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David E. Wilkins

University of Richmond, [dwilkins@richmond.edu](mailto:dwilkins@richmond.edu)

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# The Manipulation of Indigenous Status: The Federal Government as Shape-Shifter

by  
David Wilkins

The federal-Indian relationship . . . is like no other in the world. Indian tribes are denominated "domestic-dependent nations" but their practical relationship with the United States "resembles that of a ward to his guardian." Indian tribes appear to have the same political status as the independent states of San Marino, Monaco, and Liechtenstein, yet they have little real self-government and seem to be forever mired in a state of political and economic pupillage.<sup>1</sup>

This fifteen-year-old statement from Vine Deloria, Jr., the preeminent Indian political and legal scholar, still accurately reflects the convoluted nature of indigenous political, legal, and economic statuses in the United States. The multiple, overlapping, and sometimes seemingly irreconcilable manifestations of indigenous status in federal law and policy arise in Supreme Court

*David E. Wilkins, a member of the Lumbee Nation, is an Associate Professor of American Indian Studies, Political Science, and Law at the University of Minnesota/Twin Cities. He received his Ph.D. in Political Science from the University of North Carolina/Chapel Hill in 1990. His research interests include federal Indian policy and law, comparative indigenous politics, and intergovernmental relations.*

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cases, congressional statutes, treaties, agreements, and administrative regulations. These various statuses have multiplied and expanded in unusual directions, but they trace their lineage under United States law to the early moments of the American Republic's existence. Variations on indigenous status, however, date back to Columbus' conflicting commentary on Indian and Spanish theological debates about whether or not Indians were by nature free persons or slaves.<sup>2</sup>

Because of a variety of factors, the once holistic political, legal, and cultural status of indigenous nations and individuals has changed over

time in entirely unpredictable and ad hoc ways. Tribes as collective bodies have received an inherent racial, cultural, and national status. United States law first accorded them a dependent, ward-like status and later a corporate one. Tribes have been alternately treated as "discrete and insular" minority communities and as local governments or sub-units of government. They have also been viewed as social service agencies due to poverty in their demographic bodies. United States law has regarded tribes as "delegated" bodies for purposes of carrying out federal mandates. Tribes have been statutorily treated as "states" for some programmatic purposes, while at other times treated as collective bodies.

Indians as individuals have a recognized status as tribal, cultural, and political citizens eligible for distinctive property rights (such as hunting and fishing)

and tax exemptions. Although not initially granted state and federal citizenship, they now hold that standing and are entitled to the services and benefits (social security, unemployment compensation, and welfare) open to every American. Because of their "Indian" status, however, individuals are treated as "subjects" under federal law, because the federal government can abrogate or diminish their rights notwithstanding their sovereign and citizen status. This "subject" status is largely due to congressional plenary power, and it affects Indians and tribes through liquor use regulations, criminal penalties, religious rights, aboriginal Indian title to lands, and treaty adherence. As a result of these multiple inherent, assumed, and imposed statuses, indigenous peoples as collective bodies and individuals are frequently left with an inconclusive and ambivalent understanding of their political, legal, and cultural rights and their actual status vis-a-vis the states and the federal government.

In short, the federal government has an indeterminate relationship with tribal nations and their members: sometimes recognizing and supporting tribal sovereignty, and sometimes acting to deny, diminish, or even terminate that sovereign status. On the one hand, such indeterminacy accords imaginative tribal leaders, United States presidents and their executive agents, federal judges, congressional lawmakers, and state officials a degree of political and legal flexibility. Involved parties may successfully navigate otherwise difficult political terrain by choosing appropriate indigenous statuses that can benefit tribal nations and/or individual Indians. On the other hand, such ambivalence deprives aboriginal peoples, collectively and singly, of a clear and consistent understanding or the powers and rights they may be capable of exercising, thereby contributing to the ongoing tension that frequently clouds the relationship between tribes and other political or corporate entities.

In this essay, I will examine the origin, rationale, and consequences of several of these collective and individual Indian statuses. I hope this analysis provides a better understanding of these statuses and their continuing impact on contemporary political and legal thought and policy formulation. For purposes of simplicity, this paper uses a chronological approach so that we may better witness the ways in which definitions of Indian status have changed and the ways in which they have persisted.

## I. JOHN MARSHALL: THE GREAT EQUIVOCATOR

It is impossible to address indigenous status without invoking the name and jurisprudence of the third Chief Justice, John Marshall. Countless books and articles have examined his judicial opinions establishing certain

principles tribes have relied on and had to cope with since their enunciation.<sup>3</sup> These include the doctrine of discovery,<sup>4</sup> tribes as domestic-dependent nations possessing a status resembling that of a guardian to a ward,<sup>5</sup> and tribes as distinct political communities with an independence that states could not interfere with or diminish because of the sanctity of treaties, tribal sovereignty, and federal supremacy.<sup>6</sup>

In two of these opinions, *Johnson v. McIntosh*<sup>7</sup> and *Cherokee Nation v. Georgia*<sup>8</sup>, Marshall employed equivocal and problematic language about the doctrines of discovery and conquest and the status of tribes and their members, creating a confusing set of principles that still affects indigenous people. At the time of these rulings, American Indians, including the Cherokee Nation, enjoyed the status of *de facto* and *de jure* sovereign nations. Tribes had existed for millennia as national groups with bounded lands, defined populations, and adaptive governing institutions. Diplomacy, as carried out via the treaty process, had been the principle manner through which European countries and the United States had interacted with tribes.

Nevertheless, in both *Johnson* and *Cherokee Nation*, Marshall openly manipulated indigenous status by trying to provide some measure of recognition to Indian rights while at the same time elevating the federal government to a superior position in relation to tribes. Even though tribes were *de facto* and *de jure* sovereign nations, Marshall spoke of indigenous people not solely in terms of their political or sovereign capacity but more broadly as "Indians" in a conglomerate or class sense, or as a "race" of people. Yet at other times he spoke of Indians in an "individualized" sense.<sup>9</sup>

These are three very different statuses under the law—political, racial, and individual. Marshall and subsequent courts and lawmakers ventured back and forth, sometimes intentionally and sometimes unwittingly, between these three statuses. These vacillations continue to cause tremendous confusion among Indians, federal lawmakers, and practitioners of Indian law.

Take the following excerpts from *Johnson*:

- *Political status recognized:*

The plaintiffs [Johnson and Graham] in this cause claim the lands . . . by the chiefs of certain Indian tribes, constituting the Illinois and the Pinkish nations . . . .<sup>10</sup>

- *Racial status recognized:*

In the establishment of these relations, the rights of the original inhabitants [the Indians] were, in no instance entirely disregarded; but were necessarily, to a considerable extent, impaired.<sup>11</sup>

- *Racial status recognized:*

Thus has our whole country been granted by the crown while in the occupation of the Indians . . . . In all of them [the states], the soil, at the time of the grants were made, was occupied by the Indians.<sup>12</sup>

- *Individual status recognized:*

We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.<sup>13</sup>

Marshall's next opinion, *Cherokee Nation v. Georgia*,<sup>14</sup> contained more status juggling. In this case the Cherokee people, who had signed nearly a dozen treaties with the federal government, approached the Court as a sovereign political entity in an effort to get the federal government to force the state of Georgia to stop interfering in the internal affairs and territorial boundaries of the Cherokee. But the Chief Justice once again manipulated indigenous status to arrive at a compromise ruling. This ruling reduced the sovereignty of the Cherokee Nation in an effort to preserve the Court's authority from presidential encroachment. Marshall set this up by noting that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else."<sup>15</sup>

The only thing "peculiar" about the relationship was that Marshall, for the United States, was claiming that Indian territory was actually a part of the United States despite a number of treaties which affirmed that Indian lands were separate and not subject to federal jurisdiction or ownership. In order to find federal jurisdiction over tribes, while still according some recognition to Indian rights, Marshall renewed his manipulation of indigenous status, and in so doing further multiplied its categories:

- *State status:*

The acts of our government plainly recognize

the Cherokee nation as a State, and the courts are bound by those acts.<sup>16</sup>

- *Individual status:*

The Indian territory is admitted to compose a part of the United States . . . . In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens.<sup>17</sup>

- *Political status:*

They acknowledge themselves in their treaties to be under the protection of the United States . . . . [A]nd the Cherokees in particular were allowed by the treaty at Hopewell, which preceded the Constitution, "to send a deputy of their choice, whenever they think fit, to Congress."<sup>18</sup>

- *State status:*

They [tribes] may, more correctly, perhaps, be denominated domestic dependent nations.<sup>19</sup>

- *Dependency status:*

Meanwhile the [tribes] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.<sup>20</sup>

Within the space of a single page, Marshall had reaffirmed the conflicting statuses outlined in *Johnson* and added two additional and contradictory statuses: state and dependency.

In a sense, the Court was only amplifying the conflicting statuses of aboriginal people specified in the United States Constitution. First, the Commerce Clause declared that Congress has the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."<sup>21</sup> This is an explicit affirmation of the separate political status of tribes as national bodies. By contrast, in Article 1, Section 2, Clause 3 and the Fourteenth Amendment, there is reference to "Indians not taxed," which identifies the individual status of Indians who remained outside the political jurisdiction of the United States and the states for purposes of congressional representation.

This inherent tension, exacerbated by Justice Marshall's opinions, has persisted between the national or political status of tribes and the individual status of tribal members. Later developments have only further muddied the status of indigenous peoples in the United States.

Frequently the Supreme Court used this confusion to expand or constrain Indian rights, whichever they found expedient at the time, or to affect the rights of other minorities as compared to Indians.

## II. JUSTICE TANEY AND THE "MANIFEST" POWER OF THE COURT

Subsequent to Marshall's early rulings, federal Indian policy and law sought to support western expansion and land settlement while still acknowledging a variable degree of indigenous sovereignty and native proprietorship. Indian removal (1830s-1850s), the establishment of Indian reservations (1850s-early 1900s), and Indian assimilation and allotment (1860s-1920s) were the dominant policy themes for the next century. During this period, the United States treated indigenous peoples brutally, attempting to diminish their lands, their cultures, and their rights.

Indigenous status fluctuated depending on the tribe (whether considered "civilized," like the Five Civilized Tribes and the Pueblos, or "wild," like the Navajo, the Sioux, and many others), the policy and philosophical orientation of Congress and the Supreme Court, and the political atmosphere of the country at the time. In 1846, as western expansion quickened, the Supreme Court in *United States v. Rogers*<sup>22</sup> weighed in on aboriginal rights by utterly denying tribes any national or political standing. As Chief Justice Taney said, "The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied."<sup>23</sup>

Taney then brought forth a strictly racial dimension when he declared that "from the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices."<sup>24</sup> The 1847 amendment to the 1834 Trade and Intercourse Act with Indian tribes, entitled An Act to Amend an Act entitled 'An Act to Provide for the Better Organization of the Department of Indian Affairs,' continued this trend by the federal government to treat Indians as a depraved race of individuals.<sup>25</sup> Section 3 of the amended act authorized the President or the Secretary of War to pay monies due the tribe not to the chiefs or their designates, but to "the heads of families and other individuals entitled to participate therein."<sup>26</sup> This circumvention of tribal leaders violated the nation-to-nation relationship established in treaties and, in effect, gave the federal authorities power to determine the membership of tribes

at an individual level for the purpose of annuity distribution. This was the first action by Congress to individualize tribal funds and property in a way that diminished the sovereign character of tribal nations.<sup>27</sup>

A little more than a decade later, in *Dred Scott v. Sandford*,<sup>28</sup> a case which held that African Americans had no legal rights which whites had to respect and that blacks could not become American citizens, Justice Taney provided a more realistic account of tribal status. His discussion of tribal status in *Dred Scott* dicta reveals Taney's awareness of the facts about tribes that he had conveniently chosen to ignore in *Rogers*. He said:

These Indian Governments were regarded and treated as foreign governments, as much as if an ocean had separated the red man from the white . . . . Treaties have been negotiated with them, and their alliance sought in war, and the people who compose these Indian political communities have always been treated as foreigners not living under our Government.<sup>29</sup>

When compared to Taney's views of Indians in *Rogers*, this quote reveals the Chief Justice's disingenuousness in employing absolutely opposite descriptions of tribal status when it suited his political purpose.

## III. A (PARTIAL) CLOSING OF THE DOOR: LOSS OF TREATIES, LOSS OF STATUS?

As United States power waxed and indigenous power continued to wane, by the 1860s federal lawmakers, agitated by western states and territories, looked to redefine indigenous status yet again. But before Congress stepped in with its unilateral modification of the diplomatic relationship, the Supreme Court handed down two important rulings that, for the time, acted to meld the Indians' national status as sovereign bodies with the individual status of tribal members.

In *United States v. Holliday*,<sup>30</sup> the Court held that Congress had the power to regulate liquor sales to tribes and their individual members wherever they lived, both on and off the reservations. In exploring how "commerce" with tribes included the liquor trade, the Court said:

And so commerce with the Indian tribes, means commerce with the individuals composing those tribes . . . . The right to exercise [the liquor trade] in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the members of the tribe with whom it is carried on.<sup>31</sup>

*Kansas Indians* similarly mingled Indians' political and individual statuses.<sup>32</sup> In that case, the Court used powerful terminology to emphasize the national status of the tribes and the respect that was to be accorded the lands of even individually allotted Indians:

The treaty of 1854 left the Shawnee people a united tribe, with a declaration of their dependence on the National government for protection and the vindication of their rights. Ever since this their tribal organization has remained as it was before. They have elective chiefs and an elective council; meeting at stated periods; keeping a record of their proceedings; with powers regulated by custom; by which they punish offenses, adjust differences, and exercise a general oversight over the affairs of the nation. This people have their own customs and laws by which they are governed. Because some of those customs have been abandoned, owing to the proximity of their white neighbors, may be an evidence of the superior influence of our race, but does not tend to prove that their tribal organization is not preserved. There is no evidence in the record to show that the Indians with separate estates have not the same rights in the tribe as those whose estates are held in common . . . . While the general government has a superintending care over their interests, and continues to treat with them as a nation, the State of Kansas is estopped from denying their title to it . . . . Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.<sup>33</sup>

Five years later, Congress explicitly rejected these views of the Court. In March of 1871, via an Indian Appropriation Act rider,<sup>34</sup> Congress declared that henceforth the United States would no longer negotiate treaties with tribes, although it would honor all preexisting ratified treaties. Formal agreements did continue until 1912, but there was nevertheless a real sense among many federal lawmakers and Supreme Court justices that Congress had elevated itself to a superior position from which to govern all Indians through acts of Congress.

This reduction in both perceived and real tribal sovereign status, however, was not always reflected in subsequent Supreme Court cases. For example, in the important Indian criminal law case, *Ex parte Crow Dog*,<sup>35</sup> the Court reaffirmed the national status of tribes when it held that:

[T]he pledge to secure to these [Lakota] people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.<sup>36</sup>

In this same decision, however, the Court discussed Indians as being "wards," not as individuals belonging to an American polity, "but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who . . . it was hoped might become a self-supporting and self-governed society."<sup>37</sup>

The status of wardship would be most forcefully enunciated in two major cases of that period, *United States v. Kagama*<sup>38</sup> and *Lone Wolf v. Hitchcock*.<sup>39</sup> *Kagama* upheld the extension of federal criminal law over all major crimes in Indian country. The decision codified tribes not as nations or states but as "separate peoples" with some internal powers of governance. Nevertheless, tribes were seen as "wards of the nation" in a wholly "dependent" relationship to their federal guardians. In 1903, the Court in *Lone Wolf* enshrined federal plenary power over tribes and their treaty property. *Lone Wolf* reinforced the political question doctrine by refusing to consider the Kiowa, Comanche, and Apache tribes' arguments that they had been defrauded in being forced to sell their lands to the federal government. In the Court's words, the Indians' contention that their lands were being taken in violation of their treaty "ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear toward the government of the United States."<sup>40</sup>

Ironically, between these two sovereignty crushing cases, the Supreme Court in *Talton v. Mayes*<sup>41</sup>

dramatically reaffirmed that although tribes were subject to the stronger authority of the federal government, their sovereign national status did not derive from and was therefore not beholden to the United States Constitution. The Court held that Cherokees' powers of self-governance traced to a separate point of origin, the Cherokee people, who did not owe their existence or governmental structure to the United States Constitution.<sup>42</sup>

#### IV. INDIANS AS CITIZENS

The Snyder Act<sup>43</sup> in 1921 signaled an important federal statutory change in indigenous status. Up to this time, Congress and the Bureau of Indian Affairs (BIA) expended monies for Indians largely on the basis of treaty provisions or a specific law that addressed particular tribes. This Act, however, granted a general authority to the BIA under the Interior Department's supervision to spend congressionally appropriated money "for the benefit, care, and assistance of the Indians throughout the United States."<sup>44</sup> This money was to be used for a wide variety of purposes, including health, education, civilization, irrigation, and liquor control. This was the first generic appropriation measure designed to meet the tremendous socio-economic needs of Indians. The BIA was not beholden to the language of specific treaties or agreements in its allocations, nor was it restricted to serving only reservation-based tribes.

The next major shift in United States governmental actions towards indigenous groups arrived three years later in 1924 with the Indian Citizenship Act.<sup>45</sup> Through that law, Congress completed the enfranchisement of American Indian individuals as citizens of the United States. This measure, titled "A Bill granting citizenship to Indians, and for other purposes," bestowed United States citizenship on all non-citizen Indians born in the United States.<sup>46</sup> Some Indian tribes, like the Six Nations Confederacy of New York State, formally objected to this act, declaring that the United States lacked authority to impose its citizenship on tribal members who already enjoyed citizenship in their own nations.

The Act, however, brought little clarity to the status issue because it concluded with this problematic statement: "Provided, that the granting of citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."<sup>47</sup> In other words, federal citizenship did not supplant tribal citizenship. The Act simply added a layer of American citizenship to preexisting tribal citizenship. Importantly, tribal national status was unaffected by this measure since only individual Indians received the franchise. An earlier Supreme Court case, *United States v. Nice*,<sup>48</sup> involving an enfranchised Indian allottee, had held as much when the Court determined that "citizenship is not incompatible

with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indian or placing them beyond the reach of congressional regulations adopted for their protection."<sup>49</sup>

This layering of federal citizenship status onto tribal citizenship, later supplemented by various state laws which accorded Indians the right to vote, has proven most troubling for Indians. On the one hand, individual Indians are entitled to exercise their right to vote in federal elections under the Fifteenth Amendment. On the other hand, individual Indians are not guaranteed Fourteenth Amendment protection from their own tribal governments, if the tribal government is acting within its sovereign capacity, as held in *Groundhog v. Keeler*.<sup>50</sup>

#### V. TRIBES AS CORPORATE BODIES

Congress enacted two important laws in 1934 that signaled yet another dramatic shift in indigenous status. The Johnson-O'Malley Act<sup>51</sup> (JOM) increased the role of state governments in administering aid to Indians as individuals, now also recognized as state citizens. The Indian Reorganization Act<sup>52</sup> (IRA) sought to revitalize tribal nations as unique cultural, geographic, economic, and legal polities.

JOM authorized the Secretary of Interior to enter into contracts with states to provide education, health, agricultural aid, relief of distress, and social welfare assistance for individual Indians at Congress' expense. Some of these appropriations were designed to accommodate the unmet financial needs of school districts with large areas of non-taxable Indian-owned property and increasing numbers of Indian children. JOM was amended in 1936 to allow political sub-units of states—counties, municipalities, state universities and colleges, and appropriate state or private corporations—to expend federal dollars on behalf of Indians.<sup>53</sup>

IRA, enacted two months after JOM, had a much more comprehensive and collective focus. It was designed to counteract the ravages of the Indian allotment era and the harsh, coercive assimilative tactics of the Bureau of Indian Affairs since the 1880s. IRA had a number of overt objectives: stop the loss of tribal and individual lands; provide for the acquisition of new lands for tribes; establish a system of financial credit; and implement an Indian preference policy. It also sought to stabilize tribes politically by authorizing them to organize and adopt a constitutional form of government, write by-laws, hire counsel, and prevent the sale of tribal lands. In a move that has divided further the status of Indian groups in federal law, IRA established a new definition of "federally-recognized" tribes by declaring that the Act's provisions, should a tribe vote to adopt the measure, would apply to "all persons of Indian descent who are members of any recognized tribe now under Federal

jurisdiction.”<sup>54</sup> In other words, any member of a “tribe, organized band, pueblo, or the Indians residing on one reservation,” regardless of blood quantum and with whom the United States had an established government-to-government relationship, was eligible for the Act’s provisions. This provision problematically dichotomized Indian Country into two broad and contentious camps: federally recognized tribes and non-recognized tribes.

For our purposes, however, Section 17 of IRA holds special interest. This section, for the first time in a general manner, bestowed upon tribes a status in law as a corporate body. Section 17 reads in part:

The Secretary of the Interior may, upon petition . . . issue a charter of incorporation to such tribes: Provided, That such charter shall not become operative until ratified . . . Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal . . . and such further powers as may be included to the conduct of corporate business, not inconsistent with laws . . . .<sup>55</sup>

Although Section 17 was the first national legislation on the subject of tribal corporate status, the Pueblos of New Mexico had previously been incorporated under territorial legislation in 1851.<sup>56</sup> Moreover, tribes *qua* tribes were already *de facto* corporate bodies in a general political sense despite the fact that neither had a charter of incorporation.<sup>57</sup> This is because the concept of “corporation” can be defined as a group of individuals “to which the law ascribes legal personality, *i.e.*, the complex of rights, privileges, powers, and immunities enjoyed by natural persons generally.”<sup>58</sup>

In effect, corporate status for tribes, especially when it extends from an explicit law like the IRA or the Alaska Native Claims Settlement Act,<sup>59</sup> vests in indigenous polities additional powers above those they already hold as separate political bodies. These include the right to sue, the capacity to hold and exercise property rights, and the power to execute contracts.

A vital question for such federally incorporated tribes or Alaska Native entities remains: Does such incorporation make the indigenous polity an instrumentality of the federal government? Not surprisingly, there is conflicting evidence on this question. In some cases, it has been held that tribes in their relationship to states and municipal governments will be treated as federal instrumentalities. For example, a solicitor’s opinion in 1934 declared that “the granting of a Federal corporate charter to an Indian tribe confirms the character of such a tribe as a Federal instrumentality and

agency.”<sup>60</sup> On the other hand, tribes as preexisting sovereigns have also been held *not* to be federal instrumentalities within the meaning of federal statutes subjecting tribal officers to federal embezzlement laws. And as *Talton v. Mayes*<sup>61</sup> held, tribes are not subject to constitutional restrictions under the Fifth Amendment.

## VI. TERMINATION AND ITS AFTERMATH

The termination policy, inaugurated in 1953 by House Concurrent Resolution 83-108, savaged the collective sovereign/national character of a number of indigenous polities legislatively. It severed the trust relationship between the federal government and Indian tribes, both ending federal benefits and support services and dissolving the reservation status of tribal lands. The intention of the law was to expedite the assimilation of those American Indians deemed economically self-sufficient by terminating their political status and subjecting the terminated tribes and their members to state law and jurisdiction.

This policy and the accompanying relocation program that sent thousands of reservation Indians to major urban areas arose in the activist environment of the 1960s. The chain of events resulting from this era’s activism, especially the civil rights movement, revived old indigenous nations’ statuses and created new ones that have continuing effect today. These included: tribes as “discrete and insular” minorities that require special protection from discrimination; tribes as dependent and geographically incorporated communities; tribes as “states” for purposes of federal legislation in the shifting arrangement of federalism; and tribes as poverty-stricken groups deserving of federal assistance not because of their distinctive treaty or political status but because of their American citizenship and low socio-economic status. Importantly, these statuses did not supplant the preexisting statuses; they simply were added on, making an already convoluted situation even more confusing.<sup>62</sup>

### A. DISCRETE AND INSULAR STATUS

America’s major racial and ethnic minorities, African Americans, Latinos, Asian Americans, and American Indians, and the largest subordinated group, women, stepped forward in dramatic fashion in the 1960s to gain civil rights, exert cultural pride, seek equal protection under the law, and acquire educational opportunities long denied them. While American Indians were not particularly active in the early days of the civil rights movement, they did engage in some of the same strategies adopted by other groups to gain attention for their rights: fish-ins, marches, and demonstrations.

The phrase “discrete and insular minorities,” which includes religious, national, and racial minorities, first appeared in a footnote in the 1938 case, *United States v.*



*Carolene Products Company*.<sup>63</sup> It is often interpreted as having established the modern court's equal protection analysis. This case upheld the federal government's power to ban the shipment of skim milk mixed with fat or other non-milk products in interstate commerce. Justice Stone, while reaffirming that heightened scrutiny would no longer be given to laws regulating economic activities, noted that heightened scrutiny might still be given to legislation affecting fundamental rights or legislation which singled out "discrete and insular minorities."<sup>64</sup>

The Civil Rights Act of 1964<sup>65</sup> (forbidding racial discrimination in public accommodations), the Voting Rights Act of 1965<sup>66</sup> (banning racial discrimination in elections), and the Civil Rights Act of 1968<sup>67</sup> (forbidding discrimination in the sale, rental, financing, or advertising of housing) brought additional rights and opportunities to Indian peoples and their members, largely because of their status as historically underprivileged and discriminated against minority groups. Although tribal political status was not completely ignored, it was largely obscured by the Indians' minority status. The Indian Civil Rights Act of 1968,<sup>68</sup> however, which bestowed modified provisions of the Bill of Rights on the activities of tribal governments vis-a-vis reservation residents, both provides equal protection and civil liberties to individuals in their dealings with tribal governments and deals explicitly with the national status of tribes.

#### B. DEPENDENT AND GEOGRAPHICAL INCORPORATED STATUS

In *Oliphant v. Suquamish*,<sup>69</sup> holding that tribes lacked criminal jurisdiction over non-Indians, Justice Rehnquist accepted the lower courts' assessment that tribes, as sovereign polities, could not exercise any power that Congress had not formally granted, and could not wield powers that were deemed "inconsistent with their status."<sup>70</sup> But what was the tribal "status" referred to by the appellate court and reiterated by Rehnquist? It was that of a dependent "quasi-sovereign" polity made subject to the dominant federal sovereign by its geographical incorporation into the United States territorial boundaries.

Furthermore, this status, in order to be upheld, had to find support in an express "affirmative delegation" by some Congressional action. It was a dependent and delegated status based on a strange geographical phenomenon known as incorporation. It is strange in the factual sense that Indian tribes actually geographically "incorporated" the various European settlements and the United States, since tribes were the prior territorial sovereign. Thus, any literal understanding of geographic incorporation should actually support indigenous authority over all non-Indians who entered their lands, unless there can be found explicit evidence that the tribes surrendered such power via treaty or conquest.

#### C. STATE STATUS

After Congress enacted the 1975 Indian Self-Determination and Education Assistance Act,<sup>71</sup> tribal governments began to press Congress and the BIA for a greater role in administering their own health, educational, law enforcement, and social welfare affairs. In two key areas, taxation and environmental regulation, tribes were accorded a new status, "treatment as states" (TAS), under federal law. The Indian Tribal Governmental Tax Status Act<sup>72</sup> declared that:

An Indian tribal government shall be treated as a State (1) for purposes of determining whether and in what amount any contribution or transfer to or for the use of such government (or a political subdivision thereof) is deductible under . . . (A) Section 170 (relating to income tax deduction for charitable, etc., contributions and gifts) . . .<sup>73</sup>

In short, Congress meant this Act to provide tribal governments with a number of the benefits under the Internal Revenue Code that states and local governments had been receiving. For example, the IRS no longer taxed interest paid on tribal government debt obligations, consistent with its treatment of states.<sup>74</sup>

In the equally critical area of environmental policy, tribes also garnered TAS status from the Environmental Protection Agency (EPA) and Congress. They used this status to aid their efforts to rectify the host of environmental problems their peoples and lands face, including air and water pollution, waste disposal, and pesticide poisoning. The Safe Drinking Water Act Amendments of 1986,<sup>75</sup> the Clean Water Act Amendments of 1987,<sup>76</sup> and the Clean Air Act Amendments of 1990<sup>77</sup> each contain specific TAS provisions that allow tribal governments to establish their own environmental protection institutions and policies to enforce both federal and tribal standards. Other acts, such as the Comprehensive Environmental Response Compensation and Liability Act<sup>78</sup> (the "Superfund" law) and the Surface Mining Reclamation Act,<sup>79</sup> recognize tribal interests and allow for some delegated authority to tribes without specifically acknowledging their status as "states." The only major environmental statute that lacks a TAS or comparable provision is the Resource Conservation and Recovery Act,<sup>80</sup> a law dealing with solid waste disposal.<sup>81</sup>

According to the language of the 1986 Safe Drinking Water Act Amendments, in order for a tribe to receive TAS consideration, it must show: 1) it is a federally-recognized entity with a governing body capable of carrying out governmental duties; 2) it has jurisdictional authority to carry out the functions required of the act;

and 3) the tribe is capable "in the Administrative judgment" of carrying out the terms and purposes of the regulations.<sup>82</sup>

Assuming a tribal government can meet these criteria, when the EPA acts to turn over regulation of these environmental resources to the tribe, is it "devolving" this power to the tribe or merely "delegating" such authority? This question, raised by Richard Monette, returns us to the question of whether tribes are inherent sovereigns or merely federal instrumentalities.<sup>83</sup> Devolution suggests that the program or issue at stake is being returned to tribes who held original power; delegation, by contrast, indicates that tribes are without any independent authority over the subject matter and are acting as arms or instrumentalities of the federal government.<sup>84</sup>

#### D. SOCIO-ECONOMIC/POVERTY STATUS

While each of the statuses discussed above were important, their combined impact on tribes and Indians has been less significant than the shift in Indian status that began in the 1960s when tribes were made eligible for a number of social programs. These programs aimed not at Indians as tribal polities with whom the federal government had specific treaty or trust obligations, or as racial/ethnic minorities suffering discrimination, but rather as poverty-stricken human communities and individuals eligible for general legislative support because of their United States and state citizenship.

The Area Redevelopment Act of 1961,<sup>85</sup> the Economic Opportunity Act of 1964,<sup>86</sup> and the Great Society social welfare programs enabled tribes, as essentially sub-divisions of the federal establishment, to become direct sponsors of these and other federal programs. These were the first instances in which tribal governments, as sponsoring agencies, received money that was not directed to them by the BIA. For the first time since the late 1800s tribes could, to a limited degree, establish their own priorities and mete out federal funds with at least a modicum of flexibility.

To be eligible for these specific federal programs, the tribes, as governing bodies, had to assure the funding agency that they would administer the funds impartially and without regard to race, ethnicity, or gender. Tribal agencies, therefore, were now required to provide programmatic assistance to any reservation resident who otherwise met the program's eligibility criteria. For example, when Congress established Navajo Community College as the first tribally-controlled college in the nation, the school was required, in receiving federal education dollars, to establish a non-discrimination policy which currently reads: "Dine College [the school changed its name in the 1990s] does not discriminate on the basis of race, color, religion, national origin, sex, age, or

disability . . . . Equal opportunity for employment and admission shall be extended to all persons, which is promoted by the College through a positive and continuous affirmative action program."<sup>87</sup>

An interesting feature of this non-discrimination policy is that it also declared that the college would comply with the Navajo Preference in Employment Act<sup>88</sup> that provides hiring preferences for Navajos over equally qualified non-Navajos. Here we see equal opportunity and non-discrimination situated alongside Indian preference, at best an uneasy linkage of two very different policies.

Along with Indian preference, tribal nations, as polities, also enjoy sovereign immunity and cannot generally be sued without their express consent.<sup>89</sup> As was recently held in *Bassett v. Mashantucket Pequot Tribe*,<sup>90</sup> a case involving copyright infringement and breach of contract, the doctrine of tribal sovereign immunity barred Bassett's copyright claims against the Pequot Tribe since neither the tribe nor Congress under the Copyright Act waived the sovereign immunity of the tribe. Therefore, the principles of equal opportunity, due process, and non-discrimination that tribes must adhere to as recipients of federal services at times fundamentally clash with tribes' inherent sovereign powers to enact racial preferences and to immunize themselves from lawsuits.

The recurring question of whether tribes are arms of the federal government or separate sovereigns resurfaced in the 1960s and was further confused by judicial activity in the 1970s. In *Colliflower v. Garland*,<sup>91</sup> the Ninth Circuit Court of Appeals held that "in spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in the light of their history, it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government."<sup>92</sup>

Conversely, in 1978, the Supreme Court held in *United States v. Wheeler*,<sup>93</sup> a case involving the application of the double-jeopardy clause of the Fifth Amendment to the actions of the Navajo Nation, that the tribe had inherent authority to try one of its own members since Navajo self-government was not "delegated federal sovereignty."<sup>94</sup> Thus, there was no double jeopardy since Wheeler had been prosecuted by two different sovereigns—the Navajo Nation and the United States.

#### VII. INDIGENOUS STATUS IN THE SELF-DETERMINATION ERA

The Indian Self-Determination and Education Assistance Act of 1975<sup>95</sup> sought to wipe away the bitter memory of the termination era by strengthening tribal self-governance while at the same time reinforcing the trust relationship. It authorized the Secretaries of the Interior, and Health, Education, and Welfare to contract

with tribal organizations for tribal operations and the administration of specified federally funded programs. These programs were previously administered directly by these agencies. By the Act's very structure and the way it set up the contracting process, tribes, in effect, were made "a part of the executive branch as far as these programs were concerned."<sup>96</sup> In other words, even as the federal government purported to support greater tribal self-determination, in reality the self-determination measure effectively drew the tribes closer to being instrumentalities of the executive branch.

The question as to whether tribes are political or racial entities also reemerged in the 1970s. In a 1974 case *Morton v. Mancari*,<sup>97</sup> the Supreme Court reaffirmed the political status of tribes when it was called on to interpret the constitutionality of the BIA's Indian preference policy. In holding that the BIA's hiring preference did not constitute racial discrimination, the Court reasoned that "It is not even a 'racial' preference. Rather it is an employment criterion reasonably designed to further the cause of Indian self-government . . ." "In this sense," said Justice Blackmun, "the preference is political rather than racial in nature."<sup>98</sup>

This ruling was recently reaffirmed in *Rice v. Cayetano*,<sup>99</sup> a case involving the status of Hawaiian Natives. The attorney for Cayetano, Hawaii's Governor, sought to have the trust relationship and the *Mancari* theory of indigenous political status applied broadly to Hawaiian Natives and narrowly to the Office of Hawaiian Affairs, the state agency which administers programs for Hawaiian Natives. Justice Kennedy, writing for the majority, refused to accept these arguments and went to great lengths to distinguish the status of Hawaiian Natives from American Indians. Kennedy reiterated that the *Mancari* doctrine applied only to "federally recognized tribes" who exist as "quasi-sovereign" entities. Hawaiian Natives, said Kennedy, lack such status. Furthermore, the Office of Hawaiian Affairs (OHA), the state agency established to administer the lands of Hawaii's aboriginal people, did not qualify as an independent entity.

The Court concluded that:

[While the] Office of Hawaiian Affairs has a unique position under state law, it is just as apparent that it remains an arm of the State . . . the elections for OHA trustees are elections of the State, not of a separate quasi-sovereign, and they are elections to which the Fifteenth Amendment apply. To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs.<sup>100</sup>

One of the most important elements of the *Mancari* ruling, cited positively by both Kennedy and Stevens (joined by Ginsburg) in dissent, was the notion that federal legislation singling out indigenous people will be upheld as "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians . . ."<sup>101</sup> Here we see the generic word "Indians" figuring prominently into the Court's calculus, not as specific tribes, and certainly not as Hawaiian Natives. Kennedy and the majority construed the term "Indians" only to mean "federally-recognized" American Indian tribes who were entitled to trust status and protections. Stevens and Ginsburg, in dissent, interpreted the word more broadly. They defined "Indian" to include Hawaiian Natives who should have been entitled to trust status because of their colonial treatment at the hands of the United States and the so-called "guardian-ward" relationship that ensued in the wake of their colonial relationship with the United States.

### VIII. CONCLUSION

When Europeans first encountered indigenous nations in what is now the United States, they found that tribes exhibited *de facto* sovereignty and held varying forms of proprietorship over their lands. The subsequent treaties and agreements negotiated between tribes and the various European and American powers, specific congressional laws and general congressional policies, Supreme Court cases, and the various administrative rules and regulations developed by the Department of the Interior and the BIA have merged this clear treatment of Indians with a litany of indigenous collective and individual statuses that cause great confusion for aboriginal people, federal and state lawmakers, and the American public.

Congress should act to clarify the status of Native Americans within the United States. First, it should restore to the President his Indian treaty-making authority, which it problematically stripped in 1871. This would reaffirm that there is indeed, as tribes have been inconsistently told throughout history, a nation-to-nation or government-to-government relationship between tribes and the United States. Since the Fourteenth Amendment does not protect the sovereignty of tribes, the formal act of treaty negotiation is the only real device that can provide tribal nations a measure of protection while at the same time affirming their distinctive political relationship with the United States.

Congress should then act under its plenary, exclusive commerce power to clarify what rights indigenous nations and their members possess and may exercise under treaties, trust, and statutory law based on their sovereign national status (e.g., tax exempt status, rights to hunt and fish, sovereign immunity protections, and racial

preferences). It should also clarify what rights indigenous nations and their members possess and may exercise under their status as federal and state citizens or as sub-unit governments (e.g., funds for highways, social services, unemployment compensation, and the right to contract to run certain programs).

Finally, Congress should clarify its own responsibilities in the field of Indian affairs. When tribes are statutorily accorded a status as "corporations" or are "treated as states" for purposes of environmental or tax laws, are these political statuses that trace back to their aboriginal status as preexisting sovereigns? Or are they merely devolutions of federal power to the tribes which, for purposes of the statute, act as federal instrumentalities or as arms of the federal government? This strikes at the heart of one of the most important questions that the law must address: Are tribes inherent sovereigns acting as policy partners with the United States and the States, or are tribes units of government entitled to exercise only those powers expressly delegated to them by the Congress? Until this fundamental question is clarified, the multitude of statuses indigenous peoples have held both collectively and individually—whether possessed inherently (tribes as preexisting sovereign entities), unilaterally laid on them by federal decree (tribes as dependent entities), or actively pursued by tribes to improve their governing capabilities (TAS status)—will continue to proliferate. With the further blending and manipulation of these statuses, we can only expect confusion and tension to reign supreme in Indian relations.

## NOTES

<sup>1</sup> Vine Deloria, Jr., *The Evolution of Federal Indian Policy Making*, in *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 239, 239-256 (Vine Deloria, Jr. ed., 1985).

<sup>2</sup> See, e.g., LEWIS HANKE, *THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA* (1949); Felix S. Cohen, *The Spanish Origin of Indian Rights in the Laws of the United States*, 31 *GA. L. REV.* 1, (1942).

<sup>3</sup> See, e.g., JILL NORGREN, *THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS* (1996); G. EDWARD WHITE, *THE MARSHALL COURT & CULTURAL CHANGE*, (abr. 1991); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 *STAN. L. REV.* 500 (1969).

<sup>4</sup> See, e.g., *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

<sup>5</sup> See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

<sup>6</sup> See *Worcester v. Georgia*, 31 U.S. (6 Pet.) (1832).

<sup>7</sup> *Johnson*, 21 U.S. at 543.

<sup>8</sup> *Cherokee Nation*, 30 U.S. at 1.

<sup>9</sup> Special thanks to Vine Deloria, Jr. who first brought these distinctions to mind in a seminar in Boulder, Colorado some years ago.

<sup>10</sup> *Johnson*, 21 U.S. at 571-572.

<sup>11</sup> *Id.* at 574.

<sup>12</sup> *Id.* at 579.

<sup>13</sup> *Id.* at 593.

<sup>14</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 1 (1831).

<sup>15</sup> *Id.* at 16-17.

<sup>16</sup> *Id.* at 16.

<sup>17</sup> *Id.* at 17.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> U.S. CONST. art. I, §.8, cl. 3.

<sup>22</sup> 45 U.S. 567 (1846).

<sup>23</sup> *Id.* at 571-72.

<sup>24</sup> *Id.* at 572.

<sup>25</sup> Act of March 3, 1847, ch. 66, 9 Stat. 203 (current version at 25 U.S.C. §§ 40-41, 25 U.S.C. § 11, 25 U.S.C. § 130, 25 U.S.C. § 112) (2001).

<sup>26</sup> *Id.*

<sup>27</sup> FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 76 (reprint ed. 1972).

<sup>28</sup> 60 U.S. 393 (1857).

<sup>29</sup> *Id.* at 404.

<sup>30</sup> 70 U.S. 407 (1865).

<sup>31</sup> *Id.* at 417-18.

<sup>32</sup> *Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866).

<sup>33</sup> *Id.* at 737, 756-57.

<sup>34</sup> Indian Appropriation Act, ch. 120, 16 Stat. 544, 566 (1871).

<sup>35</sup> *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

<sup>36</sup> *Id.* at 568.

<sup>37</sup> *Id.* at 569.

<sup>38</sup> 118 U.S. 375 (1886).

<sup>39</sup> 187 U.S. 553 (1903).

<sup>40</sup> *Id.* at 564.

<sup>41</sup> 163 U.S. 376 (1896).

<sup>42</sup> *Id.* at 382.

<sup>43</sup> Snyder Act of November 2, 1921, ch. 115, 42 Stat. 208 (current version at 25 U.S.C. § 13 (2001)).

<sup>44</sup> *Id.*

<sup>45</sup> Indian Citizenship Act, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. §§ 1401 (2001)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *United States v. Nice*, 241 U.S. 591 (1916).

<sup>49</sup> *Id.* at 598.

<sup>50</sup> 442 F.2d 674 (1971). *See also* the discussion of citizenship in VINE DELORIA JR. & DAVID E. WILKINS, *TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS* 141-148 (1999).

<sup>51</sup> Johnson-O'Malley Act, ch. 147, § 1, 48 Stat. 596 (1934) (current version at 25 U.S.C. §§ 452-457 (2001)).

<sup>52</sup> Indian Reorganization Act of 1934, ch. 576, § 1, 48 Stat. 984 (current version at 25 U.S.C. §§ 452-455 (2001)).

<sup>53</sup> Act of June 4, 1936, ch. 490, § 1, 49 Stat. 1458.

<sup>54</sup> Indian Reorganization Act § 19, 25 U.S.C. § 479.

<sup>55</sup> Indian Reorganization Act § 17, 25 U.S.C. § 477.

<sup>56</sup> 1851-1852 N.M. Laws 176, 418.

<sup>57</sup> COHEN, *supra* note 27, at 277. *See also* Vine Deloria, Jr., *Congress in Its Wisdom: The Course of Indian Legislation, in*

THE AGGRESSIONS OF CIVILIZATION 108-115 (Sandra L. Cadwalader & Vine Deloria, Jr., eds., 1984).

<sup>58</sup> COHEN, *supra* note 27, at 277.

<sup>59</sup> Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1629 (1971)).

<sup>60</sup> COHEN, *supra* note 27, at 276.

<sup>61</sup> 163 U.S. 376 (1896).

<sup>62</sup> In the case of tribes as dependent and geographically incorporated entities, this was a reaffirmation of a status dating back to the Cherokee cases of the 1830s and revitalized sporadically since then.

<sup>63</sup> 304 U.S. 144, 152 n.4 (1938).

<sup>64</sup> *Id.*

<sup>65</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000 et. seq. (2001).

<sup>66</sup> Voting Rights Act of 1965, 42 U.S.C. §§ 1971 et. seq. (2001).

<sup>67</sup> Civil Rights Act of 1968, 42 U.S.C. §§ 3601 et. seq. (2001).

<sup>68</sup> Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301 et. seq. (2001).

<sup>69</sup> 435 U.S. 191 (1978).

<sup>70</sup> *Id.* at 208 (citing *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)).

<sup>71</sup> Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 et. seq. (2001).

<sup>72</sup> Indian Tribal Government Tax Status Act, Pub. L. No. 97-473, 96 Stat. 2605, 2607-2611 (codification is scattered) (1983).

<sup>73</sup> *Id.*

<sup>74</sup> ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 317 (3rd ed. 1991).

<sup>75</sup> 42 U.S.C. § 300j-11 (2001) (enacted by Act of June 19, 1986, Pub. L. No. 99-339, 100 Stat. 665).

<sup>76</sup> 33 U.S.C. § 1377 (2001) (enacted by Act of Feb. 4, 1987, Pub. L. No. 100-4, 101 Stat. 77).

<sup>77</sup> 42 U.S.C. § 7601(d)(1)(A) (enacted by Act of Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2468).

<sup>78</sup> 42 U.S.C. § 9626 (2001).

<sup>79</sup> 30 U.S.C. § 1240a (2001).

<sup>80</sup> Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 et. seq. (2001).

<sup>81</sup> Steffani A. Cochran, Comment, *Treating Tribes as States Under the Federal Clean Air Act: Congressional Grants of Authority—Federal Preemption—Inherent Tribal Authority*, 26 N.M. L. REV. 323, 325 (1996).

<sup>82</sup> 42 U.S.C. § 300j-11 (2001).

<sup>83</sup> Richard Monette, *Environmental Justice and Indian Tribes? The Double-Edged Tomahawk of Applying Civil Rights Laws in Indian Country*, 76 U. DET. MERCY L. REV. 736 (1999).

<sup>84</sup> *Id.* at 744, n.71.

<sup>85</sup> Act of May 1, 1961, Pub. L. No. 87-27, 75 Stat. 47 (repealed 1965).

<sup>86</sup> Act of Aug. 20, 1964, Pub. L. No. 88-452, 78 Stat. 508 (repealed 1981).

<sup>87</sup> DINE COLLEGE, 1999-2000 GENERAL CATALOG 1.

<sup>88</sup> NATION CODE tit. XV, § 7 (1998).

<sup>89</sup> *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998).

<sup>90</sup> 204 F.3d 343 (2d Cir. 2000).

<sup>91</sup> 342 P.2d. 369 (9th Cir. 1965).

<sup>92</sup> *Id.* at 378-79.

<sup>93</sup> 435 U.S. 313 (1978).

<sup>94</sup> *Id.*

<sup>95</sup> Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 et. seq. (2001).

<sup>96</sup> DELORIA & WILKINS, *supra* note 50, at 41.

<sup>97</sup> 417 U.S. 535 (1974).

<sup>98</sup> *Id.* at 554 n.24.

<sup>99</sup> 528 U.S. 495 (2000).

<sup>100</sup> *Id.* At 421-22.

<sup>101</sup> *Id.* at 531 (quoting *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974)).