ninety-five percent of Alaska.³³ Provincial ownership of land enhances the power of the provinces in negotiations with First Nations on Aboriginal claims concerning land, water, hunting and fishing, environmental rights, and governmental powers.

This Article examines several sharply defined differences in Indian law and policy between Canada and the United States. United States courts have held that Congress has “plenary” power over Indians,³⁴ and that, under *Lone Wolf v. Hitchcock*,³⁵ judicial review is not available to test acts of Congress against the federal trust responsibility to Indians. Canadian courts historically applied the same rules,³⁶ until the Canadian Supreme Court held in *Sparrow v. The Queen*³⁷ that the 1982 Constitution Act requires judicial review to assure that legislation truly advances the interests of First Nations. The court detailed the methodology for this review, which resembles remarkably the “strict scrutiny” examination given to racially based legislation in the United States.³⁸ Canadian law is thus very different from current

32. British North America Act, 1867, CAN. REV. STAT. app. II, No. 5, ch. 3, §§ 92(10), (16) (1985); Constitution Act, 1930, CAN. REV. STAT. app. II, No. 26, ch. 26 (1985).

33. See U.S. PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND, A REPORT TO THE PRESIDENT AND TO THE CONGRESS 22-23 (1970).

34. *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Kagama*, 118 U.S. 375 (1886).

35. 187 U.S. 553 (1903).

36. Aboriginal title “is subject to regulations imposed by validly enacted federal laws.” *Kruger v. R.*, [1978] 1 S.C.R. 104, 116 (1977) (citation omitted). Although the government now holds a fiduciary relationship regarding Indians, that relationship is relatively recent. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1108 (citing *Guerin v. R.*, [1984] 2 S.C.R. 335; *R. v. Taylor & Williams*, 34 O.R.2d 360 (1981)).

Woodward concludes that “[i]n the United States Indian Tribes are considered to be . . . subject to the full power of Congress to interfere with internal self-government by express legislation (citation omitted). Although never clearly expressed as such by any court, the situation in Canada is probably similar.” J. WOODWARD, *supra* note 1, at 90-91; see also *R. v. Sparrow*, [1990] 1 S.C.R., at 1103.

37. [1990] 1 S.C.R. 1075, 1108-09.

38. Few statutes survive strict scrutiny. *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

United States law with regard to Indians. Canadian courts review legislation to assure consistency with the government's trust responsibility, whereas United States courts refuse to undertake such review.

In the United States, Indian tribes assert broad sovereign governing powers over their reservations, including criminal jurisdiction over tribal members and civil jurisdiction over non-member Indians and non-Indians as well as tribal members. In Canada, the First Nations exercise minimal self-governing powers, lacking sovereignty even over their own members. The governing powers they do exercise are controlled by exceedingly detailed federal laws, primarily the Indian Act.

The following pages are divided into five sections that help explain the relationship of Native Americans to the national and state/provincial governments, and the growing tribal insistence on self-government. Each heading starts with a discussion of United States law and policy, followed by a discussion on Canadian law and policy. Comparisons are generally made in the sections on Canadian law.

II. HISTORICAL POLICY TOWARDS INDIANS

A. *The United States: A Historical Perspective*

In the past this [federal/tribal] relationship has oscillated between two equally harsh and unacceptable extremes.³⁹

Historically, United States national policy towards Indians⁴⁰ has swung widely, urging assimilation into the dominant culture, or favoring self-determination and tribal identity. In 1763, before the United States became a separate nation, Great Britain issued a Royal Proclamation designed to separate the Aboriginal and non-Aboriginal populations, and set aside an enormous land reserve for Aboriginals in what is now western Canada and the western United States.⁴¹ The Proclamation provided that no part of the reserved land could be acquired by purchase or otherwise unless by consent of the Crown. The United States continued this policy of exclusive federal jurisdiction by enacting the Trade and Intercourse Acts.⁴² The continuing policy of sepa-

39. H.R. DOC. NO. 363, 91st Cong., 2d Sess. 2 (1970) (President Nixon's message to Congress transmitting recommendations for Indian policy).

40. The Department of the Interior has "recognized" 306 Indian tribes in the lower 48 states and 197 Native Villages in Alaska. 53 Fed. Reg. 52,829 (1988). Dozens of other Native groups are seeking recognition. See *infra* notes 91-94. Still other reservations and their governments have been disestablished.

41. Royal Proclamation of 1763, CAN. REV. STAT. app. II, No. 1 (1985). See R. SURTEES, CANADIAN INDIAN POLICY 22 (1982).

42. Act of July 22, 1790, ch. 33, 1 Stat. 137. This first act and the next three, enacted in 1793, 1796, and 1799 were temporary. A permanent Act was enacted in 1802 and has been reenacted

rating the Indians and non-Indians ultimately resulted in the removal of many eastern tribes to the western United States.

From the nation's birth until about 1815, military defense dictated national Indian policy. Treaties with the great Iroquois Confederacy and other confederations and tribes gained allies for the new nation or neutralized military threats. Some tribes retained enough power to threaten the new nation's existence.⁴³ Indian support or opposition could affect battles, sometimes even wars. After approximately 1815, this was no longer true.

Between 1815 and about 1845, the national government policy favored removal, designed to clear Indians off the land and to reduce conflict with non-Indians.⁴⁴ As early as 1803, President Thomas Jefferson favored the idea of removal. He urged William Henry Harrison, governor of the Indiana Territory, to convince the Indians to move voluntarily and, if they resisted removal and took up the "hatchet" while trying to remain in their homeland, to seize their land and drive them across the Mississippi.⁴⁵ President Monroe sent a message to Congress in 1825, emphasizing the importance of removal, saying that it should only be done "to promote the interest and happiness of those tribes" and on terms "satisfactory" to them.⁴⁶ Andrew Jackson, who was President when the Cherokee removal occurred,⁴⁷ advised the tribes to voluntarily move to the west or else submit to

several times since. It is now found in 18 U.S.C. §§ 1152, 1160, 1165 (1988); 25 U.S.C. §§ 177, 179-80, 193-94, 201, 229-30, 251, 263, 264 (1988). See generally F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* (1962).

43. See F. PRUCHA, *supra* note 14, at 17.

44. For a detailed history of these eras see F. COHEN, *supra* note 1, at 78 (describing "removal").

45. See Letter from President Jefferson to William Henry Harrison, governor of Indiana Territory, (February 27, 1803), reprinted in DOCUMENTS, *supra* note 17, at 22-23. Jefferson urged Harrison to convince the Indians to move west of the Mississippi, saying:

[W]e presume that our strength and their weakness is now so visible that they must see we have only to shut our hand to crush them Should any tribe be foolhardy enough to take up the hatchet at any time, the seizing the whole country of that tribe, and driving them across the Mississippi, as the only condition of peace, would be an example to others

Id. at 23.

46. DOCUMENTS, *supra* note 17, at 39.

47. In 1830, Congress passed the Indian Removal Act, ch. 148, 4 Stat. 411 (1830), under which numerous tribes were re-settled in the West.

The Five Civilized Tribes, Choctaw, Chickasaw, Cherokee, Creek, and Seminole were removed from their ancestral homes in what is now Georgia and Florida to Oklahoma. Some 4,000 died on the winter journey to the west, out of 13,000 who started the trek. F. COHEN, *supra* note 1, at 92. Numerous other tribes were also removed, including the Delawares, Kickapoos, Quapaws, Shawnees, Kaskaskias, Peorias, Piankashaws, Weas, Winnebagoes, Chippewas, and Ottawas. F. PRUCHA, *supra* note 14, at 78-83, 88-90.

state laws because the Constitution did not provide for Indian tribal governments.⁴⁸ Secretary of War Eaton wrote to Cherokee leaders,

[b]eyond the Mississippi your prospects will be different. There you will find no conflicting interests. The United States power and sovereignty, uncontrolled by the high authority of state jurisdiction, and resting on its own energies, will be able to say to you, in the language of your own nation, the soil shall be yours while the trees grow, or the streams run.⁴⁹

The removal policy was discarded during the 1840s and 1850s, not because it fell into disfavor, but because Indian country was overrun by gold and land-hungry prospectors and settlers.⁵⁰ Violence between Indians and whites often resulted. Whites wanted the land, but the Indians had to be removed first. National policy changed to one of creating reservations in the west and cajoling, coercing, or forcing tribes, including western tribes as well as previously "removed" eastern tribes, to squeeze onto these reservations.

1. *Treaties as Land Transactions*

Between 1815 and 1871, when treaties were banned by Congress, treaties looked increasingly like land exchange transactions. The Indians ceded to the United States aboriginal title to their hunting grounds in return for title to specific reservation areas. After 1871, reservations continued to be created, but by statute, agreement approved by Congress, or executive order, rather than by treaty.⁵¹

2. *Treaties Construed in Favor of Indians*

[The lower court decided that] the Indians acquired no rights but what any inhabitants of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the Nation for more. And we have said we will construe a treaty with the Indians as "that unlettered people" understood it⁵²

48. DOCUMENTS, *supra* note 17, at 47-48.

49. Letter written by Secretary of War John H. Eaton to a Cherokee delegation to the Government (April 18, 1829), *reprinted in id.* at 46.

50. Control of Indian affairs was transferred from the Army to the newly created Department of the Interior in 1849. This had only modest effect on the administration of policy, however because the Indian Office in the Department the Army had become a civilian bureau in 1834. See F. COHEN, *supra* note 1, at 119-20.

51. *Id.* at 127-28.

52. *United States v. Winans*, 198 U.S. 371, 380 (1905). Some state courts have obstinately refused to follow the Supreme Court on treaty interpretation issues.

Indian Policies of the U.S. and Canada

Treaties and other documents creating reservations frequently contained general, unspecific, and ambiguous terms. Rules of construction gradually evolved to aid in interpreting these documents, based on the fact that the treaties and agreements were negotiated in English, a strange language to the Indians, and used white man's legal concepts, also unfamiliar to the Indians. These rules provided that treaties and agreements were to be construed as the Indians understood them.⁵³ Executive orders and statutes were to be construed in favor of the Indians.⁵⁴ The courts even read new provisions into treaties if the intent of the parties could be so construed.⁵⁵ For example, where a desert reservation was created with the intent that Indians become capitalist farmers, the Supreme Court held that the treaty reserved sufficient water from streams flowing along or across the reservation to carry out the purposes of the reservation.⁵⁶ In most cases, the United States intended that the Indians become irrigation farmers. The courts have held the tribes are entitled to sufficient water to irrigate all the irrigable land on the reservation,⁵⁷ or to propagate fish if that was the Indian goal.⁵⁸

A treaty can only exist between independent, sovereign powers. Several generations ago the United States government entered into a so-called treaty of peace with the nation of the Ute Indians. . . .

. . . [T]he descendants of the inhabitants of that nation are now citizens of the United States. . . . [The] treaties are no longer of any force or effect

Brough v. Appawora, 553 P.2d 934, 935 (Utah 1976), *vacated*, 431 U.S. 901 (1977).

The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors in getting title to this continent ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil.

These arrangements [for treaties and reservations] were but the announcement of our benevolence which, notwithstanding our frequent frailties, has been continuously displayed. Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy and whom we have so often permitted to squander vast areas of fertile land before our eyes.

State v. Towessnute, 89 Wash. 478, 481-82, 154 P. 805, 807 (1916).

53. See, e.g., *Winans*, 198 U.S. at 380-81 (citing *Choctaw Nation v. United States*, 119 U.S. 1 (1886)). Later, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), the Court construed the Indians' treaty right to fish at their usual and accustomed stations off the reservation "in common with the citizens of the territory" to mean that today the treaty tribes are entitled to half the harvestable fish in most Washington waters. Morisset, *The Legal Standards for Allocating the Fisheries Resource*, 22 IDAHO L. REV. 609, 612-13 (1985-1986); see also F. COHEN, *supra* note 1, at 221-24.

54. F. COHEN, *supra* note 1, at 224.

55. Implied water rights exist whether the reservation was created by treaty, agreement, executive order, or statute. *Arizona v. California*, 373 U.S. 546, 598 (1963).

56. *Winters v. United States*, 207 U.S. 564, 576 (1908).

57. *Arizona*, 373 U.S. at 601.

58. *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

The reservation era in the United States lasted from roughly 1850 to almost 1900. An occasional reservation was created thereafter, and may still be created, but only by statute.⁵⁹

3. *The 1887 Allotment Act: Assimilation Accelerated*

It is a part of the Indian's religion not to divide his land.

.....

... [W]hen thirty or forty years shall have passed and these Indians shall have parted with their title, they will curse the hand that was raised professedly in their defense to secure this kind of legislation

.....

This is a bill that, in my judgment, ought to be entitled "A bill to despoil the Indians of their lands and to make them vagabonds on the face of the earth."⁶⁰

Indian tribes [even today] face tremendous Congressional pressure to sell their land, divide the assets, and disperse.⁶¹

Prior to the 1860s, assimilation was a secondary national policy, designed to absorb Indians into the larger society. When removal became impossible, empty lands no longer remaining, the assimilation policy became dominant. "Eastern philanthropists wanted to civilize the Indian; western settlers wanted Indian land."⁶² The assimilation policy gained strength through the 1860s and 1870s, culminating in the Dawes Act, or General Allotment Act of 1887.⁶³

Senator Henry L. Dawes of Massachusetts favored the total Americanization of the Indian, to be accomplished by breaking up reservations.⁶⁴ The Act authorized the Secretary of the Interior to allot tracts

59. The practice of creating Indian reservations by executive order was discontinued in 1919. See Act of June 30, 1919, ch. 4, § 27, 41 Stat. 3, 34.

60. 11 CONG. REC. 780-81, 783, 934-35 (1881) (statement of Sen. Henry M. Teller during the Senate debate on Land in Severalty (the Dawes Act)), reprinted in AMERICANIZING THE AMERICAN INDIANS 134, 137 (F. Prucha ed. 1978).

61. V. DELORIA, JR., WE TALK YOU LISTEN—NEW TRIBES NEW TURF 115 (1970).

62. F. COHEN, *supra* note 1, at 132.

63. General Allotment (Dawes) Act of 1887, ch. 199, 24 Stat. 119 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381 (1988)).

64. AMERICANIZING THE AMERICAN INDIANS, *supra* note 60, at 6-7. Dawes had the backing of the prestigious Lake Mohonk Conference that met annually during the 1880s and later. The participants at these conferences were a tightly unified group who shared a common outlook and who were religiously oriented, in the evangelical Protestant tradition. *Id.* at 8. Prucha describes their goals:

All three of these main lines of Indian policy reform converged in one ultimate goal: the total Americanization of the Indians. All were aimed at destroying Indianness, in whatever form it persisted. The aim was to do away with tribalism, with communal ownership of land, with the concentration of the Indians on reservations, with the segregation of the Indians from association with good white citizens, with Indian cultural patterns, with native

of reservation land to individual Indians, eighty acres to a single person and 160 per couple, to encourage them to become farmers instead of hunters and fishers. Congress reasoned that ownership of a plot of land would automatically turn the Indians away from their communal lifestyle to become farmers. The historian Francis Paul Prucha has written that the Dawes Act was part of the “drive to individualize the Indian that became the obsession of the late-nineteenth-century Christian reformers.”⁶⁵ “Lacking all appreciation of the Indian cultures, they were intent on forcing upon the natives the qualities that they themselves embodied. It was an ethnocentrism of frightening intensity, and it set a pattern that was not easily eradicated.”⁶⁶

languages, with Indian religious rites and practices—in short, with anything that deviated from the norms of civilization practiced and proclaimed by the white reformers themselves. Failing to perceive a single element of good in the Indian way of life as it existed, they insisted on a thorough transformation. The civilization which they represented must be forced upon the Indians if they were unwilling to accept it voluntarily.

Id. at 7–8.

The Conference was made up of clergymen, congressmen, academics, and public leaders. *Id.* at 5–6. It had a strong religious orientation. Although a voluntary group, its views carried great weight in setting national Indian policy. *Id.* at 9. Lyman Abbott, a noted Congregational clergyman, spoke at the conference saying that “it may be taken for granted that we [the conference participants] are Christian men and women; that we believe in justice, good-will, and charity, and the brotherhood of the human race.” *Id.* at 32. He stated that the treaties and reservations should be cancelled, and the reservation system was “hopelessly wrong.” *Id.* at 35. “We have no right to do a wrong because we have covenanted to [do so].” *Id.* at 33. Abbott suggested that the treaties were expedient at the time they were negotiate, but should then be ignored. He concluded that the reservation system was evil: “I hold to immediate repentance as a national duty. Cease to do evil, cease instantly, abruptly, immediately. I hold that the reservation barriers should be cast down and the land given to the Indians in severalty.” *Id.* at 35.

William Strong, former United States Supreme Court Justice, disagreed about breaking the treaties. *Id.* at 40. Merrill E. Gates, president of Rutgers College, argued that Americans were the Christian “children of the light.” *Id.* at 288. He concluded that Indian society was disdained and contemptible; that tribes were political anomalies, unchristian and anticivilizing; and that the reservations should be broken up. *Id.* at 45–56.

Richard H. Pratt, a retired army officer who founded the famous Carlisle School in Pennsylvania for Indian children, said: “In a sense, I agree with the sentiment [that a good Indian is a dead Indian], but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.” *Id.* at 260–61. Pratt was critical of missionaries for encouraging Indians to remain separate and apart from white civilization, *id.* at 266, saying that “Carlisle has always planted treason to the tribe [in its students] and loyalty to the nation at large.” *Id.* at 269.

65. F. PRUCHA, *supra* note 14, at 224.

66. *Id.* at 199; *see also* H. JACKSON, *CENTURY OF DISHONOR* (1881) where she argued that deeding tribal lands to individual Indians would simply result in loss of those lands to the white community. This result may, indeed, have been one reason the law was passed, although most of Congress apparently believed that allotment was best for the Indians too.

The main purpose of this bill is not to help the Indian, or solve the Indian problem, or provide a method for getting out of our Indian troubles, so much as it is to provide a method for getting at the valuable Indian lands and opening them up to white settlement.

Indians were able to become United States citizens when they received their allotments.⁶⁷ If he/she were deemed "competent" the allottee could apply for a fee patent after a period of years. Between 1910 and 1920, however, the Secretary of the Interior issued thousands of "forced fees" to Indians who were not competent to manage their land and who neither requested nor knew of the patent issuance.⁶⁸

The Dawes Act was yet another disaster for the Indians.⁶⁹ Often in dire need of subsistence food and housing, especially during the period from 1910 to 1920, the Indians lost their land after patent, by selling or mortgaging to obtain cash.⁷⁰ At the same time, a new federal policy emerged that declared reservation lands "surplus" when not needed for allotments. The government invited white settlers to homestead these "surplus" lands. They often settled the best reservation lands. As a result of the allotment, surplus land policies, and subsequent refinements of the allotment policies, Indian land ownership dropped from 138 million acres in 1887 to forty-eight million acres by 1934. Moreover, Indians lost not only eighty percent or more of their land value held in 1887, but more than eighty-five percent of the land value of all the allotted lands as well.⁷¹ Congress belatedly stopped the allotment process with the 1934 Indian Reorganization Act.⁷²

The allotment process created checkerboard land ownership on many reservations, with fee simple, allotment tracts, and tribally owned lands intermixed. Non-Indians now range from a small minority⁷³ to an overwhelming majority of the reservation population.⁷⁴ The Supreme Court has held these checkerboard reservations remain

H.R. REP. NO. 1576, 46th Cong., 2d Sess. 7-10 (1880), reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 60, at 128.

67. F. PRUCHA, *supra* note 14, at 226. In 1924, federal law bestowed citizenship on all Indians born in the continental United States, if they did not already have this status (about two-thirds were already citizens under earlier statutes) (Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (1988))).

68. LaFave, *South Dakota's Forced Fee Indian Land Claims: Will Landowners Be Liable for Government's Wrongdoing?*, 30 S.D.L. REV. 59 (1984).

69. F. PRUCHA, *supra* note 14, at 304.

70. See generally F. COHEN, *supra* note 1, at 136-37; F. PRUCHA, *supra* note 14, at 304-05.

71. *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 16-18 (1934) (memorandum of John Collier).

72. F. COHEN, *supra* note 1, at 148.

73. For example, in 1974, the Navajo Reservation, most of which was not allotted, had a Navajo population of approximately 150,000 and a non-Indian population of approximately 5,000. U.S. DEP'T OF COMMERCE, *FEDERAL AND STATE INDIAN RESERVATIONS AND INDIAN TRUST AREAS* 63 (1974).

74. In 1978, the Port Madison Reservation was occupied by about 50 Indians and 3000 non-Indians. *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.1 (1978).

Indian Country and that tribes still govern them.⁷⁵ The presence of so many non-Indians, however, has affected the Court's assessment of the nature and extent of tribal governmental powers, especially where these powers impact non-Indians who cannot vote in tribal elections. Large non-Indian holdings have also enabled states to claim jurisdiction over lands and activities on the reservation.⁷⁶

4. *The 1934 Indian Reorganization Act and Self-Determination*

Some Indians proud of their race and devoted to their culture and their mode of life have no desire to be as the white man is. They wish to remain Indians, to preserve what they have inherited from their fathers⁷⁷

The Meriam Report of 1928 revealed the deplorable health, education, and economic conditions of reservation Indians as well as the adverse impact of the loss of most of their lands under the Dawes Act and the surplus land policy. John Collier, a strong advocate for Indian rights, was appointed by President Franklin D. Roosevelt as Commissioner of Indian Affairs in 1933. Collier used the Meriam Report to lobby for passage of the Indian Reorganization Act of 1934⁷⁸ which stopped the allotment process. It was not retroactive, however, and allotted land retains that same status today. The 1934 Act encouraged economic development, enhanced self-determination and cultural identity, and provided the tribes recognizable legal status. It enabled

75. *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962).

76. *See, e.g., Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), where the U.S. Supreme Court allowed the county to zone non-Indian owned land on a checkerboarded but predominantly non-Indian owned part of the Yakima Reservation, at the same time noting that the tribe had exclusive jurisdiction to zone the allotment and tribally owned lands. The population on this portion of the reservation was about evenly split. The court rejected a claim of concurrent jurisdiction, holding that the tribe lacked any power to zone non-Indian owned lands in these circumstances. In *Duro v. Reina*, 110 S. Ct. 2053 (1990), the Court denied tribal courts jurisdiction over non-member Indians emphasizing the voluntary character of tribal membership and the fact that only members could participate in "tribal government, the authority of which rests on consent." *Id.* at 2064. *But see* Department of Defense Appropriations Act, § 8077, Pub. L. No. 101-511, 104 Stat. 1892 (1990), in which Congress restored tribal criminal jurisdiction over non-member Indians for one year.

Non-members cannot vote in tribal elections, hold tribal office, or serve on tribal juries. The Court has noted that the Bill of Rights of the Constitution does not apply in tribal courts, and while the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1988), does apply, it does not give rise to a federal cause of action against the tribe for violations of its provisions. The only remedy for someone denied their civil rights is either in tribal court, or by habeas corpus in federal court. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 50 (1978).

77. Institute for Gov. Research (Brookings Inst.), *THE PROBLEM OF INDIAN ADMINISTRATION (MERIAM REPORT)* (1928), reprinted in *DOCUMENTS, supra* note 17, at 219.

78. 25 U.S.C. §§ 461-479 (1988).

tribes to create governments with federally-approved constitutions, that would be recognized by non-Indian bankers, and state and local officials.⁷⁹ Tribes began to create federally-chartered corporations to engage in business activities.⁸⁰ A new era appeared to shine on the horizon. This is the first time Indians were given any choice about whether to be affected by a national law. The Great Depression, however, curtailed the budget appropriations necessary to assist tribes to achieve the Act's goals. World War II indefinitely delayed budget allocations to the tribes.

5. *The Termination Policy: Public Law 280*

THESE PEOPLE SHALL BE FREE.⁸¹

By the end of World War II in 1945, national policy began again to tilt toward the opposite pole. "Termination," enthusiastically embraced by the 1953-1960 Eisenhower administration, became the new national Indian policy. This policy curtailed the sovereignty and governing powers of many Indian tribes, disbanded reservations, gave states jurisdiction over Indians and their lands, and terminated all special federal relationships with some Indians. Congress expressed its intent in House Concurrent Resolution 108,⁸² adopted in 1953 by unanimous vote of both houses.⁸³

79. F. COHEN, *supra* note 1, at 147.

80. *Id.*

81. Senator A. Watkins, 311 *Annals* 47-50, 55 (1957), reprinted in DOCUMENTS, *supra* note 17, at 239 (arguing in favor of termination of special federal relationships with Indian tribes).

82. H.R. Con. Res. 108, 67 Stat. B132 (1953) [hereinafter H.C.R. 108].

83. H.C.R. 108 states:

Whereas it is the policy of Congress, as rapidly as possible, to make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens, . . . to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: Now, therefore, be it Resolved by the House of Representatives (the Senate concurring), That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the states of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin It is further declared to be the sense of Congress that, upon the release of such tribes and individual members . . . from such disabilities and limitations, all offices of the Bureau of Indian Affairs . . . whose primary purpose was to serve any Indian tribe or individual Indian freed from Federal supervision should be abolished. It is further declared to be the sense of Congress that the Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties between the . . . United States and each such tribe, and report to Congress at the earliest practicable date, but not later than

Within a year after adopting H.C.R. 108, Congress began passing individual acts dismantling reservations. Some 109 tribes were eventually terminated,⁸⁴ including two large tribes, the Menominee in Wisconsin and the Klamath in southern Oregon.⁸⁵ In 1953, Congress enacted Public Law 83-280 (P.L. 280) empowering states to assert jurisdiction over reservations, with or without tribal consent.⁸⁶ Many states asserted such jurisdiction,⁸⁷ further eroding the prospects for Indian self-government and autonomy.

6. *Self-Determination Adopted as National Policy*

Indians, Congress, and executive officials increasingly criticized termination during the late 1950s and early 1960s.⁸⁸ By 1970, the pendulum had swung through the arc again. Termination was roundly discredited, to be replaced by a policy of self-determination and economic self-sufficiency, more like Collier's original proposals in the 1934 Indian Reorganization Act. In 1970, President Richard Nixon put the termination policy to rest:

Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to . . . expressly renounce, repudiate and repeal the termination policy as expressed in House Concurrent Resolution 108. . . .⁸⁹

President Nixon also proclaimed the new policy of self-determination, which has been embraced by all administrations since 1970.⁹⁰

Support for termination still exists, however, and advocates of this policy continue to seek new ways to express this philosophy. Barsh has argued persuasively that the Department of Interior follows a pol-

January 1, 1954, his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution.

Id.

84. See Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977).

85. *Id.* Both tribes have since been restored to their former status by Congress. Menominee Restoration Act of 1973, 25 U.S.C. §§ 903-903f (1988); Klamath Indian Tribe Restoration Act, 25 U.S.C. § 566.

86. 18 U.S.C. § 1162(a) (1988); 28 U.S.C. § 1360(a) (1988).

87. See generally Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 546-47 (1975).

88. See, e.g., S. REP. NO. 604, 93d Cong., 1st Sess. 4 (1973).

89. H.R. Doc. No. 363, 91st Cong., 2d Sess. 3 (1970) (President Nixon's message to Congress transmitting recommendations for Indian policy).

90. *Id.* at 4.

icy of "administrative termination" of Indian tribes.⁹¹ The Secretary has evolved a pattern of withdrawing federal services from a tribe and then requiring that the tribe challenge this action by filing a petition for "acknowledgment."⁹² In this way, tribes' continuing eligibility for federal services depends on their ability to satisfy spot checks.⁹³ To meet this onerous burden, the tribe must go through the same lengthy and expensive evidence-gathering process required for tribes seeking initial federal recognition.⁹⁴

7. *Whittling Sovereignty Away: The Supreme Court's Recent Trend*

a. *Tribal Court Criminal Jurisdiction*

The judiciary is simultaneously whittling away at both tribal legislation and judicial jurisdiction. Cases in the early 1800s held that, because of their dependent status, the tribes had lost their capacity to engage in international relations,⁹⁵ and their ability to convey title to real property without the consent of the United States.⁹⁶ In 1883, the Supreme Court held that a crime committed on a reservation by a non-Indian against a non-Indian fell under state court rather than tribal or federal court jurisdiction.⁹⁷ Further, Congress has decided that crimes committed by non-Indians against Indians should be tried in the federal courts, although state law controls the trial.⁹⁸ Jurisdiction stood thus until 1978, when the Supreme Court decided *Oliphant v. Suquamish Indian Tribe*,⁹⁹ ruling that tribal courts did not have criminal jurisdiction over non-Indians who violate tribal codes on the reservations. In 1990, the Supreme Court took an even more serious bite out of tribal court jurisdiction by holding that tribal courts do not have criminal jurisdiction over non-member Indians, that is, Indians

91. Barsh, *The Rocky Road to "Recognition,"* 4 ANN. W. INDIAN L. SYMP. 407, 416 (1990).

92. *Id.* at 414-16. See 25 C.F.R. § 83 (1990) (federal acknowledgment process).

93. Barsh, *supra* note 91, at 416.

94. Comment, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 217-19 (1991).

95. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

96. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

97. *United States v. McBratney*, 104 U.S. 621 (1882).

98. Assimilative Crimes Act, 18 U.S.C. § 13 (1988); Indian Country Crimes Act, 18 U.S.C. § 1152. Criminal jurisdiction on Indian reservations is very complicated. See Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

99. 435 U.S. 191 (1978).

who are members of other tribes.¹⁰⁰ Congress legislatively reversed this decision in November 1990 for a period of one year.¹⁰¹

Criminal jurisdiction in Indian Country is a confusing maze, raising the question whether a competent law and order system is possible on reservations. Matters are further complicated where states also exercise jurisdiction under Public Law 280.¹⁰² The Yakima Tribe raised this question in the Supreme Court in 1979. The Tribe argued that its members were denied equal protection under the federal Constitution because of the complexity in criminal law enforcement brought about by P.L. 280 in Washington. The Supreme Court rejected the Yakima argument, and in a holding remarkably insensitive to Indian aspirations and to the federal policy of self-determination, volunteered in dicta that if the tribe did not like the complicated partial jurisdiction imposed by the state it could simply request full state jurisdiction.¹⁰³

b. Tribal Court Civil Jurisdiction: Preemption Analysis

In civil matters, a similar judicial trend is apparent. Until 1973, "sovereignty," as defined in *Worcester v. Georgia*,¹⁰⁴ shielded the tribes against state law intrusions on the reservation. In *Williams v. Lee*,¹⁰⁵ the Court held that state law did not apply on reservations where it "infringed on the right of the Indians to govern themselves."¹⁰⁶ *Williams* thus suggests a balancing approach to determine jurisdiction. In *McClanahan v. State Tax Commission*,¹⁰⁷ however, the Court introduced preemption analysis as a new method for determining whether state law applies on Indian reservations. *McClanahan* relegated sovereignty to a "background" status. Preemption analysis, in most cases, constitutes a balancing process. The issue is congressional intent but, because congressional intent frequently is not spelled out, decisions turn not on whether events took place in Indian Country, but instead on the degree of "Indianness" of the events. If Indian interests are

100. *Duro v. Reina*, 110 S. Ct. 2053 (1990).

101. Department of Defense Appropriations Act, § 8077, Pub. L. No. 101-511, 104 Stat. 1892 (1990).

102. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a) (1988). For example, in Washington state, P.L. 280 applies to Indians on fee patent land on the reservation, to non-Indians anywhere in Indian country, and to Indians on trust land for certain subjects such as divorce, mental health, and driving on public highways. WASH. REV. CODE § 37.12.010 (1989). Thus jurisdiction depends both on the geography of land ownership and on subject matter.

103. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 499 (1979).

104. 31 U.S. (6 Pet.) 515, 556-57 (1832).

105. 358 U.S. 218 (1959).

106. *Id.* at 223.

107. 411 U.S. 164, 172 (1973).

strong and the state or local government interests are weak or modest, the Court is likely to find preemption. If the reverse is true, then federal preemption will be rejected in favor of state jurisdiction. The decisions of the present Supreme Court reflect a trend against finding federal preemption.¹⁰⁸ The Supreme Court instead appears headed towards a goal of permitting Indians to govern only Indians and Indian-owned lands. Indian governments will lack jurisdiction over non-Indians or non-member Indians except in rare circumstances.

B. Canada

In contrast to the radical swings in Indian policy in the United States,¹⁰⁹ “the most singular feature of Canadian legislation concerning Indians is that the governmental policy established therein, that of ‘civilizing the Indians,’ has shown almost no variation since the early 19th century when the government assumed responsibility for the society and welfare of the Indian population.”¹¹⁰

The national government explicitly announced an assimilation policy in the Civilization of Indian Tribes Act of 1857.¹¹¹ This Act authorized the “enfranchisement” of Indians who were “sufficiently advanced,” that is, who could assume the duties and responsibilities of “citizens” and could support themselves, at which time they attained

108. *Montana v. United States*, 450 U.S. 544 (1981); see also *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). Somewhat earlier cases appeared to favor preemption. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). But note that Rehnquist dissented in those cases and the mix of court members has changed.

109. Some scholars argue that United States policy was quite consistent, at least until the 1970s. See R. BERKHOFER, *supra* note 15; B. DIPPLE, *supra* note 14.

110. Bartlett, *The Indian Act of Canada*, 27 BUFFALO L. REV. 581, 582 (1978) [hereinafter Bartlett, *The Indian Act of Canada*]; see also R. BARTLETT, INDIAN RESERVES AND ABORIGINAL LANDS IN CANADA: A HOMELAND 25 (1990) [hereinafter R. BARTLETT, A HOMELAND].

The exact numbers of Aboriginal people, in bands and on reserves in Canada, is unknown. Recent data placed the registered Indian population at just over 300,000, among 573 bands residing on 2,242 reserves. The 1981 census recorded 75,110 non-status Indians and 98,260 Metis. These figures are much disputed. See Morse, *Aboriginal Peoples and the Law*, in ABORIGINAL PEOPLES AND THE LAW: INDIAN, METIS AND INUIT RIGHTS IN CANADA 5 (B. Morse ed. 1985).

The precise number of treaties and agreements concluded between native groups and the government is also unknown. The federal Department of Indian and Northern Affairs lists 67 treaties and 26 land grants concluded between 1680 and 1929. G. BROWN & R. MAGUIRE, INDIAN TREATIES IN HISTORICAL PERSPECTIVE xvi-xxiv (1979). Uncertainty exists, however, because of the informal nature of early agreements, particularly in the Maritime provinces, and the ambiguous nature of French treaty activity following discovery of Quebec territories. *Id.* at 10, 20.

111. Ch. 26, 1857 Can. Stat. 84.

the right to vote but lost their right to register as Indians.¹¹² The enfranchisement law was repealed in 1985. "There is now no way for a person who is an Indian within the meaning of the Indian Act to cease being one."¹¹³

Both Canada and the United States negotiated treaties with Aboriginal tribes. In eastern Canada, the French were the first to deal with the First Nations.¹¹⁴ Unlike the British, the French made no pretense of recognizing Aboriginal title to land. As a result, they signed no land cession treaties in Quebec and the Maritime Provinces.¹¹⁵ In 1763, following the British takeover of French lands, Great Britain issued a Royal Proclamation announcing its first Aboriginal policy, designed to minimize contact between Aboriginals and non-Aboriginals.¹¹⁶ The Proclamation created a huge reserve in the west, encompassing an area from southern Ontario to the Gulf of Mexico, and from the Appalachian highlands to the Mississippi River. It also provided that no one but the Crown could purchase land from the Aboriginal tribes, and prohibited squatting or trespassing on Aboriginal lands.¹¹⁷ The Proclamation was, however, limited geographically. The Maritime Provinces ignored it altogether and the Proclamation's coverage of the far West was uncertain.

Beginning in 1783, British policy toward First Nations changed from protecting Indigenous people from white encroachment to purchasing their lands for settlement and military purposes. This new direction corresponded with a change in the way the British perceived the First Nations. Their importance as warriors, either as allies or enemies, decreased as the white population grew. They became less a military presence and more a hindrance to white expansion. National

112. This was the era of active reservation creation in the United States, when tribes were forced to stop their roaming and live on reservations. At the same time, in the United States, there was an opposite undercurrent towards allotment and assimilation. Some of the pre-Dawes Act allotments were accomplished by treaty and some by statute. Sometimes, similar to the Canadian enfranchisement policy, "[a]llottees surrendered their interests in the tribal estate and became citizens subject to state and federal jurisdiction." F. COHEN, *supra* note 1, at 130.

113. J. WOODWARD, *supra* note 1, at 30.

114. G. BROWN & R. MAGUIRE, *supra* note 110, at 10.

115. S. WEAVER, MAKING CANADIAN INDIAN POLICY—THE HIDDEN AGENDA 1968-1970, at 32 (1981).

116. Royal Proclamation of 1763, CAN. REV. STAT. app. II, No. 1 (1985).

117. *Id.* This prohibition against squatters and trespassers in Indian Country was ignored by the miners and prospectors who refused to leave. NATIVE RIGHTS IN CANADA 70, 71 (P. Cumming & N. Mickenberg 2d ed. 1971). The United States also often failed to uphold its own agreements with Indian tribes. See *infra* notes 232-42 and accompanying text.

policy changed accordingly, as it did in the United States a few years later.¹¹⁸

“Until Confederation the imperial government put no restraints upon the power of the [Canadian] colonies to control [First Nations’] reserves and lands. The [Indigenous people] had to look to the local governments for protection of their lands and interests.”¹¹⁹

1. *Assimilation Policy Formally Adopted*

[W]hile the purpose of the Indian Act is to protect the rights and interests of the Indians . . . it is not right that the requirements of the expansion of white settlement should be ignored, that is, that the right of the Indian should be allowed to become a wrong to the white man.¹²⁰

The Civilization of Indian Tribes Act of 1857 explicitly articulated the policy of assimilation,¹²¹ although it had been national policy since the 1830s in a more obscure form.¹²² Under this policy, the government first collected the Aboriginals onto reservations. Reserves were meant to be temporary, useful merely to educate and Christianize the Aboriginals and establish agriculture as their primary economic base. This process, advocates argued, could accelerate assimilation by giving the Aboriginals fee simple title to their property and engendering pride of ownership.¹²³ By the 1840s, however, opponents defeated this policy by arguing that it would cause the Aboriginals to lose their land and their reserves.¹²⁴ Interestingly, this debate took place in Canada during the 1830s, while the United States was still preoccupied with removal. Later, during the 1880s, when Congress considered the Allotment Act, it rejected the argument that allotment would cause the Indians to lose their land. Not until the 1920s and 1930s, after the Indians had lost two-thirds of their land, did the United States admit that this prediction was accurate.

Since the late 1800s, the Indian Act in Canada has been the primary vehicle for dealing with First Nations in Canada. Bartlett traces the form of the modern Indian Act¹²⁵ to an 1867 Act¹²⁶ and an 1869

118. G. BROWN & R. MAGUIRE, *supra* note 110, at 24–25.

119. R. BARTLETT, *A HOMELAND*, *supra* note 110, at 21.

120. *Id.* at 28 (quoting the Canada Minister of the Interior, House of Commons Deb., 3d Sess., 11th Parl., 1 & 2 Geo. 5, at 7826 (1910–1911)).

121. Bartlett, *The Indian Act of Canada*, *supra* note 110, at 583 (citing 1857 Can. Stat., ch. 26).

122. *Id.* at 583 n.8.

123. R. BARTLETT, *A HOMELAND*, *supra* note 110, at 20–21.

124. *Id.*

125. CAN. REV. STAT. ch. I-5 (1985).

126. Department of the Secretary of State Act, ch. 42, 1868 Can. Stat. 91.

amending statute entitled "Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs."¹²⁷ This amendment gave the Superintendent General broad powers over reserve lands and reserve income, giving only token encouragement to Indian self-government. The government has insisted on dominating governance and land rights¹²⁸ of First Nations, severely limiting First Nations' rights and abilities to self-government.¹²⁹

The consolidation of Aboriginal laws first appears in the Indian Act of 1876,¹³⁰ but that Act contained little new material. In contrast, the Dawes (Allotment) Act passed by the United States Congress just eleven years later differed markedly from prior policy in establishing a powerful national program of breaking up reservations through allotments to individual Indians.

Comparison of Canadian and United States Indian policies during the 1800s reveals that the differences stem both from demographic factors and from conscious choices in policy. Settlement came earlier in the western United States than in western Canada, and this population pressure caused problems that directed policy choices. In the United States, pioneer migration into the Mississippi and Ohio valleys and the South triggered the removal policy. Manifest destiny and the migration of prospectors and settlers into the West prompted creation of the reservation policy. Assimilation in the United States was an early and ongoing policy, but it was secondary until 1887, when the Dawes Act was passed.

127. Ch. 6, 1869 Can. Stat. 22; see Bartlett, *The Indian Act of Canada*, *supra* note 110, at 583.

128. The omnipotence of the federal government in relation to Indian bands is unequivocally expressed in section 18(1) of the Indian Act, CAN. REV. STAT. ch. I-5 (1985):

Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose [sic] for which land in a reserve are used or are to be used is for the use and benefit of the band.

See Bartlett, *The Indian Act of Canada*, *supra* note 110, at 603.

In the United States, similar power over reservation lands is held by the federal government. This results in part from the Trade and Intercourse Acts adopted by Congress from 1790 on, Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, and partly from the guardian/ward relationship developed by the Supreme Court in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). See F. COHEN, *supra* note 1, at 510, 511 n.6. It is often said that Congress has "plenary" power over Indians and Indian lands. The principal remedy for a tribe whose land is "taken" by the federal government is a right to compensation.

129. The Indian Advancement Act, ch. 28, 1884 Can. Stat. 116, reflects this inconsistency. It provided for wider powers for the Band Councils, including the raising of money, but then appointed the government's Indian Agent Chairman of the Council.

130. Ch. 18, 1876 Can. Stat. 43. It is interesting to note that it was also in 1876 that the battle of Little Bighorn took place, where Custer and his troops were defeated by the Sioux.

2. *Treaty Interpretation in Canada*

The Canadian government, created in 1867, continued Britain's practice of signing treaties with the First Nations. The same year that Congress barred further treaties with Indian tribes in the United States, 1871, marks the beginning of Canada's most active treaty-making period. The Robinson Treaties, covering the northwestern part of upper Canada, were signed in 1850.¹³¹ Between 1850 and 1853, Vancouver Island bands signed fourteen treaties covering about one-fourth of the island. Between 1871 and 1921, all of the "numbered" treaties were signed, covering vast tracts of interior Canada, the largest area touched by treaties. The signing of Treaty 11 in 1921 essentially concluded the treaty making era in Canada.¹³² Approximately half the aboriginally occupied lands of Canada, including most of British Columbia, the Yukon, the Northwest Territories, and parts of Quebec, were never the subject of treaties, and the treaties in the Maritimes established peace and friendship between the parties, rather than land surrenders.¹³³

Rules of construction for treaty interpretation in Canada are very much like the rules applied by courts in the United States. Treaties with Indigenous peoples are often ambiguous, and sometimes leave out terms clearly intended, such as the right to use waters on or adjacent to the reserve. The courts apply rules of construction to interpret these ambiguities and omissions. Ordinarily the "plain meaning" of the words in an agreement will control.¹³⁴ The Supreme Court of Canada, however, recently held that "plain meaning" interpretation is inappropriate for Indian treaties and statutes. In *Nowegijick v. The Queen*,¹³⁵ a unanimous Court declared that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favor of the Indians. . . ."¹³⁶ Affirming this principle

131. G. BROWN & R. MAGUIRE, *supra* note 110, at xxv.

132. See ABORIGINAL PEOPLES AND THE LAW, *supra* note 110, at xxxix-xlv (Chronology of Key Events).

133. S. WEAVER, *supra* note 115, at 36.

134. See, e.g., R. v. Johnston, 56 D.L.R.2d 749, 752 (Sask. 1966).

135. [1983] 1 S.C.R. 29. The Court quoted from the landmark United States case of Jones v. Meehan, 175 U.S. 1, 11 (1899) where "it was held that Indian treaties 'must . . . be construed, not according to the technical meaning of [their] words . . . but in the sense in which they would naturally be understood by the Indians.'" *Id.* at 36.

136. *Id.* This principle was recently stated in *Horseman v. The Queen*, [1990] 1 S.C.R. 901. *Horseman*, an Indian, went moose hunting to feed his family, pursuant to a treaty right. He shot and killed a moose, skinned it, and hurried home to obtain assistance from other Band members to haul it out of the bush. When they arrived a grizzly bear was eating the moose, claiming "valid possessory title." *Id.* at 924. Faced with a conflicting claim, the bear charged *Horseman*, who displayed cool courage and skill under attack by shooting and killing the charging bear. He

in *R. v. Simon*, the Court approved not only the principle of resolving doubtful expressions in favor of the Indians, but also held that these agreements should be interpreted as the Indians understood them.¹³⁷ These rules of construction are consistent with those applied by United States courts.¹³⁸

The recent decision of the Canadian Supreme Court in *Attorney General of Quebec v. Regent Sioui*,¹³⁹ adds significantly to Canadian treaty law. Defendant Sioui and other Huron Indians were convicted of cutting down trees, camping, and making fires in places contrary to regulations of the Jacques-Cartier Park.¹⁴⁰ Defendants admitted the acts charged but claimed they were practicing ancestral religious rites which were the subject of a treaty between the Hurons and the British.¹⁴¹ The document in question is only one paragraph long,¹⁴² and fails to describe the territory covered. The Court held the document was a treaty, that it had not expired from lack of use, and that it had not been extinguished by laws creating and regulating the Jacques-Cartier Park. The Court spoke against extinguishment in strong terms:

skinned the bear and took the hide. Horseman did not have a license to hunt grizzly bears or sell their hides. A year later, in spring of 1984, Horseman found himself out of work and in need of money to support his family. Under this financial pressure he decided to sell the grizzly hide. Before doing so he applied for and was issued a grizzly bear hunting license entitling him to hunt and kill one bear and sell the hide to a licensed dealer. He made use of the license to sell the hide of his adversary of the year before to a licensed dealer for \$200. He was then charged with a crime.

The majority of the Supreme Court upheld Horseman's conviction, stating that his treaty hunting rights had been limited by the Albert Natural Resources Transfer Agreement of 1930, under which he could hunt only for food. *Id.* at 932-36. Horseman received the minimum fine. *Id.* at 926.

137. [1985] 2 S.C.R. 387, 402; *see also* *R. v. White & Bob*, 52 W.W.R. 193, 232-33 (B.C. 1965), *aff'd*, 1965 S.C.R. vi; *R. v. Taylor & Williams*, 34 O.R.2d 360, 367 (1981).

138. *Winters v. United States*, 207 U.S. 564, 576-77 (1908). On treaty interpretation generally, *see* *Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows, Or Grass Grows Upon The Earth"—How Long A Time Is That?*, 63 CALIF. L. REV. 601 (1975).

139. [1990] 1 S.C.R. 1025.

140. *Id.* at 1030.

141. *Id.* at 1031.

142. The treaty states:

THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His Nation, to submit to His BRITTANICK MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English; — recommending it to the Officers commanding the Posts, to treat them kindly.

Id.

It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned. Since the Hurons had the capacity to enter into a treaty with the British, therefore, they must be the only ones who could give the necessary consent to its extinguishment¹⁴³

The Court followed *Simon* in construing this minimal and incomplete treaty in favor of the Indians.

The province also argued that a different treaty, the Treaty of Paris, signed by England and France on February 10, 1763, abrogated the treaty between the Hurons and the English. The Court rejected this argument, however, holding that "England and France could not validly agree to extinguish a treaty between the Hurons and the English" ¹⁴⁴ This is, of course, a very different position from that taken by the United States cases, which hold that although treaties are the supreme law of the land, a treaty with an Indian tribe may be abrogated either by later statute, or later treaty.¹⁴⁵

In *Sioui*, the Attorney General of Quebec argued that the territorial scope of the treaty did not extend to cover the park.¹⁴⁶ The Hurons argued that the treaty gave them personal rights, which included the right to practice religion in the park, as part of the territory they occupied in 1760.¹⁴⁷ The Attorney General of Canada argued that treaty rights equalled territorial rights. The Court rejected both extremes and held that the treaty covered an area large enough to meet the Hurons' need to exercise their religious practices and customs, including sites within the park, "so long as the carrying on of the customs and rights is not incompatible with the particular use made by The Crown of this territory."¹⁴⁸ It was "up to the Crown" to prove that it could not accommodate its occupancy of the territory to reasonable exercise of the Hurons' rights.¹⁴⁹

For the exercise of rites and customs to be incompatible with the occupancy of the park by the Crown, it must not only be contrary to the purpose underlying that occupancy, it must prevent the realization of that purpose.

143. *Id.* at 1063 (citation omitted).

144. *Id.*

145. F. COHEN, *supra* note 1, at 63.

146. [1990] 1 S.C.R. at 1066.

147. *Id.* at 1066-67.

148. *Id.* at 1070.

149. *Id.* at 1072.

First, we are dealing with Crown lands, lands which are held for the benefit of the community. Exclusive use is not an essential aspect of public ownership. Second, I do not think that the activities described seriously compromise the Crown's objectives in occupying the park. . . . [The unique qualities of this area are not threatened.] These activities . . . present no obstacle to cross-country recreation.¹⁵⁰

The Court concluded that the Attorney General had failed to establish that the park purposes were incompatible with the exercise of Huron rites and customs.¹⁵¹

In light of the rulings and language in *Sioui* and *Horseman* there is serious doubt whether Parliament has power to modify or extinguish a First Nation's treaty without the consent of that Nation, except where the federal action is taken for the benefit of the Indigenous people or with their consent. *Sioui* teaches that the courts will carefully scrutinize legislation concerning treaties to ensure that it is indeed for the benefit of the Native Americans, or at least not detrimental without justification.¹⁵² This is consistent with current Canadian government policy of negotiating with tribes for settlement of Aboriginal claims.

In the United States, by comparison, the courts have not deviated from *Lone Wolf v. Hitchcock*, which held that Congress has plenary power to abrogate Indian treaties if it chooses to do so for any reason whatsoever.¹⁵³ Further, the courts will not review legislation to assure that it advances the government's trust responsibility, or benefits the Indians.

3. *Subjugation Under the Indian Act*

The Great Depression of the 1930s "appears to have been the high water mark of government regulation and interference in the daily lives" of the Canadian Indians.¹⁵⁴ Parliament made numerous detailed amendments to the Indian Act before and during the Depression years. Only a few have been made since. None of the amendments changed the basic policy of "civilizing" the Indigenous peoples and denying the First Nations meaningful self-government.¹⁵⁵

In the United States, the 1950s were dominated by the termination policy. In Canada, 1951 was significant for passage of a new Indian

150. *Id.* at 1073.

151. *Id.*

152. "The very definition of a treaty thus makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned." *Id.* at 1063.

153. 187 U.S. 553 (1903).

154. Bartlett, *The Indian Act of Canada*, *supra* note 110, at 585.

155. R. BARTLETT, *A HOMETLAND*, *supra* note 110, at 177-78.

Act,¹⁵⁶ which, for all its changes, looked more like the 1868 Indian Act than anything new.¹⁵⁷ It increased the imposition of provincial laws and standards on First Nations. The new Act did remove some of the cultural control and lessened excess government control of local affairs on the reserves, but it did not alter the policy of encouraging assimilation through award of citizenship. Nor did the Act bestow any broader powers of self-government on First Nations. The concept of termination, as conceived in the United States, did not reach Canada until 1969, and then was short-lived, appearing only as a “proposed” policy without any follow-up legislative implementation.¹⁵⁸

In the United States, self-determination became the dominant national policy by the late 1960s. The Indian Civil Rights Act, enacted in 1968, permitted tribal retrocession from state jurisdiction under P.L. 280 and enhancement of tribal courts. In 1970, President Nixon made his landmark speech flatly rejecting termination and endorsing a strong and comprehensive policy of self-determination for Indian tribes.

4. *Termination in Canada: A Short-Lived “Era”*

In the late 1960s, while the United States was moving rapidly towards self-determination, Canada was going in the opposite direction. In 1969, the Canadian government issued a policy statement called a “White Paper” on Indian Policy.¹⁵⁹ This Paper set forth a formula for termination and reads remarkably like H.C.R. 108¹⁶⁰ adopted by the United States Congress in 1953 to launch the termination era. Bartlett describes the White Paper:

[The Paper] . . . declared that total assimilation must occur within a short period of time—the Indian Affairs Branch should be abolished in five years. All legislation specially pertaining to Indians was to be repealed, thereby denying special rights of Indians. Instead, all services were to be provided by the provinces; the statement rejected treaties and land-claims as insignificant in the debate on the future of the Indians. The Federal Government’s goal of total assimilation would be accomplished according to the Statement, by short-term economic aid. The 1969 Policy did not contain any major positive suggestions regarding the

156. Ch. 29, 1951 Can. Stat. 131.

157. Bartlett, *The Indian Act of Canada*, *supra* note 110, at 586.

158. STATEMENT OF THE GOVERNMENT OF CANADA ON INDIAN POLICY (1969).

159. *Id.*

160. H.R. Con. Res. 108, 67 Stat. B132 (1953); *see supra* notes 82–83.

well-being of the Indians. Its essence was the severing of all ties between the Indians and the Federal Government.¹⁶¹

The 1969 White Paper generated immediate opposition. In 1970, the Indian Chiefs of Alberta presented their "Red Paper"¹⁶² to the Trudeau cabinet, opposing the entire concept of termination and arguing for greater recognition of treaty rights, Aboriginal claims, and rights to self-government. Passage of the Alaska Native Claims Settlement Act in 1971 influenced Canadian policy, as did the *Calder* case, decided in 1973. On August 8, 1973, shortly after *Calder* was decided, "the federal government issued a Statement on Aboriginal Claims, in which it declared its willingness to negotiate" these claims with First Nations peoples.¹⁶³ The 1969 White Paper proposal was dead. In 1977, the Mackenzie Valley Pipeline inquiry, headed by Thomas Berger, recommended recognition and settlement of native claims.¹⁶⁴ In 1981, the federal government further developed its policy in a publication titled *In All Fairness: A Native Claims Policy, Comprehensive Claims*.¹⁶⁵

5. *Canada Begins To Recognize Aboriginal Rights*

In the 1970s, Canadian policy began to reverse itself. The 1973 *Calder*¹⁶⁶ decision posed the very real possibility that the courts might recognize Indian claims to aboriginal titles and rights. In 1982, Canada adopted a new Constitution Act. Section 35(1) of the Act recognized and affirmed First Nation Aboriginal rights. In 1990, the *Sparrow* Court interpreted this language to mean that Aboriginal fishing rights are not extinguished merely because they are regulated in detail, and that the government has a heavy fiduciary duty, reviewable in the courts, when dealing with Aboriginal rights. *Sparrow* represents a remarkable turnaround for Canada.

6. *Academics and Lawyers Take Up the Indian Cause*

The *Sparrow* decision is unusual in the Court's heavy reliance on academic writings to support its analysis. The Court notes that:

161. Bartlett, *The Indian Act of Canada*, *supra* note 110, at 588.

162. *Id.* at 588-89.

163. R. BARTLETT, *A HOMELAND*, *supra* note 110, at 49.

164. *Id.*

165. CANADA, DEP'T OF INDIAN AND NORTHERN AFFAIRS (1981); *see* R. BARTLETT, *A HOMELAND*, *supra* note 110 at 51.

166. *Calder v. Attorney-General*, 1973 S.C.R. 313, *aff'g* 13 D.L.R.3d 64, 74 W.W.R. 481 (B.C. 1970).

[Until 1966] there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, Aboriginal claims were not even recognized by the federal government as having any legal status It took a number of judicial decisions and notably the *Calder* case in this court (1973) to prompt a reassessment of the position being taken by government.¹⁶⁷

The Court then cites and quotes from numerous academic articles, all written after 1980, when academics realized that these problems should be studied.¹⁶⁸ In the United States, a similar pattern of scholarship emerges, although the Canadian scholarship has influenced the Canadian Supreme Court more profoundly. Cohen published his landmark treatise, *Handbook of American Indian Law*, in 1942. It was revised ineptly in 1957, but remained virtually the only example of legal scholarship with regard to Indian law until the 1970s. The field was then "discovered" by academics and, since 1975, dozens of fine articles and books have appeared.¹⁶⁹

Paralleling the discovery of this field by academics has been the discovery and participation in the field by competent Indian and non-Indian lawyers. Competent legal representation has had a significant impact on the achievement of Indian goals. Until the 1960s competent legal counsel were seldom available to Indian tribes.¹⁷⁰ They were rel-

167. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1103-04.

168. B. SCHWARTZ, *FIRST PRINCIPLES, SECOND THOUGHTS* 353-64 (1986); Little Bear, *A Concept of Native Title*, 2-3 CAN. LEGAL AID BULL. 99 (1982); Lyon, *An Essay on Constitutional Interpretation*, 26 OSGOODE HALL L.J. 95 (1988); McNeil, *The Constitutional Rights of the Aboriginal Peoples of Canada*, 4 SUP. CT. L. REV. 255 (1982); Pentney, *The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee*, 22 U. BRIT. COLUM. L. REV. 207 (1988); Sanders, *Pre-Existing Rights: The Aboriginal Peoples of Canada*, in *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* (2d ed. 1989); Slattery, *Understanding Aboriginal Rights*, 66 CAN. B. REV. 727 (1987); Slattery, *The Hidden Constitution: Aboriginal Rights in Canada*, 32 AM. J. COMP. L. 361 (1984). This is not to suggest that academics always, or even usually, turn out to be any more enlightened than anyone else. In this instance, however, they have served an important purpose in revealing the legal, social, and economic mistreatment of Canadian and United States Indians.

169. F. COHEN, *supra* note 1; M. PRICE & R. CLINTON, *LAW AND THE AMERICAN INDIAN* (2d ed. 1983); R. STRICKLAND, *FIRE AND THE SPIRITS—CHEROKEE LAW FROM CLAN TO COURT* (1975); WILKINSON, *supra* note 18; Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975); Clinton, *supra* note 98; Collins, *Indian Allotment Water Rights*, 20 LAND & WATER L. REV. 421 (1985); Getches, *Water Rights on Indian Allotments*, 26 S.D.L. REV. 405 (1981); Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207 (1972); Johnson & Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587 (1979); Strickland, *The Absurd Ballet of American Indian Policy or American Indian Struggling with Ape on Tropical Landscape: An Afterword*, 31 ME. L. REV. 213 (1979).

170. Attorneys for the Solicitor's office were sometimes dedicated and competent, and sometimes not. Frequently, they were, and are, up against highly competent, and highly paid private counsel when negotiating natural resources agreements on reservations. Government

egated to relying on government counsel who had unfettered discretion as to whether to represent a tribe in a given case. The government lawyers are located in the Solicitor's office and the Department of Justice and have (with a few recent exceptions) established a very checkered history of advocacy on behalf of Indian tribes.

The civil rights movement of the 1950s and 1960s produced a cadre of young, capable lawyers dedicated to minority causes, some of whom became expert in the unique field of Indian law. Lawyers in the Office for Economic Opportunity (War on Poverty Legal Service Program) became knowledgeable in Indian law. By 1969, some forty Legal Services lawyers were working on reservations throughout the nation.¹⁷¹ More importantly, the University of New Mexico law student program¹⁷² encouraged several hundred Indians themselves to attend law schools throughout the country. Most of these lawyers have returned to work on behalf of their communities. Law schools began teaching federal Indian law only in the late 1960s and early 1970s.¹⁷³ It is now a widely taught subject in western law schools. Law school casebooks¹⁷⁴ and law review articles began to appear during the same period. In 1982, the revised edition of the 1942 "Felix S. Cohen's Handbook of Federal Indian Law" was published after being completely rewritten over a seven year period.¹⁷⁵

attorneys are hampered by conflicts of interest, as where they advise both the Bureau of Indian Affairs and the Bureau of Reclamation on water allocation disputes.

The other group of lawyers who became expert in aspects of Indian law represented tribes in claims before the United States Indian Claims Commission. These attorneys became specialists on the historic claims of tribes, what lands the tribes originally occupied, and when and how the United States "took" those lands. Only a few claims attorneys became involved in current Indian litigation. U.S. INDIAN CLAIMS COMM'N, FINAL REPORT 21 (1978).

171. Price, *Lawyers on the Reservation: Some Implications for the Legal Profession*, 1969 LAW & SOC. ORD. 161.

172. Twenty-five to thirty-five Indian pre-law students have attended the summer program at the University of New Mexico Indian Law Center each year since 1968. After a six week summer introduction to law they attend law schools throughout the nation.

173. Professor Fred Hart, University of New Mexico, and Professor Monroe Price, UCLA Law School, began to teach this subject in 1971. The author started teaching Indian law in 1969.

174. Monroe Price of UCLA Law School, authored the first such casebook, LAW AND THE AMERICAN INDIAN (1973). This book has been revised and the third edition is now co-authored by Robert Clinton and Nell Newton. D. Getches and C. Wilkinson have published a casebook, FEDERAL INDIAN LAW (2d ed. 1986).

175. The original treatise was published in 1942 and was authored by Felix S. Cohen. It became the dominant authority in the field. The 1982 edition was written by a group of academic scholars. The board of authors and editors includes Rennard Strickland, editor-in-chief, Charles F. Wilkinson, managing editor, Reid Peyton Chambers, Richard B. Collins, Carole E. Goldberg-Ambrose, Robert N. Clinton, David H. Getches, Ralph W. Johnson, and Monroe E. Price.

In 1966, Congress enacted a law permitting Indian tribes to file suit in their own names if the United States declined to sue for them.¹⁷⁶ Many such suits were filed. In the 1970s and 1980s, the United States dedicated more resources to litigation on the Indians' behalf. The Native American Rights Fund (NARF) in Boulder, Colorado, created in 1968, provides exceptional legal talent to tribes around the nation.¹⁷⁷ The totality of these changes means that Indian tribes, for the first time, have access to competent legal assistance, an accessibility that is essential for survival in modern United States. Treaty, statutory and other rights held by the tribes, long dormant, are now increasingly recognized and enforced by the courts.

III. ABORIGINAL RIGHTS

A. *The United States*

Conquest gives a title which the courts of the conqueror cannot deny The conqueror prescribes its limits. . . . [T]he Indian inhabitants are to be considered merely as occupants . . . incapable of transferring the absolute title to others.¹⁷⁸

In the United States the issues surrounding aboriginal title have nearly all been resolved, through treaty cessions and through the 1946 Indian Claims Commission Act. In Canada, these issues are now at center stage and are the major preoccupation of the Indian community.

Aboriginal rights and titles are recognized in both Canada and the United States. In *Johnson v. M'Intosh*, Justice Marshall affirmed the existence of such title:

They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.¹⁷⁹

176. 28 U.S.C. § 1362 (1988).

177. Started by David H. Getches as a spin-off of California Indian Legal Services, it continues its tradition of excellence under the leadership of John Echohawk. NARF employs about 20 lawyers. It generally is involved in about 70 cases at any one time, throughout the nation.

178. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588-91 (1823).

179. *Id.* at 574.

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The Supreme Court has stated that the Indians' right of occupancy is "as sacred as the fee-simple of the whites."¹⁸⁰ The Indians' possessory right is a "federal" right,¹⁸¹ so that a tribe is entitled to recover rent from a persistent trespasser on Indian title land.¹⁸²

Indian aboriginal claims are founded on immemorial custom. Such claims are proven by establishing exclusive use and occupancy of the land¹⁸³ from time immemorial,¹⁸⁴ which the court defines as prior to the assertion of sovereignty by the United States.¹⁸⁵ The Ninth Circuit has held that proof of aboriginal hunting and fishing rights can create possessory rights in Native Villages of Alaska.¹⁸⁶

Aboriginal title is good against all but the United States, which has the exclusive power to extinguish such title.¹⁸⁷ While Indians are generally not entitled to compensation when aboriginal title is extinguished by the United States,¹⁸⁸ Congress usually awards compensation as a matter of policy. Once Indian title has been recognized by treaty, agreement, or statute, compensation is required when the title is taken by the United States.¹⁸⁹ This is not true of executive order reservations.¹⁹⁰

Very few aboriginal title claims remain unsettled in the United States.¹⁹¹ The federal government largely abolished Indian title during the reservation era, 1850-1857, forcing Indian tribes to give up their ancestral hunting grounds in return for "recognized" title to reservations. Throughout the first half of this century, Indian tribes bitterly complained that they were forced, coerced, or induced by fraud

180. *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835).

181. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974).

182. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236 (1985).

183. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946).

184. *Confederated Tribes of Warm Springs Reservation v. United States*, 177 Ct. Cl. 184 (1966).

185. *Village of Gambell v. Clark*, 746 F.2d 572, 574 (9th Cir. 1984).

186. *Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969).

187. See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

188. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 313 (1955).

189. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938).

190. See *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949); *Sioux Tribe of Indians v. United States*, 315 U.S. 317 (1942). In spite of those cases, the "modern practice" of Congress has been to provide compensation to tribes for the taking of property on executive order reservations. F. COHEN, *supra* note 1, at 496.

191. One such claim was recently put forth by several Alaska Native Villages to aboriginal hunting and fishing rights on the outer continental shelf. The Alaska Native Claims Settlement Act of 1971 (ANCSA) abolished all aboriginal hunting, fishing, and land rights of Natives "in Alaska." 43 U.S.C. §§ 1601-1628 (1988). The Ninth Circuit held, in *Village of Gambell v. Hodel*, 869 F.2d 1273, 1279 (9th Cir. 1989), that the outer continental shelf is not "in Alaska." Thus aboriginal rights on the outer shelf were not abolished by ANCSA.

to leave their ancestral lands and move onto reservations, and maintained that the United States should return the land or at least pay for the taking. Before 1946, such claims could not be filed in court unless Congress passed special legislation waiving sovereign immunity and authorizing suit on each claim.¹⁹² Over 140 such special bills had been passed. Deciding this process was too cumbersome,¹⁹³ Congress, in 1946, enacted the Indian Claims Commission Act¹⁹⁴ establishing a special forum to settle Indian claims without special legislation for each lawsuit. The Commission made monetary awards to several hundred tribes between 1946 and 1978,¹⁹⁵ thereby resolving most aboriginal claims. A few claims remained against states¹⁹⁶ or subdivisions of states,¹⁹⁷ based on violation of the Trade and Intercourse Acts¹⁹⁸ for entering into treaties or agreements with Indian tribes in the late 1700s.

B. Canada

The Canadian law of Aboriginal rights remained fairly constant throughout the Canadian history until the 1973 decision in *Calder*,¹⁹⁹ the Constitution Act of 1982,²⁰⁰ and the 1990 Supreme Court decision in *Sparrow v. The Queen*.²⁰¹

1. Canadian Hostility Toward Aboriginal Rights

Prior to the 1982 Constitution Act, the federal government had both unilateral and exclusive power to deal with, or terminate, Aborig-

192. See F. COHEN, *supra* note 1, at 160.

193. U.S. INDIAN CLAIMS COMM'N, FINAL REPORT 2-3 (1978).

194. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049. The Commission terminated in 1978 (omitted at 25 U.S.C. § 70v (1988)).

195. These damage awards were challenged by various Indian tribes. The tribes objected to the fact that (1) they could only obtain money damages under the Act, they could not reclaim the land, (2) they received the value of their land at the date it was taken, usually sometime in the 1800s, (3) they received no interest on this valuation after the date of the taking, (4) the United States ardently contested each claim, sometimes attempting to offset the cost to the government of "removing" the tribe from its eastern homeland to Indian territory in the West, and (5) the Commission would only entertain claims by tribes, not individual Indians. See generally U.S. INDIAN CLAIMS COMM'N, FINAL REPORT 1-21 (1978).

196. See *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (tribal claim against the state of Maine).

197. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

198. Several of the Acts were passed by Congress in the late 1700s and early 1800s. See, e.g., Trade and Intercourse Act of 1793, 1 Stat. 329. They provided that no agreement with an Indian tribe could be valid unless approved by Congress.

199. 1973 S.C.R. 313, *aff'd* 74 W.W.R. 481 (B.C. 1970).

200. CAN. REV. STAT. app. II, No. 44 (1985).

201. [1990] 1 S.C.R. 1075.

inal title and rights.²⁰² The 1867 Constitution Act provides that the federal government has exclusive jurisdiction over “Indians and lands reserved for Indians.”²⁰³ The federal government retains exclusive power to deal with Aboriginal rights, as against the provinces, but that power is now constrained by the 1982 Constitution Act.

The Canadian government has recently declined to extinguish title without consent. By negotiating settlements of Aboriginal claims, it has engaged in a process with all the earmarks of earlier treaty negotiations.²⁰⁴ Several settlement agreements have been concluded in recent years.²⁰⁵

Because treaties covered only about half the nation, First Nations still assert claims of Aboriginal title to large areas of Canada. Until recently, the Canadian government looked unkindly on attempts to assert or litigate these Aboriginal claims. In 1927, for example, the Indian Act was amended making it a “federal crime to take Indian claims to court, to raise money to pursue Indian claims or in fact to organize to pursue Indian claims.”²⁰⁶ Although this provision was repealed in the 1930s, the federal government believed as late as 1969 that Aboriginal claims were so ill-defined that “it is not realistic to think of them as specific claims capable of remedy.”²⁰⁷ By 1973, the Canadian government’s perspective had altered. The government recognized Aboriginal title when it indicated a commitment to negotiate outstanding claims, including those based on Aboriginal title.²⁰⁸

202. J. WOODWARD, *supra* note 1, at 138–39; *see, e.g.*, R. v. Sparrow, [1990] 1 S.C.R. 1075, 1097–99; *see also*, R. v. Derrickson, [1976] 2 S.C.R. v, 71 D.L.R.3d 159 (Sup. Ct. Can. 1976), *aff’g* 60 D.L.R.3d 140 (B.C. 1975); Bartlett, *The Indian Act of Canada*, *supra* note 110, at 581.

203. CAN. REV. STAT. app. II, No. 5, § 91(24) (1985).

204. It seems clear that the constitution authorizes cession of Aboriginally held lands as part of a voluntary settlement and no further constitutional amendment is necessary to accomplish this. P. HOGG, *CONSTITUTIONAL LAW OF CANADA* 565–66 (2d ed. 1985).

205. *See, e.g.*, CANADA, EDITEUR OFFICIEL DU QUEBEC, *THE JAMES BAY AND NORTHERN QUEBEC AGREEMENT* (1976), and CANADA, DEP’T OF INDIAN AND NORTHERN AFFAIRS, *THE WESTERN ARCTIC CLAIM—THE INUVIALUIT FINAL AGREEMENT* (1984). The Inuvialuit Agreement came into force after the 1982 Constitution Act and has been constitutionalized, as was the James Bay Agreement.

206. Many Fingers, *Commentaries: Aboriginal Peoples and the Constitution*, 19 ALTA. L. REV. 428, 429 (1981). The potlatch tradition of the Six Nations of Iroquois was outlawed by the Canadian government and jail sentences handed down to all violators; attendance at potlatch functions was prohibited by law as late as 1951. CAN. REV. STAT. ch. 43, § 114 (1886) (repealed 1951). *See* CANADA HOUSE OF COMMONS, SPECIAL COMMITTEE ON INDIAN SELF-GOVERNMENT, *INDIAN SELF-GOVERNMENT IN CANADA* 13 (1983) [hereinafter *INDIAN SELF-GOVERNMENT*].

207. STATEMENT OF THE GOVERNMENT OF CANADA ON INDIAN POLICY (1969).

208. Morse, *The Resolution of Land Claims*, in *ABORIGINAL PEOPLES AND THE LAW*, *supra* note 110, at 617.

2. *Recent Canadian Recognition of Aboriginal Rights*

In 1973 the Supreme Court started down the path toward recognizing Aboriginal rights when it decided *Calder v. Attorney-General*.²⁰⁹ The Nishga people of northwestern British Columbia sought a declaration that they had Aboriginal title to their land and that this title had not been terminated. The Nishgas based their claim on the fact that their ancestors had occupied and used the land from time immemorial. Justice Hall, speaking for three members of the Supreme Court of Canada, agreed that the Nishgas had existing Aboriginal title derived from original occupancy and use.²¹⁰ Justice Judson, speaking for three other members of the Court, held that whatever title the Nishgas may have had had since been terminated.²¹¹ Justice Pigeon, the seventh judge, wanted to dismiss the Nishgas' application because the Tribe had failed to comply with a British Columbia statute requiring the Lieutenant Governor's consent to litigation involving the Crown's title to land.²¹² Because of the 3-3 stalemate between the other judges on the substantive issues, Pigeon's procedural argument is the sole reason *Calder* is binding legal authority. The real significance of *Calder*, however, lies in its ruling that Aboriginal title is not necessarily limited to the confines of the Royal Proclamation of 1763, but may be based on the concept of prior occupation of lands.²¹³

Until 1982, it was generally assumed that the Canadian government could unilaterally abrogate Aboriginal rights and title. Section 91(24) of the 1867 Constitution Act stood as authority for this position. This section granted the federal government jurisdiction over "Indians, and Lands reserved for the Indians."²¹⁴ This view has changed with the adoption of the 1982 Constitution Act, which provides in section 35(1) that "[t]he existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."²¹⁵

The 1982 Constitution Act appears to "constitutionalize" Aboriginal and treaty rights prospectively. Extinguishments that occurred prior to 1982 are still effective, but future attempts by Parliament to extinguish or alter such rights would be void. In 1985, Hogg wrote that section 35:

209. 1973 S.C.R. 313.

210. *Id.* at 375, 422 (Hall, J., dissenting).

211. *Id.* at 333, 344.

212. *Id.* at 426-27 (Pigeon, J., concurring).

213. *See* *Guerin v. R.*, [1984] 2 S.C.R. 335, 376-77.

214. *British North America Act, 1867*, CAN. REV. STAT. app. II, No. 5 (1985); *see, e.g.*, J. WOODWARD, *supra* note 1, at 88, 94, 95.

215. *Constitution Act, 1982*, CAN. REV. STAT. app. II, No. 44, § 35(1) (1985).

operates as a limitation on the legislative power of both the federal Parliament and the provincial Legislatures: neither level of government is competent to impair aboriginal or treaty rights. The entrenchment of aboriginal or treaty rights means . . . that future extinguishments of such rights could be implemented only by the process of constitutional amendment.²¹⁶

The one exception would occur when a First Nation voluntarily agreed to the extinguishment.

3. *Sparrow v. The Queen Requires Judicial Review of Laws*

Although the 1982 Constitution Act does not define Aboriginal rights, or how they should be treated by the courts, *Sparrow v. The Queen*²¹⁷ provides both a methodology and substantive answers to the meaning of section 35(1). The defendant was charged under the Fisheries Act²¹⁸ for fishing with a driftnet longer than permitted by his band's food fishing license. He admitted the facts but claimed an Aboriginal right to fish under section 35(1) of the 1982 Constitution Act.²¹⁹ The court remanded the case for trial on the constitutional issue, and provided criteria for reviewing legislation to assure that it advances rather than hinders First Nation interests.²²⁰

The *Sparrow* Court said the Government has a fiduciary duty to Aboriginal peoples.²²¹ The role of the Government is "trust like," rather than adversarial.²²² Contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.

Important differences exist between the aboriginal title and rights of First Nations in Canada and the United States. Many more outstanding claims of Aboriginal title exist in Canada than in the United States. Canada never created an equivalent to the United States Indian Claims Commission. Aboriginal title and its proprietary inci-

216. P. HOGG, *supra* note 204, at 566.

217. [1990] 1 S.C.R. 1075.

218. CAN. REV. STAT. ch. F-14, §§ 34, 61 (1970).

219. The issue of commercial fishing as an Aboriginal right was not raised in the lower courts, and thus was not discussed by the Supreme Court.

220. It is interesting to note that the *Sparrow* court cited and relied on *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), where the Supreme Court recognized Indian aboriginal title while at the same time recognizing broad federal power over that title. [1990] 1 S.C.R. at 1103. *Johnson*, and the two Cherokee opinions by Justice John Marshall, are frequently cited by Canadian courts and scholars. These issues arose in the United States earlier than in Canada because of the earlier settlement and conflict between Indians and non-Indians. This may also explain in part why United States courts seldom cite Canadian cases in the Indian law field.

221. [1990] 1 S.C.R. at 1108.

222. *Id.*

dents are important, contemporary issues in Canada and are the basis for numerous claims now being pursued through legal and political avenues.

Justice Hall described Aboriginal title as "a right to occupy the lands and to enjoy the fruits of the soil, the forest, and of the rivers and streams."²²³ In *Sparrow*, the Court, in interpreting the 1982 Constitution Act, found that the scope of the defendant's Aboriginal fishing right should not be limited to mere subsistence, but could incorporate evolving and contemporary²²⁴ uses as well.

IV. FEDERAL POWERS REGARDING NATIVE AMERICANS AND NATIVE CANADIANS

A. *The United States*

1. *The Plenary Power of Congress over Indians and the Indian Commerce Clause*

The United States Supreme Court has said that the federal government has plenary power over Indians and Indian tribes.²²⁵ Early cases attributed this power to the treaty clause of the Constitution, the property clause, and the war power. In *United States v. Kagama*,²²⁶ the Supreme Court attributed the power to enact the Major Crimes Act²²⁷ to the trust relationship. The Court rejected the Indian commerce clause as a basis²²⁸ because the clause only authorized Congress to legislate about commerce, and crimes are not commerce. More recent judicial opinions²²⁹ have rejected the trust relationship as a source of congressional power and have attributed such power to the commerce clause.

223. *Calder v. Attorney-General*, 1973 S.C.R. 313, 352 (Hall, J., dissenting).

224. [1990] 1 S.C.R. at 1093, 1099-1101.

225. *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937). See the definitive study by Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 199 (1984).

226. 118 U.S. 375 (1886).

227. The Major Crimes Act, 18 U.S.C. § 1153 (1988) makes it a crime for Indians to commit certain crimes on reservations, e.g., murder, manslaughter, rape, arson. In *Kagama*, 118 U.S. at 384-85, the Court upheld the constitutionality of the Act against the challenge that it was beyond Congress' power.

228. U.S. CONST. art. I, § 8, cl. 18. That clause states: "[t]he Congress shall have Power To . . . regulate Commerce with foreign nations, and among the several States, *and with the Indian Tribes*" (emphasis added).

229. See, e.g., *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) (the source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making).

The Supreme Court has not always identified a specific constitutional clause as the source of the federal government's power over Indian tribes. In *Johnson v. M'Intosh*,²³⁰ the Court held that Indian tribes have no power to convey title to lands to anyone other than the federal government because "discovery" denied them that power. An act of Congress is required to authorize a tribe to convey real property. This includes water rights, which are considered real property.²³¹

2. *All Indian Treaties Have Been at Least Partially Abrogated*

Congress has asserted its authority over Indian tribes by disestablishing some tribes,²³² by authorizing states to impose state jurisdiction over tribes either with or without tribal consent,²³³ by authorizing highways and reservoirs to be built on Indian lands,²³⁴ and by enacting other legislation altering tribal sovereignty.²³⁵

The Supreme Court has approved Congress's unilateral authority to abrogate Indian treaties²³⁶ and agreements, just as treaties with other nations can be abrogated.²³⁷ If Indian property rights are damaged or destroyed by such abrogations the Indians are entitled to compensation under the fifth amendment.²³⁸ If, however, the federal government takes land or resources held under aboriginal title, which it clearly has power to do, the Indians have no constitutional right to compensation,²³⁹ although in recent years Congress has usually made a political judgment to award compensation.²⁴⁰

230. 21 U.S. (8 Wheat.) 543 (1823).

231. See P. SLY, *RESERVED WATER RIGHTS SETTLEMENT MANUAL* (1988); G. WEATHERFORD, M. WALLACE, & L. STOREY, *LEASING INDIAN WATER—CHOICES IN THE COLORADO RIVER BASIN* (1988).

232. See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

233. This 1953 law, H.R. 1063, 83d Cong., 1st Sess., is commonly known as P.L. 280 (codified as amended at 18 U.S.C. § 1162(a) and 28 U.S.C. § 1360(a) (1988)).

234. *Seneca Nation of Indians v. Brucker*, 262 F.2d 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959).

235. See Newton, *supra* note 225.

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

237. Few treaties with foreign nations have been abrogated by Congress, whereas every Indian treaty has been abrogated to some extent.

238. See *United States v. Creek Nation*, 295 U.S. 103, 111 (1935).

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

240. The most important example of this policy is found in the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601–1628, where the federal government extinguished all aboriginal claims to land and to hunting and fishing rights in Alaska and in return awarded the Natives nearly a billion dollars, confirming title in newly-created Native Corporations to approximately 44 million acres of land.

Congress can enact special criminal laws applicable only to Indians who commit crimes in Indian country.²⁴¹ Enactment of these laws, applying only to Indians and Indian tribes, does not violate the Equal Protection Clause of the United States Constitution,²⁴² because the Court has said that they are based upon a political classification (tribes), rather than a racial classification.

3. *The Trust Relationship in the United States*

The United States has a special relationship toward Indian tribes, known as the "trust relationship." This includes general moral and political obligations to deal fairly with Indians,²⁴³ as well as legally enforceable obligations.²⁴⁴ The courts are often unclear which dimension of the trust relationship is at issue and the line between these two concepts is often blurred.

Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia*²⁴⁵ is the source of the trust relationship. Marshall characterized the tribes as "domestic dependent nations"²⁴⁶ with a right of occupancy of the land until the federal government chooses to extinguish their title. He said "[m]eanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."²⁴⁷

The trust obligation of the federal government constrains congressional authority much less than it constrains executive authority. As applied to Congress, the trust obligation imposes only a moral or political obligation. No court has ever struck down congressional legislation concerning Indians on the basis of the trust relationship.²⁴⁸ On the other hand, the trust relationship imposes justiciable duties on the executive. The Court has held that where a treaty required the United States to pay funds to tribal members, it was liable when it instead paid the money to the tribal government which was known to be misappropriating it. The government was "more than a mere contracting party," it was to "be judged by the most exacting fiduciary stan-

241. Major Crimes Act, 18 U.S.C. § 1153 (1988); see *United States v. Antelope*, 430 U.S. 641 (1977).

242. *Morton v. Mancari*, 417 U.S. 535, 554 (1974); *Antelope*, 430 U.S. 641; see *Johnson & Crystal*, *supra* note 169.

243. *Chambers*, *supra* note 169.

244. *United States v. Mitchell (Mitchell II)*, 463 U.S. 206 (1983).

245. 30 U.S. (5 Pet.) 1 (1831).

246. *Id.* at 17.

247. *Id.*

248. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); Comment, *Sparrow and the Lone Wolf: Native American Rights, Congress, and the Trust Obligation in the United States and Canada*, 66 WASH. L. REV. (forthcoming Oct. 1991).

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dards.”²⁴⁹ In the 1980s, the Supreme Court defined the trust relationship further, holding that when the government assumes comprehensive control over some aspect of Indian resources, such as timber harvesting, a trust obligation arises:

[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present; a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).²⁵⁰

The Court then held the government liable for damages for the breach of its fiduciary duties.²⁵¹

Mitchell and other trust cases indicate that the Court will find an enforceable trust responsibility as to the executive but only when a statute or course of government conduct supports that relationship, that is, no general trust relationship will be found arising out of the common law. The trust relationship tends to reinforce the rules of construction that doubtful statutes shall be construed in favor of the Indians, and that treaties and agreements will be construed as the Indians understood them.²⁵²

B. Canada

“The federal Parliament has taken the broad view that it may legislate for Indians on matters which otherwise lie outside its legislative competence, and on which it could not legislate for non-Indians.”²⁵³ This view is based on interpretation of section 91(24) of the 1867 Constitution Act.²⁵⁴

Can Parliament, by legislation, abrogate treaties with Indians? Pentney writes that “[i]n practice . . . virtually all of the important terminations of treaty obligations have been involuntary, in the form of legislative enactments.”²⁵⁵ The termination of treaty rights has usually arisen in connection with hunting and fishing rights. The leading case in *Regina v. Sikyee*,²⁵⁶ which upheld the Migratory Birds Con-

249. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

250. *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

251. *Id.* at 228.

252. *United States v. Winans*, 198 U.S. 371, 380 (1905).

253. P. HOGG, *supra* note 204, at 553. Hogg writes that the most conspicuous examples of this super legislative authority are the provisions of the Indian Act that govern succession to the property of deceased Indians. There are also provisions for administration of the property of the mentally ill and infants. *Id.*

254. CAN. REV. STAT. app. II, No. 44 (1985).

255. Pentney, *supra* note 168, at 46.

256. *R. v. Sikyee*, 46 W.W.R. 65, 74-75 (N.W. 1964), *aff'd*, 1984 S.C.R. 642.

vention between Great Britain, on behalf of Canada, and the United States and Mexico, despite the fact that it substantially restricted treaty hunting rights. This case established that federal law could supersede treaty rights, and has been followed in later cases.²⁵⁷

The Canadian Bill of Rights guarantees equality before the law and specifically prohibits discrimination by reason of race. Yet section 91(24) of the 1867 Constitution Act establishes a basis for special laws for Indians and reserves. In fact, as Hogg says:

such laws are the sole reason for s. 91(24). Indeed, legislation enacted in relation to "Indians" . . . must normally be confined to Indians, that is to say, it must employ a racial classification in order to be constitutional. Legislation in relation to "lands reserved for the Indians" . . . need not necessarily employ a racial classification.²⁵⁸

In the United States, congressional legislation dealing with Indians does not violate the equal protection clause because, the Court says, it refers to a political classification—Indian tribes—and not to Indians as a racial group.²⁵⁹ Such legislation is also sustained by the Indian commerce clause of the Constitution.²⁶⁰

1. The Indian Act Stifles Tribal Governments

Under the Indian Act in Canada, traditional Indian governments were replaced by band councils that function as agents of the federal government, exercising a limited range of delegated powers under close federal supervision.

The basic Canadian law dealing with Aboriginals is the Indian Act, originally passed in 1876.²⁶¹ It determines who is a status²⁶² Indian in Canada by enumerating which bands are recognized or chartered,²⁶³ and provides for a registration system for individuals of those bands. The Act specifically excludes Metis²⁶⁴ and Indians who are

257. See Pentney, *The Rights of the Aboriginal People of Canada and the Constitution Act, 1982—Part I: The Interpretive Prism of Section 25*, 22 U. BRIT. COLUM. L. REV. 21, 48 (1988).

258. P. HOGG, *supra* note 204, at 555.

259. *Morton v. Mancari*, 417 U.S. 535 (1974); *United States v. Antelope*, 430 U.S. 641 (1977).

260. U.S. CONST. art. I, § 8.

261. See CAN. REV. STAT. ch. 43 (1886). Although amended several times, this Act remained nearly the same until significant revisions occurred in 1951. The 1951 edition has been amended, but is substantially the same at present. CAN. REV. STAT. ch. 32 (1985).

262. "Status" Indian in the Canadian literature means an Indian who is registered or who is entitled to be registered under section 2(1) of the Indian Act. Sometimes they are referred to as "treaty" Indians where their land is covered by a treaty. J. WOODWARD, *supra* note 1, at 7.

263. See J. WOODWARD, *supra* note 1, at 12.

264. Metis are commonly thought to be persons of mixed white and Indian blood. See, e.g., *Metis Betterment Act*, ALTA. REV. STAT. ch. 233 (1970) amended by ch. 26, 1982 Alta. Stat.

251. Woodward suggests the definition should include facts or circumstances, such as "whether

enfranchised, that is, fully assimilated into Canadian majority society.²⁶⁵ Status Indians and Inuit are generally accorded the same rights in terms of Aboriginal title and treaty agreements.²⁶⁶

The 1982 Constitution Act recognizes and affirms existing Aboriginal and treaty rights, which were preserved in the Royal Proclamation of 1763.²⁶⁷ No new legislation is necessary to create or delegate those rights. A special committee to the House of Commons recommended in 1983 that legislation be enacted to occupy all areas of competence necessary to permit First Nations to govern themselves and to ensure that provincial laws would not apply on Indian lands except by agreement of the Band government.²⁶⁸ No such legislation has yet been enacted and there is little chance that such enactment will soon occur.

2. *The Trust Relationship in Canada*

In Canada, the law concerning trust obligations and Indians is considerably less developed than in the United States. It has largely blossomed since the 1982 Constitution Act, and partly because of that Act. Nonetheless Canadian and United States laws are similar.

Some form of fiduciary relationship has been recognized in Canada from early times. Woodward notes that the fiduciary relationship was first enunciated in the Royal Proclamation of 1763,²⁶⁹ but the case that primarily developed the relationship was *Guerin v. The Queen*.²⁷⁰

The trust relationships of the United States and Canadian governments towards Indians are generally parallel. Canadian courts have tended to adopt rules similar to those supplied by courts in the United States, largely because the issues have frequently arisen and been decided earlier in the United States. Bartlett says:

The history of the Aboriginal peoples and of their relationship to governments in the United States closely parallels circumstances in Canada.

Not surprisingly, Canadian courts have paid considerable regard to United States jurisprudence. The Supreme Court of Canada has accen-

a person's ancestors received 'scrip,' or a grant of land under the Manitoba Act, 1870 . . . [or] under any of the Dominion Lands Acts, or were entitled to such a grant." J. WOODWARD, *supra* note 1, at 54-55.

265. Some enfranchised Indians may get their status back under 1985 revisions to the Indian Act. CAN. REV. STAT. ch. I-5, § 6(1)(e) (1985); see also J. WOODWARD, *supra* note 1, at 22-23.

266. The Metis, despite initial agreements reserving a land base to them, were later excluded from treaty activity as a group, their claims being settled through individual payments of land or scrip. G. BROWN & R. MAGUIRE, *supra* note 110, at 28, 31-35.

267. INDIAN SELF-GOVERNMENT, *supra* note 206, at 44.

268. *Id.* at 59.

269. J. WOODWARD, *supra* note 1, at 63.

270. [1984] 2 S.C.R. 335.

tuated this practice in recent years. When *Guerin* was appealed to the Supreme Court of Canada, all parties relied on United States jurisprudence.²⁷¹

The trust obligation in Canadian law was given more power in *Guerin v. The Queen*,²⁷² where the Court held that the federal government must deal in good faith, and keep its word, when managing tribal property held in trust. "The Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms of the lease actually obtained by the Crown were much less favorable than those approved by the Band at the surrender meeting."²⁷³ The Court found that when the Crown took the land in order to lease it, a fiduciary relationship was created in its place: "[t]he *sui generis* nature of Indian title and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation."²⁷⁴ The property had appreciated since the breach of trust. The court affirmed damages of ten million dollars, quoting an Australian opinion on common law principles concerning damages in breach of trust: "a defaulting trustee must make good the loss by restoring to the estate the assets of which he deprived it notwithstanding that market values may have increased in the meantime."²⁷⁵

In 1990, however, in *Sparrow v. The Queen*,²⁷⁶ the Canadian Supreme Court tied the trust relationship together with the honor of the Crown. The *Sparrow* Court opined that the "honour of the Crown" is at stake when interpreting documents involving First Nations. In addition, "the special trust relationship and the responsibility of the government vis-a-vis Aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified."²⁷⁷

The Court said that legislation affecting the exercise of Aboriginal rights is valid only if it meets the test for "justifying" an interference with a right "recognized and affirmed" under section 35(1). The Court then set forth criteria to determine if legislation is "justified," one of which is the extent of legislative or regulatory impact on an Aboriginal right.

271. R. BARTLETT, *A HOMELAND*, *supra* note 110, at 190 (footnote omitted).

272. [1984] 2 S.C.R. 335.

273. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1108 (discussing *Guerin*, [1984] 2 S.C.R. at 345-48).

274. *Id.* (discussing *Guerin*, [1984] 2 S.C.R. at 348-50, 376, 382).

275. *Guerin*, [1984] 2 S.C.R. at 361 (quoting *Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co.*, 84 N.S.W.W.N. 399, 404-06 (1966)).

276. [1990] 1 S.C.R. 1075.

277. *Id.* at 1079.

[F]ederal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with . . . the concept of holding the Crown to a high standard of honourable dealing.²⁷⁸

This level of judicial review provides “a measure of control over government conduct and a strong check on legislative power.”²⁷⁹

The Court stated that section 35(1) requires judicial review of legislation. The broad legislative power over Indians provided in the 1867 Constitution Act is now modified by the judicial review power imposed by section 35(1). The government bears the burden of justifying legislation²⁸⁰ that has a negative effect on any Aboriginal right protected under section 35(1).²⁸¹ The first question a court should ask is whether the legislation interferes with an Aboriginal right. If so, it represents a *prima facie* infringement of section 35(1). To decide whether a *prima facie* case is established, the court must determine whether the limitation is unreasonable.²⁸² Second, the court must determine whether the regulation imposes undue hardship. Third, the court must determine whether the regulation denies holders of their preferred means of exercising that right.²⁸³

At this point, analysis moves to the issue of justification.²⁸⁴ Is there a valid legislative objective? If the objective is conserving and managing a natural resource, it will probably be valid.²⁸⁵ Also valid would be objectives purporting to prevent the exercise of section 35(1) rights that would cause harm to the general populace, or to Aboriginal peoples themselves.²⁸⁶

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue, considering whether the “honour of the Crown” has been upheld.²⁸⁷ Food fishing, including fish for ceremonial and social occasions, is to be given priority over the inter-

278. *Id.* at 1109.

279. *Id.* at 1110.

280. See the comparison of the *Sparrow* criteria with United States equal protection analysis, *infra* notes 298–305 and accompanying text.

281. *Sparrow*, [1990] 1 S.C.R. at 1110.

282. *Id.* at 1112.

283. For example, in *Sparrow* the test involved asking whether either the purpose or the effect of the restriction on net length unnecessarily infringed the interests protected by the fishing right. Were the Musqueam forced to spend undue time and money per fish with a shorter net?

284. *Sparrow*, [1990] 1 S.C.R. at 1113.

285. *Id.* at 1113–14.

286. The court rejected the test, whether the legislation or regulation is in the “public interest” as too vague. *Id.* at 1113.

287. *Id.* at 1114.

ests of other user groups.²⁸⁸ Additional questions must be addressed, such as whether there has been the least infringement possible, whether fair compensation is available if an expropriation is involved, and whether the Aboriginal group has been consulted with respect to the conservation measures.²⁸⁹

3. *Does the Sparrow Concept Fit the United States?*

The American public has difficulty believing . . . [that] injustice continues to be inflicted upon Indian people because Americans assume that the sympathy or tolerance they feel toward Indians is somehow "felt" or transferred to the government policy that deals with Indians. This is not the case.²⁹⁰

Two comparisons come to mind when considering *Sparrow* and United States Indian law. The first involves the Pacific Northwest Indian fishing rights dispute in which the courts were asked to interpret treaties that reserved to the tribes the right to fish off-reservation at their usual and accustomed fishing sites "in common with the citizens of the territory."²⁹¹ In 1968, the United States Supreme Court held that under this treaty language, the state may regulate Indians "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."²⁹² Later, in 1974, a federal court found that state regulations failed to meet the conservation standard or were discriminatory, and enjoined their implementation.²⁹³ Conservation, the court said:

is limited to those measures which are reasonable and necessary to the perpetuation of a particular run or species of fish. In this context . . . "reasonable" means that a specifically identified conservation measure is appropriate to its purposes; and "necessary" means that such purpose in addition to being reasonable must be essential to conservation.²⁹⁴

The state has the burden of proving the regulation is reasonable and necessary. To do so, the state must show that the conservation purpose cannot first be satisfied by restricting non-Indian fishing. The

288. *Id.* at 1101, 1116.

289. *Id.* at 1119.

290. L. Silko (Laguna Pueblo author), *Foreword* to *NOW THAT THE BUFFALO'S GONE* (A. Josephy, Jr. ed. 1982).

291. Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927; Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933; Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132.

292. *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968).

293. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir.), *cert. denied*, 423 U.S. 1086 (1975).

294. *Id.* at 342.

court said: “[i]f alternative means and methods of . . . conservation regulation are available, the state cannot lawfully restrict the exercise of off reservation treaty right fishing, even if the only alternatives are restriction of fishing by non-treaty fishermen, either commercially or otherwise, to the full extent necessary for conservation of fish.”²⁹⁵

Two observations are pertinent. First, the United States rules evolved out of a treaty interpretation case, whereas the *Sparrow* rule evolved from an Aboriginal rights case. Secondly, the United States Supreme Court has ruled that Indians may fish commercially, because they bartered fish from prehistoric times.²⁹⁶ The *Sparrow* Court declined to decide this issue because it was not raised in the lower courts.²⁹⁷

A second analogy may be drawn between Canadian and United States law. The *Sparrow* rule reminds one of the equal protection analysis of the United States Supreme Court.²⁹⁸ The fifth and fourteenth amendments to the federal Constitution require the federal and state governments respectively to provide equal protection to all individuals. The concept governs governmental actions which classify individuals for different benefits or burdens under the law. It requires that persons similarly situated should be treated alike.²⁹⁹ It guarantees that legislative classifications will not be based on impermissible criteria or arbitrarily used to burden a group of individuals.³⁰⁰ A statutory classification that is based on economics will be tested by the milder “rational basis” standard: the question is whether it is conceivable that the classification bears a rational relationship to an end of government that is not prohibited by the Constitution. Nearly all legislation tested by this standard is sustained.

On the other hand a statutory classification that affects a fundamental right such as voting,³⁰¹ or the right to travel,³⁰² or a classification

295. *Id.*

296. *Id.* at 332-33.

297. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1101.

298. When a status infringes on a fundamental right, such as the right to vote or travel, or if the statute is based on a suspect classification such as race or national origin, the courts apply “strict scrutiny” to the legislation. Under this often fatal test the classification must be “necessary” to achieve a “compelling governmental interest” for the law to stand. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

299. *Tussman & TenBroek, The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

300. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 523 (3d ed. 1986).

301. *Harper*, 383 U.S. 663.

302. *Shapiro*, 394 U.S. 618.

that is based on race or national origin, receives "strict scrutiny"³⁰³ by the courts. Under this test a court strikes down the legislation unless it is "necessary" to achieve a "compelling" governmental interest. Almost all legislation tested by this standard fails.³⁰⁴

Nowak, Rotunda and Young have concisely described the Supreme Court's strict scrutiny test:

The strict scrutiny test means that the justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end. The Court will not accept every permissible government purpose as sufficient to support a classification under this test, but will instead require the government to show that it is pursuing a "compelling" or "overriding" end—one whose value is so great that it justifies the limitation of fundamental constitutional values.

Even if the government can demonstrate such an end, the Court will not uphold the classification unless the justices have independently reached the conclusion that the classification is necessary to promote that compelling interest. Although absolute necessity might not be required, the justices will require the government to show a close relationship between the classification and promotion of a compelling or overriding interest. If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee.³⁰⁵

Returning to the field of Indian law, the Supreme Court held in *Lone Wolf v. Hitchcock*,³⁰⁶ that Congress is the sole arbiter of its own good faith and of the question whether legislation advances or damages Indian interests. No judicial review applying strict scrutiny or any other standard constrains Congress.³⁰⁷ In Canada the *Sparrow* decision holds differently. If the good faith or trust responsibility of

303. Strict scrutiny has been called "strict in theory and fatal in fact." Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

304. Gunther, *supra* note 303, at 1.

305. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 300, at 530.

306. 187 U.S. 553, 567-68 (1903).

307. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). This case called for judicial review of treaty dealings with the Sioux tribe. The case is unique in that Congress passed a special statute asking the courts to make such a review. Act. of Mar. 13, 1978, Pub. L. No. 95-243, 92 Stat. 153 (1978). *Lone Wolf*, 187 U.S. 553 (1903) still stands as the law absent such special legislative authority. See also Comment, *supra* note 248.

Parliament is in question, the court will give the law careful "scrutiny."³⁰⁸

Although *Sparrow* dealt with an Aboriginal fishing right, the language used by the Court to describe the fiduciary duty of the government seems to reach more broadly, as where the Court says "the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."³⁰⁹ This broad language suggests that the trust relationship protects not only Aboriginal title and fishing rights, but also, perhaps, the right to self-government.

The *Sparrow* doctrine of judicial review of Indian legislation is predicated partly on the 1982 Constitution Act. Given the general terms of that Act, however, the *Sparrow* interpretation is significantly attributable to the Canadian Supreme Court's embracement of a general trust obligation. The United States Supreme Court took a different turn in *Lone Wolf v. Hitchcock*, ruling that while congressional legislation about Indians should demonstrate "perfect good faith," no judicial review of that issue was justified.³¹⁰ *United States v. Sioux Nation of Indians*³¹¹ reflects a judicial tempering of this view and a possible inclination to re-examine the *Lone Wolf* rule. In that re-examination United States courts could benefit from a study of the Canadian jurisprudence, specifically *Sparrow v. The Queen*.

V. STATE AND PROVINCIAL POWER OVER INDIANS

A. *United States*

In the United States, states historically had no judicial or legislative power over Indian country,³¹² because the tribes were semi-sovereign

308. This exact term is used twice in *Sparrow*. "The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation" of the Aboriginal right. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1110.

'[R]ecognition and affirmation' incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. . . . [F]ederal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with . . . a high standard of honourable dealing with respect to the aboriginal peoples of Canada

Id. at 1109.

309. *Id.* at 1108.

310. 187 U.S. 553, 566 (1903).

311. 448 U.S. 371 (1980).

312. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

under federal protection. Only the federal government had authority to negotiate with the tribes. The Court blurred this "bright line" doctrine slightly in 1882 when it decided that an offense committed by a non-Indian against a non-Indian on a reservation fell under the jurisdiction of state courts and state criminal codes.³¹³

Congress further eroded tribal immunity from state law in 1953 when it enacted P.L. 280, empowering forty-five states to make a limited extension of state jurisdiction onto Indian reservations with or without Indian consent.³¹⁴ Many states enacted laws asserting jurisdiction over reservations, sometimes with Indian consent and sometimes without.³¹⁵ The courts have limited P.L. 280,³¹⁶ construing it to apply only to state laws of general application such as state criminal laws.³¹⁷ States cannot impose state taxes, or state or local regulatory laws, such as zoning, on reservations.³¹⁸ P.L. 280 explicitly denied states jurisdiction over Indian hunting, fishing, and water rights.³¹⁹

The United States Supreme Court has further eroded Indian immunity from state law by changing its analytical approach to the issue of state jurisdiction in Indian country. In 1973, the Court decided that immunity from state law no longer depends on "sovereignty," but now depends on "preemption" analysis.³²⁰ Preemption analysis asks whether the federal government has so fully occupied the field of law that there is no room left for state action. When sovereignty was the key issue, the reservation boundary was quite impervious to state law, except when Congress explicitly breached it by clear legislation such as P.L. 280, or termination legislation. Under preemption analysis, however, the court considers each case on its own facts³²¹ in deciding whether the federal government has so fully occupied the field that no room is left for state action. In general, the courts easily find preemption where the controversy is among Indians, or between an Indian and a tribe.³²² Preemption is difficult to find if the controversy is

313. *United States v. McBratney*, 104 U.S. 621 (1881).

314. Act of Aug. 15, 1953, ch. 505, 87 Stat. 588-90 (codified as amended in 18 U.S.C. §§ 1151, 1162, and 28 U.S.C. §§ 1331, 1360 (1988)).

315. *E.g.*, WASH. REV. CODE § 37.12.010 (1989) (amended 1963).

316. *E.g.*, *Bryan v. Itasca County*, 426 U.S. 373 (1976).

317. *E.g.*, *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

318. *Id.*

319. 18 U.S.C. § 1162(b) (1988); 28 U.S.C. § 1360(b) (1988).

320. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1973).

321. *See Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980).

322. *Bracker*, 448 U.S. at 150-51.

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among non-Indians.³²³ Uncertainty occurs when the controversy is between a non-Indian and an Indian.³²⁴ In the meantime, “sovereignty” has been relegated to “backdrop” status.³²⁵

Where an Indian and a non-Indian are involved, state laws will apply on the reservation even though Congress has never so legislated if the tribal interest is modest and the state interest great.³²⁶ State and local law have been held to apply to zoning of non-Indian land on a checkerboarded part of a reservation where approximately 50% of the land is owned by non-Indians.³²⁷ Conversely, a few members of the Court said state zoning laws do not apply on a “closed” portion of the reservation where more than 90% of the land was tribally owned.³²⁸ State law applied to non-Indians fishing on non-Indian lands on a reservation where the tribe was not seriously affected by the fishing and failed to show historic, aboriginal reliance on fish as a source of food.³²⁹ State jurisdiction failed when a state imposed taxes on the non-Indian builder of a school on a reservation because federal policy and money encouraged the educational program for Indian children.³³⁰ In yet another case, the state was barred from imposing a “transactions privilege tax” on a non-Indian machinery seller who made a one-time-only tractor sale on the reservation to a member of the tribe.³³¹ The Court said the non-Indian seller was a “trader” and was comprehensively regulated by the federal Indian Trader Statutes.³³² A state also failed in its attempt to impose taxes on a non-Indian motor carrier that hauled logs on the reservation from an Indian logging operation.³³³ The logs were hauled over BIA or tribal roads, and the logging operation was strongly encouraged and partly financed by the federal government, thus preempting state jurisdiction. On the other hand, the state is not preempted from controlling water distribution to non-Indian landowners on the reservation where the

323. In no case has a court found preemption where two non-Indians are involved.

324. See *Bracker*, 448 U.S. at 144; *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 155–56 (1980).

325. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1973).

326. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 109 S. Ct. 2994 (1989).

327. *Id.* at 3009.

328. *Id.* at 3015.

329. *Montana v. United States*, 450 U.S. 544 (1981).

330. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982).

331. *Central Mach. Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980).

332. See 25 U.S.C. §§ 261–264 (1988).

333. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

water is surplus to the Indians' needs, and the source river starts above the reservation and flows on below it.³³⁴

Federal law controls the question of Indians' rights to water under the *Winters* doctrine. Under the 1952 McCarran Amendment,³³⁵ however, state courts have jurisdiction to adjudicate Indian water rights and determine the amount of water to which the Indians are entitled.³³⁶ State courts must still apply federal law in these proceedings, and the Indians, or the United States on their behalf, can petition the United States Supreme Court for review if they feel the state court misconstrued or misapplied federal law. Several such state court adjudications have now been completed in the western United States.³³⁷ Others are still pending in the courts.³³⁸

B. Canada

Canada has no foundation court decision similar to the *Worcester v. Georgia*³³⁹ holding that state law does not apply on an Indian reservation. In Canada, detailed federal laws control much of Aboriginal life. In addition, federal power over Aboriginals has been transferred to the provinces through a number of legislative enactments. Perhaps the most important delegation of federal legislative power over First Nations is found in a 1951 amendment to the Indian Act.³⁴⁰ Section 88 permits extension of provincial laws of general applicability over Indians, subject to the terms of treaties and federal laws.³⁴¹ This statute has spawned voluminous litigation, particularly with regard to off-reserve hunting and fishing rights. The extent to which section 88 per-

334. *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). Where the source river was entirely contained on the reservation, the court held that state law did not apply to the non-Indian landowner in his use of surplus water. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

335. Act of July 10, 1952, ch. 208(a)-(c), 66 Stat. 560 (codified at 43 U.S.C. § 666 (1988)).

336. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *see also United States v. District Court*, 401 U.S. 520 (1971).

The term "adjudication" means to bring into one lawsuit everyone who claims a water right within a given river basin or sub-basin so that all water rights are determined at one time. It does not allow suits against the United States for determination of Indian water rights by a single, or even several plaintiffs. Every claimant must be included.

337. Two such agreements are representative: the Big Horn River System, Wyoming, *see In re Big Horn*, 750 P.2d 681 (Wyo. 1988), and the Fort Peck, Montana Compact, *see MONT. CODE ANN.* § 85-20-201 (1990).

338. P. SLY, *supra* note 231; G. WEATHERFORD, M. WALLACE & L. STOREY, *supra* note 231.

339. 31 U.S. (6 Pet.) 515 (1832).

340. The Indian Act, ch. 29, 1951 Can. Stat. 131, 161.

341. CAN. REV. STAT. ch. I-5, § 88 (1985). This power is presumably now subject also to the constitutional entrenchment of Aboriginal and treaty rights under the Constitution Act, 1982, CAN. REV. STAT. app. II, No. 44, § 35(1) (1985).

mits application of provincial laws to Indian lands and resources is unsettled.³⁴² Provincial laws generally apply to Indians on as well as off reserves.³⁴³ This is true of wildlife,³⁴⁴ environmental, and other laws. This rule, however, is subject to several exceptions. Provincial laws do not apply to First Nations where Aboriginal rights are protected by section 35(1) of the 1982 Constitution Act, are expressed in a treaty, or appear in a federal statute such as the Indian Act.³⁴⁵ Further, provincial laws may not single out Indians for special adverse treatment or affect their "Indianness."³⁴⁶ Sanders describes "Indianness" as covering the "political, social and economic life of the community."³⁴⁷ Woodward says it covers "laws which affect the essential characteristics of a people as Indian people," and notes that these "essential characteristics have not yet been elaborated on by the Courts."³⁴⁸ In *Derrickson v. Derrickson*, the Court ruled that provincial laws may not interfere with First Nation possessory rights to reserve land, which are exclusively a federal matter.³⁴⁹ In *Surrey v. Peace Arch Enterprises*,³⁵⁰ the Court found that provincial zoning laws cannot apply on reserve lands. Thus, a municipality could not zone reserve lands even within municipal boundaries. In the United States, the prevailing doctrine is that state laws do not apply in Indian country unless Congress says so,³⁵¹ or when the issue is not central to Indian life.³⁵² In Canada, the opposite theory prevails. Provincial law

342. *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, 297-99. Questions of title and rights of possession concerning reserve lands are exclusively within Parliament's federal authority. *Id.* at 293, 296. "It is far from settled that s. 88 contemplates referential incorporation [of provincial laws] with respect to lands reserved for Indians." *Id.* at 297.

343. "The basic principle is that provincial laws apply [to Indians and Indian lands] unless excluded by one of these rules." J. WOODWARD, *supra* note 1, at 120. For "these rules," see *infra* notes 345-46 and accompanying text.

344. *Dick v. R.*, [1985] 2 S.C.R. 309.

345. Sanders delineates two basic principles that have emerged from the cases: (1) provincial laws apply to Indians if they do not discriminate against Indians and are not in conflict with federal laws; and (2) provincial laws apply to Indian reserve lands if they do not directly affect the use of those lands, do not discriminate against Indians, and do not conflict with federal law. Sanders, *The Application of Provincial Laws*, in *ABORIGINAL PEOPLES AND THE LAW*, *supra* note 110, at 452.

346. Sanders, *Hunting Rights—Provincial Laws—Application on Indian Reserves*, 38 SASK. L. REV. 234, 242 (1974).

347. *Id.* (citing *Dick v. R.*, [1985] 2 S.C.R. 309, 323).

348. J. WOODWARD, *supra* note 1, at 121.

349. [1986] 1 S.C.R. 285, 296.

350. 74 W.W.R. 380, 383 (B.C. 1970).

351. See, e.g., 18 U.S.C. § 1162(a) (1988); 28 U.S.C. § 1360(a) (1988) (authorizing states to impose state jurisdiction on reservations).

352. For example, where a non-Indian commits a crime against a non-Indian, or where zoning applies mostly to non-Indians and non-Indian-owned lands.

applies to Indian reserves except when the provincial law is contrary to section 35(1) of the 1982 Constitution Act, contrary to a treaty, or contrary to federal law.³⁵³ Significantly, the Allotment Act of 1887 in the United States, which created checkerboard ownership on many reservations, has no parallel in Canada. In the United States, this checkerboarding is one reason that state law has been allowed to intrude onto reservations. In Canada, of course, provincial law applies to reserves regardless of land ownership.

VI. INDIAN SELF-GOVERNMENT

The act establishing the [Cherokee] Standing Committee . . . provided for Warriors in National Council Assembled. The committee was to consist of thirteen members each serving two year terms. . . . The resolution further provided that "affairs of the Nation shall be committed to the care of the standing committee . . . but acts of this body shall not be binding in our common property on the Nation without unanimous consent of the members and Chiefs of the Council."³⁵⁴

A. *The United States*

In the United States, tribes have all the powers of self-government except as those powers have been changed by clear action of Congress, or lost by necessary implication arising from their dependent status.³⁵⁵ Over the years, these sovereign powers have gradually but consistently diminished. Early decisions held that tribes, because of their dependent status, lost their power to enter into treaties or agreements with other nations.³⁵⁶ Also, due to the guardian-ward relationship, tribes lost their capacity to convey title to their real property, including water rights, except with the consent of the United States.³⁵⁷ In 1881, the Supreme Court held that a crime committed by one non-Indian against another non-Indian was to be tried in state court, under state

353. Under P.L. 280, the tribes may have retained concurrent jurisdiction with the state, so the tribes did not *lose* any jurisdiction. State jurisdiction was merely added and made concurrent with tribal jurisdiction. This issue is now being tested in *Confederated Tribes of the Colville Reservation v. Superior Court*, No. 89-35829 (9th Cir. filed Nov. 30, 1989).

354. R. STRICKLAND, *FIRE AND THE SPIRITS—CHEROKEE LAW FROM CLAN TO COURT* 62 (1975).

355. "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and non-members of the tribe . . .*" *Montana v. United States*, 450 U.S. 544, 564 (1981) (emphasis in original) (citing *United States v. Wheeler*, 435 U.S. 313, 326 (1978)).

356. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

357. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

law.³⁵⁸ Tribal courts had no jurisdiction. In 1886, the Court held that Congress had power to enact the Major Crimes Act,³⁵⁹ applicable to Indians in Indian Country, without necessarily obtaining the consent of the Indians.³⁶⁰

Government policy seriously eroded traditional Indian governance in the late 1800s by breaking up reservations under the 1887 Dawes Act³⁶¹ and by administrative policies designed to individualize Indians and discourage their communal lifestyle.³⁶² Congress intended gradually to terminate the reservations and thus saw no need to plan the best form of tribal governments. The tribes would simply disappear.³⁶³ The IRA sanctioned tribal governments, but operated to promote governments with limited powers and non-Indian forms and procedures. In 1953, Congress enacted P.L. 280 authorizing forty-five states to impose their jurisdiction over Indian reservations either with or without Indian consent.³⁶⁴ In 1968, the Indian Civil Rights Act (ICRA)³⁶⁵ changed the law to require Indian consent to state jurisdiction. The ICRA, however, also applied a variation of the Bill of Rights to Indian tribal courts and governments, and limited tribal court criminal jurisdiction to fines of \$500 and imprisonment of six months.³⁶⁶

Modern court decisions have contributed to the erosion of tribal government. In 1978, the Supreme Court held that tribal courts did not have criminal jurisdiction over non-Indians committing crimes against the tribal code.³⁶⁷ In 1990, the Supreme Court held that tribal courts lack jurisdiction over non-member Indians.³⁶⁸ In 1973, the Supreme Court adopted preemption as the formula for analyzing

358. *United States v. McBratney*, 104 U.S. 621 (1881).

359. 18 U.S.C. § 1153 (1988).

360. *United States v. Kagama*, 118 U.S. 375 (1886). The courts still have not decided whether the Major Crimes Act eliminated tribal court jurisdiction over the same crimes. Tribal and federal jurisdiction are probably concurrent.

361. General Allotment Act of 1887, ch. 119, 24 Stat. 388.

362. F. COHEN, *supra* note 1, at 129–30.

363. *Id.* at 139.

364. Many states imposed jurisdiction on tribes, sometimes with, and sometimes without their consent. See Goldberg, *supra* note 87.

365. Title II, §§ 201–203, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301–1303, 1321–1322 (1988)).

366. *Id.* § 202. The penalties were increased in 1986 to \$5,000 and one year of confinement. 25 U.S.C. § 1302(7).

367. *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

368. *Duro v. Reina*, 110 S. Ct. 2053 (1990). *But see* Department of Defense Appropriations Act, § 8077, Pub. L. No. 101-511, 104 Stat. 1892 (1990) (legislatively reversing the *Duro* holding for one year).

whether state laws applied on the reservation.³⁶⁹ In practice, this meant that state laws apply in many situations where they would earlier have been excluded, such as where a county zones property owned by a non-Indian on a checkerboarded part of the reservation.³⁷⁰ Thus, the sovereignty and self-governing powers of Indian tribes have gradually been eroded in these multiple and diverse ways. Tribal governmental powers nonetheless are still substantial.

[I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation.

Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has direct effect on the political integrity, the economic security, or the health or welfare of the tribe.³⁷¹

Several cases have been decided by the federal courts since *Montana* and illustrate how the lower federal courts apply the *Montana* test.³⁷² The Supreme Court itself addressed the question of tribal zoning

369. *McClanahan v. State Tax Comm'n*, 411 U.S. 164 (1973).

370. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

371. *Montana v. United States*, 450 U.S. 544, 564, 565-66 (1981).

372. In *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987), the court held that a municipal rent control ordinance could not be applied to a mobile home park operated by non-Indians on an Indian-owned allotment land on the Agua Caliente Reservation in California. Both tribal trust land and allotment land fall under the exclusive regulatory authority of the tribe. In *Knight v. Shoshone & Arapaho Indian Tribes*, 670 F.2d 900 (10th Cir. 1982), the court ruled that the tribe could zone non-Indian land on the reservation and prevent it from being subdivided by private developers. This met the "police power" aspect of the *Montana* test in that the development would have a direct effect on the health and welfare of the tribe. The county had no zoning ordinance for the area in question. The fact that the code applied to and affected non-Indians who could not participate in tribal government was immaterial.

The Ninth Circuit Court of Appeals, in *Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967 (1982), held that the Quinault Indians' tribal health and safety regulations applied to non-Indian owners of a grocery store within the reservation. The facts satisfied both

power over non-Indian land on the reservation in *Brendale*,³⁷³ holding in a highly fractured opinion that the tribe had exclusive zoning power over the "closed" part of the Yakima reservation, predominantly Indian land and population, while the tribe and county shared zoning power over the "open" part of the reservation, predominantly non-Indian occupied and owned. The county zoned non-Indian-owned lands, while the tribe zoned trust and tribally-owned lands within the "open" area.

One of the most comprehensive legislative intrusions in Indian governance occurred in the Indian Reorganization Act of 1934 (IRA).³⁷⁴ This Act encouraged renewal of tribal governments, but in a different form. The Act authorized tribes to draw up constitutions for approval of the Secretary of the Interior. When a constitution was approved it gave the tribe status of an IRA tribe with certain legislative powers and protections. These constitutions created governments with a tribal chairperson, and tribal councils elected by the tribal membership.

In spite of the fact that the tribes had federally approved constitutions, they operated on the basis of inherent sovereignty.³⁷⁵ Federal policy encouraged tribal courts to grow and become more proficient. Acceptance of the IRA form of government was voluntary. Each tribe

the consensual commercial relationship aspect of the *Montana* test, and represented conduct that directly threatened tribal health and welfare, which met the second aspect of the *Montana* test.

The federal district court in *Lummi Indian Tribe v. Hallauer*, 9 Ind. L. Rep. (Am. Indian Law Training Program) 3025 (W.D. Wash. 1982), approved a tribe's requirement that non-Indians hook up to the tribal sewer system. The health and welfare of the reservation residents was clearly involved there.

In *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982), the Ninth Circuit held that the Flathead Tribe could regulate the riparian rights of non-Indian landowners on the reservation. The non-Indians owned land fronting on a lake, the bed of which was part of the reservation. The exercise of these riparian rights directly affected the health and welfare of the tribes. In a recent district court case in California, *Pinoleville Indian Community v. Mendocino County*, 685 F. Supp. 1042 (N.D. Cal. 1988), the court upheld an injunction against an asphalt and cement plant on non-Indian owned land within the boundaries of the rancheria (a reservation-like holding in California). The court found that the plant would affect the health and welfare of the tribe.

In *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981), the court held that the tribe could regulate surplus water use on non-Indian-owned land on the reservation where the source stream started and died within the boundaries of the reservation. In a subsequent case, *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984), the court ruled that the tribe could not regulate non-Indian water use on fee land where the source river started above the reservation and flowed on beyond it downstream. The court recognized the tribe's interest in regulation but concluded the state's interest was greater than in *Walton* because only a small portion of the source river was located on the reservation.

373. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

374. 25 U.S.C. §§ 461-492 (1988).

375. F. COHEN, *supra* note 1, at 149, 232, 239.

voluntarily decided whether to accept this form of government.³⁷⁶ Over two-thirds of the nation's tribes became IRA tribes.³⁷⁷ Over the years, however, nearly all tribes (except for the theocratic Pueblos of New Mexico) adopted constitutions and the chairperson/council form of government similar to the IRA tribes.³⁷⁸

1. *Federal Delegation of Environmental Control to Indian Tribes*

What happens to the Earth happens to the children of the Earth. Man has not woven the web of life. He is but one thread. Whatever he does to the web, he does to himself.³⁷⁹

In the United States, Congress and the courts have affirmed tribal governmental power by delegating authority to implement federal environmental laws to the tribes, and by enabling tribes to receive federal grants toward this goal in the same way as states. In Canada, no similar legislative delegations have occurred.³⁸⁰

Seven major federal environmental statutes authorize delegation of authority to Indian tribes: the Clean Water Act (CWA),³⁸¹ the Clean Air Act (CAA),³⁸² the Safe Drinking Water Act (SDWA),³⁸³ the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),³⁸⁴ the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),³⁸⁵ the Surface Mining Control and Reclamation Act of 1977 (SMCRA),³⁸⁶ and the Resource Conservation and Recovery Act (RCRA).³⁸⁷ Only a few tribes have received these delegations, primarily because of the lack of federal funds to hire the essential experts.

376. 25 U.S.C. § 478 (1988).

377. F. COHEN, *supra* note 1, at 150 n.48.

378. F. PRUCHA, *supra* note 14, at 390.

379. Attributed to Chief Seattle (Duwamish Indian Tribe, 1855). See HOW CAN ONE SELL THE AIR? A MANIFESTO OF AN INDIAN CHIEF (1984).

380. Only a few tribes in the United States have taken advantage of this opportunity to manage their water quality environment. Most show a relative disinterest, or lack of capacity to manage water quality effectively.

381. 33 U.S.C. §§ 1251-1387 (1988).

382. 42 U.S.C. §§ 7401-7642 (1988).

383. 42 U.S.C. § 300f-300j (1988).

384. 42 U.S.C. §§ 9601-9675 (1988). The statute was amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of Titles 10, 26, 29, and 42 U.S.C.), and Pub. L. No. 99-563, 100 Stat. 3177 (codified at 42 U.S.C. §§ 9671-9675).

385. 7 U.S.C. §§ 136-136y (1988).

386. 30 U.S.C. §§ 1201-1328 (1988).

387. 42 U.S.C. §§ 6901-6992 (1988).

Indian Policies of the U.S. and Canada

The CWA is illustrative of these delegations. Enacted in 1972, it gave the federal government, rather than the state governments, primary authority to prevent, reduce, or eliminate pollution in the nation's waters. A national waste discharge permit system was established that could be delegated to the states for implementation.³⁸⁸ The Environmental Protection Agency (EPA) has authority to approve and delegate, or disapprove and decline to delegate, state programs.³⁸⁹ If a state chooses not to have a program, the EPA will itself implement pollution control in that state. Amendments to the CWA in 1987³⁹⁰ provide that the EPA shall treat tribes similarly to the states for most purposes including implementation of the permit program and the non-point source control program. Tribes are also defined as "municipalities" in the CWA,³⁹¹ making them eligible for federal grants for construction of sewage treatment facilities. Each of the other environmental statutes listed above has similar delegation clauses, except for RCRA.³⁹²

RCRA is the only federal environmental statute that does not authorize Indian tribes to be treated as states for implementation of

388. 33 U.S.C. § 1342(a)-(b) (1988).

389. *Id.* § 1342(b).

390. Title V, § 506, Pub. L. No. 100-4, 101 Stat. 77 (codified at 33 U.S.C. § 1377(h)).

391. 33 U.S.C. § 1362(4) (1988).

392. The CAA provides that the redesignation or change of air quality standards on an Indian reservation can be done by the tribal, not the state government. If either a state or a tribe permits a new emission source that contributes to air pollution greater than that permitted by the receiving government's area, either may request the EPA to arbitrate the dispute. If it cannot be arbitrated, then the EPA has authority to decide the issue. 42 U.S.C. § 7474 (1988).

The SDWA protects drinking water supplies, including sources and distribution systems, from contamination. Amendments in 1986 authorized the EPA administrator to treat Indian tribes the same as states and delegate implementation power to them for most purposes. Alternatively, if a tribe does not seek or obtain EPA approval, this federal agency is empowered to implement the program itself. 42 U.S.C. § 300(h)-1(e) (1988).

CERCLA (the "Superfund" Act) is designed to facilitate cleanup of hazardous waste sites and oil spills. In 1986, SARA authorized tribes, as well as states and the United States, to recover for losses to natural resources from hazardous waste disposal or oil spills. Tribes also are authorized to enter into cooperative agreements with states to join in an effort to clean up hazardous waste sites. 42 U.S.C. § 9604(d)(1).

FIFRA regulates pesticide handling and use. In its original enactment in 1978 Congress empowered the EPA Administrator to delegate almost complete operating authority to Indian tribes as well as states. 7 U.S.C. § 136u (1988).

The SMCRA recognizes that surface coal mining creates serious environmental problems and that regulation is necessary to require operators to reclaim the land after mining is completed. From its initial enactment this law has mandated that tribes be treated as states for most purposes under the Act. 30 U.S.C. § 1235(k).

Tribes will be granted primacy under the CWA, CERCLA, and the SDWA only if they meet certain conditions concerning governmental powers and the capacity to implement these federal statutes. They also need federal funding, which has been totally inadequate to date.

the Act, which regulates disposal of solid and hazardous wastes to protect underground water sources. RCRA is intended to track hazardous wastes from their origin to their final disposition. As with the CWA, tribes are defined as "municipalities," and thus are eligible for financial assistance for facilities planning, legal assistance, economic and other studies.³⁹³

In a recent case, the state of Washington attempted to exercise RCRA jurisdiction over reservations.³⁹⁴ The EPA, however, approved the state program only as to non-Indian lands on reservations. The Court held that Indian tribes possess inherent sovereignty, which the EPA recognizes, and Indian reservations are not subject to state regulation under the Act. The EPA may approve tribal jurisdiction, or if a tribe declines implementation, then the EPA may regulate in the tribe's place.³⁹⁵

These delegations of environmental authority to Indian tribes illustrate how Indian tribal governments are entrenched in the statutory and case law of the nation. Their existence denies the "disappearing Indian" myth, and illustrates how Indian governments and institutions have become a permanent part of the governmental structure of the nation.

2. *The Power To Exclude*

Indian tribes generally have the power to exclude persons from the reservation.³⁹⁶ This power sometimes is provided for in treaties, but it exists as an inherent sovereign power whether or not found in a treaty, statute, or other government source.³⁹⁷ Tribes clearly have the power to exclude non-members from trust lands.³⁹⁸ Whether the tribe can exclude a non-member from fee patent land depends on the circumstances. Certainly the tribe could not exclude a person from his or her own land on the reservation, or from road access to that land. Whether a tribe could exclude a non-member from all non-Indian owned land on the reservation has not been answered by the courts.

393. 42 U.S.C. § 6903(13) (1988).

394. *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985).

395. *Id.* at 1472.

396. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

397. F. COHEN, *supra* note 1, at 252.

398. *Montana v. United States*, 450 U.S. 544, 557 (1981); *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130, 136-37 (1982).

3. Tribal Legislatures and Tribal Courts

All but a few Indian tribes have legislative bodies,³⁹⁹ much like a typical city council. These legislatures enact laws which are then enforced by the executive branch of government,⁴⁰⁰ and by tribal police. Tribal legislative bodies exist whether or not the tribe has a constitution approved by the Secretary of the Interior under the 1934 Indian Reorganization Act.⁴⁰¹

In the past twenty years, tribal councils have become increasingly active in passing legislation. In earlier times the principal law adopted by most tribes was a criminal code dealing with misdemeanors.⁴⁰² This has changed. In recent years tribal councils have enacted laws concerning inheritance, domestic relations, traffic control, adoption, taxation, and a multitude of other topics.⁴⁰³ These enactments demonstrate the intention of tribal governments to exercise their powers of self-government and to control their own destinies.

Approximately 130 tribal courts operate on reservations in the United States.⁴⁰⁴ Most tribal courts are courts of general jurisdiction that derive their authority from the inherent sovereignty of the tribe, as reflected in the tribal constitution and ordinance. Under their inherent sovereign powers tribal courts start with unlimited criminal and civil jurisdiction. Limitations, however, have been placed on tribal court jurisdiction by Congress, the Supreme Court, and in some instances by tribal laws. Federal law limits tribal court criminal jurisdiction to punishments of no more than one year in jail and \$5000.⁴⁰⁵ *Oliphant v. Suquamish Indian Tribe*⁴⁰⁶ restricts tribal court jurisdiction to Indians, and *Duro v. Reina*⁴⁰⁷ limits that jurisdiction to mem-

399. F. COHEN, *supra* note 1, at 247.

400. In some tribes implementation is not by a separate executive branch. Instead, staff works under direct control of the council. See INDIAN TRIBAL CODES (R. Johnson ed. 1988).

401. F. COHEN, *supra* note 1, at 247.

402. *Id.* at 250.

403. INDIAN TRIBAL CODES (R. Johnson ed. 1988).

404. About 17 BIA courts, or Courts of Indian Offenses, also operate in the United States. These courts are regulated by 25 C.F.R. pt. 11 (1990). They draw their authority as well as their pay from the BIA and are considered arms of the federal government; judges are hired and fired by the BIA. Tribal courts draw their authority from "sovereignty" and are independent of the federal government. F. COHEN, *supra* note 1, at 250.

Since 1970, the National American Indian Court Judges Association has conducted extensive training programs for tribal judges, many of whom are now lawyers.

405. 25 U.S.C. § 1302(7) (1988).

406. 435 U.S. 191 (1978).

407. 110 S. Ct. 2053, 2064-65 (1990). *But see* Department of Defense Appropriations Act, § 8077, Pub. L. No. 101-511, 104 Stat. 1892 (1990) (legislatively reversing the *Duro* holding for one year).

bers of the tribe where the court sits. In other words, tribal courts have no criminal jurisdiction over either non-Indians or non-member Indians. On the civil side, tribal courts' general jurisdiction is not limited by federal law in extent or type of case. Where P.L. 280 applies,⁴⁰⁸ some tribes exercise concurrent civil jurisdiction with state courts.

Tribal courts were not historically part of Indian dispute resolution. In 1883, the BIA began creating a system of Courts of Indian Offenses, similar to the Indian courts now operating under the Code of Federal Regulations.⁴⁰⁹ Few tribal courts existed at the time. Enactment of the IRA in 1934 encouraged rapid growth of tribal courts based on inherent sovereignty. The trend dwindled during the termination era, but developed rapidly again after the Indian Civil Rights Act of 1968.⁴¹⁰ Most tribal courts are not significantly different from state courts, although they occasionally apply customary tribal law. The Bill of Rights of the federal Constitution does not constrain tribal governments,⁴¹¹ but they are bound by the legislated Indian Civil Rights Act, which is very similar to the federal Bill of Rights.⁴¹² Tribal courts have civil jurisdiction similar to state courts over matters occurring on the reservation. To the extent that the tribe has legislative jurisdiction over environmental matters on the reservation, the tribal court has civil enforcement powers against non-Indians, and both civil and criminal enforcement power as to tribal members. The tribal court also has jurisdiction over suits for nuisance, negligence, or riparian rights, depending on the applicable statutory and common law as determined by each tribe.

B. Canada

As Canada evolved from colonial status to independence, the Indigenous people were largely ignored, except where the government negotiated agreements to obtain more land for settlement.⁴¹³ The Aborigines played no part in negotiating the Confederation or in drafting the British North America Act of 1867, which assigned legis-

408. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1988), 25 U.S.C. §§ 1321-1326 (1988), and 28 U.S.C. § 1360 (1988)); see *supra* notes 102-03 and accompanying text.

409. 25 C.F.R. pt. 11 (1990); see F. COHEN, *supra* note 1, at 736-37.

410. 25 U.S.C. § 1302.

411. F. COHEN, *supra* note 1, at 664-66; see *United States v. Wheeler*, 435 U.S. 313 (1978); *Talton v. Mayes*, 163 U.S. 376 (1886).

412. F. COHEN, *supra* note 1, at 666-70; see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

413. INDIAN SELF-GOVERNMENT, *supra* note 206, at 39.

lative authority with respect to “Indians and Lands reserved for the Indians” to the federal government.⁴¹⁴ The government assumed increasing legislative control over Indian communities, leading to the 1876 Indian Act, which, with minor modifications, remains in effect today.⁴¹⁵ The result over the years has been the wholesale erosion of First Nation governmental powers.⁴¹⁶

Initially, the federal government recognized traditional native governments for the purpose of signing treaties and surrendering land. In spite of the fact that a Legislative Assembly study of 1858 recommended that traditional First Nation internal government be allowed,⁴¹⁷ the government nonetheless soon imposed controls on tribal governments. Subsequent detailed legislation deprived the tribes of most of their self-governing powers.⁴¹⁸

In 1869, Parliament passed the Act for the Gradual Enfranchisement of Indians and the Better Management of Indian Affairs.⁴¹⁹ The provisions of this Act have been only slightly altered since that time. Section 10 of the Act provided for elections for office to be held for a three year term. The officers were subject to removal by the governor “for dishonesty, intemperance or immorality.”⁴²⁰ Especially in small communities, this “elective method” appears to have been less democratic than existing Indian customs and tradition. The three year term and the limited powers of removal vested in the Governor denied the immediate control of the Chiefs formerly possessed by the community.⁴²¹

Parliament intended to introduce the Indigenous people to the dominant society’s forms of government, and inculcate a spirit of individuality in place of the communal life and hereditary leadership of the traditional past.⁴²² The Indian-elected governments were given only trivial powers, and generally were subjected to stifling supervision by government. An 1880 amendment gave the Governor in Council broad discretion over the bands, to make decisions “[w]henever the Governor in Council deems it advisable.”⁴²³ The Indian agent was

414. CAN. REV. STAT. app. II, No. 5, § 91(24) (1985). Neither did Indians play a part such as this in the United States.

415. CAN. REV. STAT. ch. I-5 (1985).

416. See generally INDIAN SELF-GOVERNMENT, *supra* note 206.

417. Bartlett, *The Indian Act of Canada*, *supra* note 110, at 593.

418. *Id.* at 594–603.

419. Ch. 6, 1869 Can. Stat. 22; see J. WOODWARD, *supra* note 1, at 93 n.59.

420. Ch. 6, § 10, 1869 Can. Stat. 22, 24.

421. Bartlett, *The Indian Act of Canada*, *supra* note 110, at 594.

422. *Id.* at 582–83.

423. Ch. 28, § 72, 1880 Can. Stat. 202, 223.

empowered to call and reside over all band council meetings. The Department's blindness to First Nation objections to this intrusion into tribal powers of self-government is unfortunate. The same ethnocentrism that has plagued Indian policy in the United States has plagued Canadian Aboriginal policy.

The band council elective system was fully developed by 1884.⁴²⁴ The First Nations consistently resisted it. In 1951, the Indian Act was again amended by legislation that returned the form of the Act to its 1868 concepts. The policy of self-determination apparently was never seriously considered in Canada.⁴²⁵

Many experts assert the First Nations still have sovereign governmental powers, even though seldom used and yet unrecognized by the federal government.⁴²⁶ Some suggest that it is not the sovereign governmental powers of Indigenous people that are ill-defined, but the recognition of these powers in Canadian law.⁴²⁷ The federal government has so occupied the internal affairs of First Nations, however, that precious little room is left for self-government. Federal regulation defines bands, amalgamates bands, permits the government to abrogate band custom councils, determines how the councils of certain bands are elected, determines who shall be a member of the band, determines how a band council may make decisions, determines how a band may spend its money, and defines the legislative power of a band council.⁴²⁸

Although many bands claim rights to self-government and to their own tribal courts⁴²⁹ as an Aboriginal right never divested,⁴³⁰ the Indian Act historically and today does not recognize such claims.⁴³¹ The powers of band councils to make by-laws have been virtually unchanged since 1886 and are confined to matters with which a rural municipality might normally be concerned. They are, however, expressly subject to regulations that the Governor in Council might make consistently with the Indian Act and the power of disallowance of the Minister of Indian Affairs. The power to make money by-

424. Bartlett, *The Indian Act of Canada*, *supra* note 110, at 596.

425. INDIAN SELF-GOVERNMENT, *supra* note 206, at 42.

426. *Id.* at 43.

427. J. WOODWARD, *supra* note 1, at 82-83; INDIAN SELF-GOVERNMENT, *supra* note 206, at 43-45.

428. CAN. REV. STAT. ch. I-5, §§ 2(1), 2(3)(6), 9(1), 10(1), 17(1)(a), 61(1), 74, 74(1), 81, 83, 85.1. (1985); J. WOODWARD, *supra* note 1, at 90-91.

429. Hemmingson, *Jurisdiction of Future Tribal Courts in Canada: Learning From the American Experience*, 2 CAN. NATIVE L. REP. 1 (1988).

430. INDIAN SELF-GOVERNMENT, *supra* note 206, at 43.

431. Bartlett, *The Indian Act of Canada*, *supra* note 110, at 593.

laws—the taxation of interests in reserve land and of band members—is confined to those bands declared to have “reached an advanced stage of development.”⁴³² In the Province of Saskatchewan there are sixty-seven bands with a population of approximately 45,000—none of the bands has been declared to have “reached an advanced stage of development.”⁴³³

Two kinds of band councils operate in Canada: those selected by customary means (about 35%) and those elected under terms of section 74 of the Indian Act (about 65%).⁴³⁴ Band councils selected by custom exercise customary powers but can be stripped of these powers by Parliament. Disagreement exists as to the powers of the section 74 councils.⁴³⁵ Some courts take the view that their powers derive strictly from the Indian Act. Others contend they have broader powers, but no court has taken the position of *Worcester v. Georgia*⁴³⁶ that Indian tribes have all powers of government unless specifically removed by federal statute or by their dependent status.

In 1983, the Report of the Special Committee of the House of Commons on Self-Government recommended that the rights of Indian peoples to self-government be explicitly stated and entrenched in the Canadian Constitution.⁴³⁷ Indian governments would then form a distinct order of government. The Committee recommended that, while waiting the constitutional entrenchment, Parliament should fully occupy the field, ousting Provincial jurisdiction, and then vacate those areas of jurisdiction to recognize First Nation governments. Different agreements would be entered into with each First Nation concerning the extent of that tribe’s jurisdiction, including land and water management, revenue raising, and economic and commercial development.⁴³⁸ A bill was introduced in Parliament based on the Committee recommendations,⁴³⁹ but fell far short of implementing the Report’s recommendations and was never passed.⁴⁴⁰ Bartlett observes that “[t]he Bill did not provide for self-government or even self-management. It merely provides for the possibility of negotiating with the

432. CAN. REV. STAT. ch. I-6, § 83(1) (1970).

433. Bartlett, *The Indian Act of Canada*, *supra* note 110, at 600.

434. J. WOODWARD, *supra* note 1, at 164.

435. *Id.*

436. 31 U.S. (6 Pet.) 515, 556–57 (1832).

437. INDIAN SELF-GOVERNMENT, *supra* note 206, at 41, 44, 141.

438. *Id.* at 59, 64, 76.

439. C-52 (1984) (“Indian Self-Government Act”) (on file with the *Washington Law Review*).

440. R. BARTLETT, *A HOMELAND*, *supra* note 110, at 160–61.

minister an agreement which could confer powers of self-management over Indian lands."⁴⁴¹

"In spite of [intrusive provincial policies], the concept of a homeland has been gaining strength The idea of a homeland for Aboriginal peoples seems now to be an accepted part of provincial and federal government policy for Indians, Inuit and Metis."⁴⁴²

1. Federal Delegation of Environmental Control to First Nations

No delegation of Canadian national environmental laws to First Nations has occurred in Canada. One obvious reason is the paucity of governmental authority held by these Nations. Without some type of on-going governmental operation it is unlikely that the national government would delegate governing authority to Indian tribes.

2. Tribal Courts

Tribal courts, drawing authority from inherent sovereignty, do not operate in Canada, although that may change if the movement toward self-determination, self-government and independence continues to grow. Alternatively, First Nations may attempt to establish courts on the basis of existing Indian Act authority. Woodward believes that "as government by band by-law becomes more and more common, it may be expected that bands will attempt to establish their own courts and tribunals to enforce and interpret those laws."⁴⁴³ He concludes, however, that the Indian Act provides a "thin" basis upon which to build a judicial system to enforce band by-laws.⁴⁴⁴

VII. CONCLUSION

Although similarities exist between Canadian and United States policies concerning Native tribes and bands, the differences are substantial. Neither country deserves accolades for dealing fairly with the Aboriginal tribes within their borders.

The official national policy of both countries has always been to negotiate voluntary treaties and agreements with Indigenous tribes. The Royal Proclamation of 1763 first stated this policy. The 1763 Proclamation also pronounced that only the national government could sign treaties with First Nations, a position later adopted by both Canada and the United States.

441. *Id.* at 162.

442. *Id.* at 178.

443. J. WOODWARD, *supra* note 1, at 378.

444. *Id.*

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In spite of these official declarations, the real policy of both governments was to move the Aborigines off the land and make it available for prospecting, logging, farming, and settlement by non-Indians. The policies of treaty negotiation, removal, assimilation, and reservations were all designed to accomplish this overriding goal. In practice, treaties and other cessions were seldom concluded with willing Indian tribes. The tribes usually knew that they must either cede their lands and put their welfare and survival at the mercy of the dominant government, or be pushed aside without even a small reservation to call home.

The swings in United States policy have been more extreme than in Canada: from removal in the first half of the nineteenth century, to a reservation policy for the second half of that century, to assimilation under the 1887 Allotment Act, to self-determination in 1934, to termination in the 1960s and back to self-determination in the 1970s and 1980s. Canada has maintained a consistent policy of individualization and assimilation from 1763 to recent time.

Both nations recognize Aboriginal land rights, and in both only the national government has legal authority to abrogate such rights. In the United States virtually no aboriginal rights remain, having been eradicated largely by Indian cessions in the reservation era of the 1800s. Claims still alive went to the 1946 Indian Claims Commission where tribes received partial monetary compensation for their lost land.⁴⁴⁵ Except for a few remaining claims, aboriginal land rights are no longer an issue in the United States. The situation is quite different in Canada. Although some cessions occurred in treaties and agreements establishing reserves in Canada, these documents were used more sparingly than in the United States, resulting not so much from any conscious policy as from the fact that central and western Canada were settled later than the western United States and had fewer population pressures. Canada has only recently attacked this problem and under national policies promulgated in the 1970s and the Constitution Act of 1982, is now attempting to negotiate settlement of Aboriginal claims.⁴⁴⁶ Other Canadian First Nation claims are in the courts for resolution. Nothing comparable to the United States Indian Claims Commission is anticipated in Canada. The Canadian policy of negotiation poses a long and arduous journey, but has the distinct advantage of showing respect for tribal claims.

445. It was only partial because values were determined as of the date of the taking, and no interest was allowed on the years since the taking. U.S. INDIAN CLAIMS COMM'N, FINAL REPORT 11 (1978).

446. See *supra* note 205 and accompanying text.

The United States Congress and the Canadian Parliament both have extremely broad powers to legislate about Indian affairs, under the United States Constitution and the several Constitution Acts of Canada. Until recently these governments could abrogate treaties, disestablish reservations in whole or part, take Indian property in condemnation proceedings, determine who is an Indian, and determine the nature of tribal government. Canadian law has changed with *Sparrow v. The Queen*.⁴⁴⁷

In 1903, the United States Supreme Court ruled in *Lone Wolf v. Hitchcock*⁴⁴⁸ that Congress should act "with perfect good faith" towards Indians, but held that Congress, not the Court, was the arbiter of its own good faith.⁴⁴⁹ In contrast, the Canadian Supreme Court ruled in *Sparrow* that the courts will give careful scrutiny to legislation adversely impacting Native Americans.⁴⁵⁰

This ruling is reminiscent of two separate doctrines in the United States. With regard to off-reservation treaty fishing rights in the Pacific Northwest, the courts have held that states can regulate these rights, but only when necessary for conservation, and only when regulation of non-Indian fishermen cannot accomplish the same purpose.⁴⁵¹ The states, in other words, must regulate the non-Indians first, before regulating the treaty tribes.

The second parallel with *Sparrow* concerns the constitutional rights of "equal protection" set forth in the fifth and fourteenth amendments to the federal Constitution. Under the cases interpreting these constitutional rights, a legislative classification based on a fundamental right (e.g., voting, travel), or upon race, ethnic origin, or religion, will be given "strict scrutiny" by the courts. The courts reject any presumption of validity. The legislation will be upheld only if it is necessary to achieve a "compelling governmental interest." An examination of the cases reveals that very few statutes that trigger strict scrutiny pass this test. The *Sparrow* approach implements the fiduciary relationship, and ought to be considered carefully by courts in the United States. The question is whether the legislation about Indians is consistent with the government's fiduciary responsibility, whether it advances Indian interests or does them harm. Such a test is needed because of the often cavalier and sometimes disastrous ways that Native American tribes

447. [1990] 1 S.C.R. 1075.

448. 187 U.S. 553, 566 (1903).

449. *Id.* at 567-68.

450. *Sparrow*, [1990] 1 S.C.R. at 1109-10.

451. *United States v. Washington*, 384 F. Supp. 312, 333, 342 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

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and their governments are treated by congressional and state legislation. Such a test would be particularly relevant where Congress enacts legislation adversely impacting tribal self-government. Such legislation can totally destroy the all important rights to self-government, can even destroy the tribe as a political entity, without the payment of compensation—because no “property” is taken.

Sparrow also implies that compensation will be required if the government takes any Indian aboriginal right. In the United States, no compensation is required when the federal government takes aboriginal lands or rights.⁴⁵²

In the United States, the 1832 decision of *Worcester v. Georgia* ruled that state laws do not apply on Indian reservations.⁴⁵³ But that bright-line doctrine has been chipped away to the point that today state laws often apply on reservations, for example, where a crime or civil wrong is committed by one non-Indian against another non-Indian, where states have asserted jurisdiction under P.L. 280, and where county zoning applies to predominantly non-Indian owned areas of reservations. Nonetheless, Indian tribes in the United States still retain many characteristics of sovereign government. Tribes enact their own civil and criminal laws, establish and empower their own tribal courts, exercise criminal jurisdiction over their members, determine criteria for tribal membership, control inheritance rights, and retain civil jurisdiction over non-Indians where a vital tribal interest such as health or safety is involved—and they do all of these things with about the same degree of success as state and local governments. In Canada, a combination of federal and provincial law smothers tribal governments. Virtually no self-governing powers exist.

The Canadian attitude toward Indian self-government is anomalous in that the government acknowledged the legitimacy of tribal government for the purpose of signing treaties and ceding land, but has since refused to acknowledge that Indians are capable of self-government. If anything, the Canadian government’s policy towards Indian self-government has been more denigrating and stifling than policies of the United States. In the past thirty years self-determination and economic self-sufficiency have become the official national United States policy towards tribes. Nearly all Indian tribes in the United States have self-created governments, constitutions, tribal courts, tribal police, and other accoutrements of government. In a sense these governments have become “constitutionalized,” and are now accepted as

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

453. 31 U.S. (6 Pet.) 515 (1832).

a permanent part of the legal landscape of the United States. In Canada, the movement toward self-determination and self-government is at a very different stage. Almost no self-government exists, even though many Indian tribes and academic scholars believe that self-governing powers based on inherent sovereignty could be exercised by the tribes. The recent Report of the Special Committee of the House of Commons, "Indian Self-Government in Canada," makes a strong case for creating, or recognizing, the independence, self-governing powers, and right to self-determination of Canadian Indian tribes. But Indian self-government is not a widely accepted concept in Canada, as it is in the United States. The prevailing law in Canada for reservations emanates from a federal or provincial source rather than from tribal legislative bodies as in the United States.

In the United States, termination was the official Indian policy in the 1950s. More than 100 tribes were terminated under this policy, and P.L. 280 was enacted authorizing states to impose jurisdiction over Indian reservations either with or without tribal consent. In Canada, the idea of a termination policy did not officially appear until a 1969 government White Paper. This document was met with such strong opposition that the policy was dropped and never effectuated. The impact of termination in the United States was especially great in its destruction of tribal governments.⁴⁵⁴ Canadian termination policy would have had its greatest impact in destroying Aboriginal claims, because no tribal governments exist. In both countries, special health and welfare programs would have terminated.

In both Canada and the United States, the role of academics has been significant in forming contemporary government policy and law. Academic legal literature dealing with Indians was virtually nonexistent in both countries until the 1970s. In the 1980s, however, the trickle of the late 1970s became a flood. This literature has informed the courts of important theories, historical and anthropological data, analytical approaches, and policy considerations. It is noteworthy that the great bulk of academic legal literature on both sides of the border tends to take a pro-Indian point of view.

Canada deals with Indian tribes through the comprehensive Indian Act, a single statute that defines and controls nearly all Indian relations between Indians and the government. In the United States, there is no single statute comparable to the Indian Act. Statutes dealing

454. But, at the same time, it was undoubtedly a major factor in the development of pan-tribal political activism and support for tribal self-determination. See S. CORNELL, *supra* note 21.

with Indians and Indian tribes are scattered, and frequently uncoordinated.

In the United States, tribal courts are now woven into the legal fabric of the nation. They provide law and order and dispute resolution for the reservations. Their successful operation, especially since the Indian Civil Rights Act of 1968, is viewed with justifiable pride by the Indian community. With their unlimited civil jurisdiction, and significant criminal jurisdiction, they serve a critically important function on the reservations. The competence of the judges and other court personnel continues to improve. An increasing number of these courts are staffed with lawyers. Full faith and credit is usually given to their judgments by state courts.⁴⁵⁵ In Canada, no tribal courts exist. In the past few years Canadian natives have shown great interest in the tribal court system in the United States. Some Canadian Indians believe there is sufficient residual sovereignty in Canadian tribes to support a tribal court system, but it is clear that the Indian Act would have to be overhauled before an effective tribal court system could be created in Canada.

The policy of self-determination, combined with economic self-sufficiency, is the most enlightened policy choice ever adopted by the United States toward American Indians. This policy permits Indians to determine what is best for themselves, rather than thrusting federally designed programs at the tribes. Self-determination furthers two key goals. It fosters a genuinely pluralistic society; and it provides Indians with legal and political space to define themselves in their own way. Congress has effected this policy through a variety of legislative enactments, while the Executive branch has embraced the policy for the past twenty years.

Until recently, United States Supreme Court decisions supported and reinforced self-determination. Unfortunately, the contemporary Court has begun to undercut this policy, through decisions denying Indian tribal courts jurisdiction over non-member Indians, allowing state taxes to apply on reservations, refusing to find federal preemption in key situations, and denying Indians the protection needed for exercising their religious beliefs. It will be unfortunate, indeed, if the Supreme Court undercuts this policy, which took so long and so many tragic mistakes to evolve. Historically, the federal courts in the United States were the guardians of Indian rights, a role that now appears to be changing.

455. *See, e.g.,* *Fredericks v. Eide-Kirschmann* Ford, 462 N.W.2d 164 (N.D. 1990).

At the same time, the Canadian Supreme Court is headed in the opposite direction, toward greater judicial protection of First Nations and Aboriginal rights. The *Sparrow* decision enhances the trust responsibilities of the courts in Canada, giving them substantive review powers over legislation affecting aboriginal land claims and self-government. These powers assure consistency between governmental action, the trust relationship, and the honor of the Crown.

In the United States, tribal governments, tribal courts, and tribal businesses have established themselves as legally valid, politically justified, and economically sound endeavors. State and local governments increasingly respect them, engage in joint programs with them, and cooperate in areas of mutual interest. Congress may now be the preferred forum in which to press toward institutionalizing these gains, and assuring that Indian tribal self-determination and self-government are permanently woven into the fabric of society.