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**An Idea of American Indian Land Justice:
Examining Native Land Liberation in the New Progressive Era
By Richael Faithful**

Introduction

Celebrated contemporary political philosopher and economist Amartya Sen, in the introductory chapter of his recent work, *The Idea of Justice*,¹ describes a classical distinction in East Indian² jurisprudence between *niti* and *nyaya*. *Niti* is represented by *matsyanyaya* or “justice in the world of fish,” and *nyaya* represents whole justice.³ *Matsyanyaya*, according to his narrative, is justice where fish may freely swim but large fish dominate the water because they are free to devour smaller fish.⁴ East Indian legal theorists rebuke *matsyanyaya* for the reason that a world of this kind—where smaller fish are inevitably endangered for the mere reason that they are small—seems intuitively unfair.⁵ *Matsyanyaya*, they argue, suggests that justice is a purely personal matter that hinges on individual moral choices. But, they ask, is not justice something more? This “something” is embodied by a concept known as *nyaya*. *Nyaya* reflects societies’ willingness to judge themselves as well as their principles, institutions, and conduct in relation to justice. These East Indian thinkers believe that *nyaya* ought to represent justice in the world of humans, for it is justice that makes up the metaphorical water in which we humans swim.

¹ AMARTYA SEN, *THE IDEA OF JUSTICE* 20 (2009) (advancing a political theory of justice developed from decades’ critiques of John Rawls’ preeminent theory of justice).

² This article compares ideas from continental Indian philosopher Amartya Sen and American Indian scholar, Robert Odawi Porter. To avoid confusion, I will designate “East Indian” for continental India and “American Indian” for American Indian tribes.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

In the Tewa tribal tradition there is a story that explains how the Tewa People found themselves in San Juan, California. It begins with a Great Drought.⁶ The fish people were responsible for offering prayers to the Great Spirit, so they assembled to fast, pray, and sacrifice in a secluded kiva until the rain came as was custom. A woman named Fee-ne-nee was responsible for their daily feeding.⁷ On the third night, one of the men could no longer stand the isolation, and suffering from thirst, secretly left to the nearby lake, and drank until he could do so no more.⁸ He quietly returned to the fish people, but his water-filled body burst when he entered the kiva.⁹ Water poured out of his head, eyes, mouth, arms, body, and legs—soon the other fish people turned into fish, frogs, and other water animals.¹⁰ The next day when Fee-ne-nee arrived, she saw water gushing into the air and water animals swimming in the torrent.¹¹ She returned to the village to the first house she saw, home to an old man and wife.¹² When she entered the house she turned into a snake.¹³ The old woman and man knew that something happened at the kiva and that this was a bad omen for the village people.¹⁴ After placing the young woman in a

⁶ AMERICAN INDIAN MYTHS AND LEGENDS 415 (Richard Erdoes & Alfonso Ortiz, eds. 1984).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ AMERICAN INDIAN MYTHS AND LEGENDS 416 (Richard Erdoes & Alfonso Ortiz, eds. 1984).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

snake burrow east of the village, the old couple returned, crying.¹⁵ They told their people that the law required them to move from their home, O-Ke-owin, and find another place to live.¹⁶

Justice and displacement are intractable cultural themes that continue to be enormously relevant today. What is fair is strongly correlated to the story of where people are and how they got there. This Tewa story contains a tangled historical tapestry for America's First Peoples who, in large part, have been displaced from their ancestral lands to places unlike their homes. The Tewa story tells about a certain kind of displacement, one which is dictated by the Great Spirit's law. But many other American Indian displacement stories tell about "justice in the world of fish" where tribes were forced or pressured into leaving their homelands by invaders. In this way, East Indian philosophy is connected to American Indian history because both narratives meet at a universal-political theology. The spiritual and political commitment to liberation, as well as the legal and ethical commitment to justice, is long-sought by peoples throughout the world. Relating among strains of justice-seeking traditions—Indian, Euro-Western, and American Indian—is crucial for universal improvement toward justice.

I would like to discuss the matter of justice in this spirit. This article aims to achieve two goals: to begin articulating American Indian land justice policy proposals as we approach a progressive horizon, and to re-ignite advocates' imagination about land justice to usher movement toward the horizon. The article also contains two levels of analyses. On the first level, it examines connections between a contemporary theory of justice, developed by East Indian thinker, Amartya Sen, and an emerging American Indian law land-justice proposal, introduced by American Indian law scholar, Robert Odawi Porter. This comparison shows how Western

¹⁵ *Id.*

¹⁶ AMERICAN INDIAN MYTHS AND LEGENDS 416 (Richard Erdoes & Alfonso Ortiz, eds. 1984).

justice theoretical developments parallel existing American Indian justice theory and how these theories can mutually inform each other.¹⁷ On the second level, this article further investigates Professor Porter's legal vision called "land liberation,"¹⁸ as a vehicle to realize American Indian justice. I argue that we must recognize new opportunities to deliver justice as they emerge, like land liberation, while the global-political climate around justice quickly transforms. This article re-visits American Indian land rights' discussions on moral entitlements, judicial autonomy, and tribal sovereignty in a changing socio-political, human rights context, during which the potential for land justice is as ripe as ever.

Part I of this article generally maps out the land liberation vision put forth by Robert Odawi Porter. Part II compares the land liberation vision to Amartya Sen's newest contribution on political justice theory, *The Idea of Justice*. Part III examines land liberation in more detail—its implications and possibilities—focusing on the "plenary power problem," and "loss of trust problem." Part IV finally concludes by identifying new opportunities to realize the land liberation vision in an Obama era.

¹⁷ This article does not intend to assign value to either theory as each theory fits its unique context and purposes. Few commentators, however, have given credit to first peoples' contributions to international legal and social theory. See S. James Anaya, *Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law*, 22 WASH. U. J. L. & POL'Y 107 (2006) (arguing that indigenous peoples have taken advantage of, and contributed toward, the fast-paced development of international human rights law).

¹⁸ Amartya Sen offers an interesting perspective about the inter-relatedness between norms and law. See AMARTYA SEN, *Normative Evaluation and Legal Analogue* in NORMS AND THE LAW 250 – 251 (John N. Drobak ed. Cambridge Press 2006) (contending that normative moral rights and duties are understood by their legal analogues and that as such, law and law-making inform moral norms as much as norms inform law). If law not only reflects norms but influences them, then the political goal of this article is, in part, to inspire legal re-imagination as a vehicle for social change for American Indian emancipation.

I. Land Liberation Vision

Over the last year, Indian law scholar, Robert Odawi Porter, has called for the Obama administration to assist tribes in achieving land liberation.¹⁹ Land liberation, in his view, is the federal government's return of trust land to tribal sovereigns.²⁰ His argument relies on a compelling rationale that the absence of tribal ownership over land inherently limits tribal sovereignty and in many instances, prevents tribes from achieving economic self-sufficiency.²¹ Porter believes that Indian control over vital land resources will emancipate tribes from their dependent-nation status from the federal government.²²

I should preface this Article with the acknowledgment that Professor Porter has not directly written on his land liberation proposal, though, I believe that much of the land liberation vision is embodied in his work about tribal sovereignty. This Article is my iteration of his vision, notably from a non-Indian perspective, and it is one that skims the surface of many details and implications of a tangible proposal. My hope is that this Article may invite Indian advocates and scholars to join leftist Indian voices in exploring this vision and proposal during a time of potential socio-political transformation across the world.

¹⁹ Beyond Land-into-Trust: Creative Land Ownership Options for Tribes, DC Indian Law Conference, and November 13, 2009 (proposing the theoretical idea of land liberation as an available opportunity for further investigation during the Obama administration).

²⁰ *Id.*

²¹ *Id.*

²² The dependent-sovereign or diminished sovereignty doctrine is one of the three foundational Indian law principles originating from the Marshall Trilogy. *See Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831) (designating tribes, which reside within U.S. territorial boundaries but exist as independent sovereign nations, as “domestic dependent nations” under Congress’ plenary power). The other two doctrines include the plenary power doctrine and trust doctrine. *See Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823) (declaring the discovery doctrine application to tribes); *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832) (establishing an implicit trust relationship between the U.S. federal government and tribes). *See also* Robert O. Porter, *The Inapplicability of American Law to Indian Nations*, 89 IOWA L. R. 1595, 1597-1598 (2004)(criticizing American Indian legal scholars and practitioners for analyzing foundational doctrines but failing to examine the broader context of American Indian jurisprudence as “the law of the colonizing nation”).

I believe that Porter's land liberation vision is a remarkable suggestion that warrants serious consideration. Such a vision poses a set of ethical questions and another set of legal questions. I intend to briefly address each set of questions in this article. Porter's moral vision is persuasive because it draws from his and other Indian law scholars' work which argues for genuine tribal sovereignty and recompense for harm suffered.²³ These arguments are independently strong, but I hope to offer insights from a comparative examination of Western philosophical thought, American Indian jurisprudence, and intuitive thinking about United States-American Indian justice. The values and goals underlying these theories are similar and inform how we should concretize these visions moving forward.

From such a vantage point, it is easy to see why a strong supporter of tribal sovereignty, like Robert Porter, is attracted to an idea like land liberation. Land restoration, which is the return of tribal land title from federal government trust, would allow tribes to independently execute their own land-related laws²⁴ and policies that open opportunities for a range of sovereign powers, including renewable energy production and gaming development.²⁵ The

²³ Some of the most prominent law scholars' voices for American Indian emancipation from federal government supremacy, reparations, and entitlements in addition to Robert Odawi Porter, are Robert Williams Jr., Ward Churchill, and William Bradford. William Bradford, in particular, has written extensively on U.S.-American Indian reconciliation. *See generally Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO STATE L.J. 1 (2005) (assessing a range of justice models to administer tribal relief which include reparations, restitution, public apologies, and policy reform); THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION (2008) (emphasizing the importance of sovereignty in dictating tribes' economic capacities and futures).

²⁴ *See, e.g.,* Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625 (2007) (arguing for indigenous right for self-determination to avoid genocidal costs resulting from nations' climate change adaptation strategies).

²⁵ *See* Alice Kaswan, *Greening the Grid and Climate Justice*, 39 ENTL. L. 1143, 1152-1153 (2009) (stating that while American Indian advocates see opportunities for renewable energy development, tribes usually lack start-up capital for projects, which, therefore, requires private investment; this option, however, is hindered by heavy federal regulation over tribal development that requires federal approval.). *See also* Matthew L.M. Fletcher, *Bringing*

provocative idea of land liberation offers, at least principally, some pathway through which tribal governments can better address ever-changing tribal conditions, particularly for those who view American Indian law foundational principles as perhaps primarily designed to maintain non-Indian control over Indians.²⁶

It is, nonetheless, land liberation's legal questions that are less clearly understood. Land liberation, quite frankly, undermines a large portion of American Indian law, which could be a positive turn of events.²⁷ It also creates a vast world of uncertainty which may negatively affect tribes at least in the short-term. Land restoration alone, however, cannot guarantee land liberation for two reasons.

Balance to Indian Gaming, 44 HARV. J. ON LEGIS. 39, 41-42 (2007)(arguing that the over-reaching federal regulatory scheme on Indian gaming severely disadvantage tribes by mandating state revenue-sharing and by weakening their bargaining power in compact negotiations); Ezra Rosser, *This Land Is My Land, This Land Is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. R. 245, 268-278 (2005) (explaining how land alienation restrictions placed on individual and tribal reservation land prevents possibilities for long-term wealth development); Robert Miller, *American Indian Entrepreneurs: Unique Challenges, Unlimited Potential*, 40 ARIZ. ST. L. J. 1297 (2008) (surveying the complex matrix of bureaucratic challenges that deter Indian entrepreneurship despite its promise to lift many Indians from poverty). *But see also* Wambdi A. WasteWin, *Tribal Nation Economics: Rebuilding Commercial Prosperity in spite of U.S. Trade Restraints—Recommendations for Economic Revitalization in Indian Country*, 44 TULSA L. REV. 383 (acknowledging tribal market sophistication and resilience in traditional trade and commerce).

²⁶ See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990)(introducing a critical race analysis to American Indian law and history in a description of the role of imperialism and power in American jurisprudence toward Indians); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. R. 21, 22 (2005)(claiming that the Court altogether foreclosed the option of tribal land restoration, at the time, when it established the “doctrine of discovery” in *Johnson v. McIntosh*); William Bradford, *“Another Such Victory And We Are Undone”*: *A Call to American Indian Declaration of Independence*, 40 TULSA L. R. 71, 72 (2004)(arguing that Indians have been “saddled” with the European-American problem which is a political and legal system created with the sole purpose of preserving the “might of the conqueror”); Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. R. 453, 458-467 (1993-1994)(recounting various methods by which the U.S. federal government exercised or facilitated American Indian land dispossession through fraud, threats, and policy coercion); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 UNIV. OF PENN. L. R. 195, 196 (explaining that the judiciary have “labored” to clarify federal control over Indians, yet when tribal sovereignty is considered, the U.S. Constitution provides no guidance other than federal control).

²⁷ See Felix Cohen, *Handbook of Federal Indian Law*, United States Government Printing Office, 91 (1945) available at <http://thorpe.ou.edu/cohen/5cohen89.pdf> (asserting that federal government power over Indian tribes or tribal members is as far-reaching as its power of citizens that it is essentially “plenary”).

First, there is the “plenary power” problem. Even if title is transferred from one sovereign to another, the federal government reserves almost unfettered, constitutionally-based, plenary power over tribes.²⁸ For tribes to enjoy genuine land liberation they must be afforded full freedom to make land use decisions, free of U.S. meddling that may effectively nullify or amend tribal decisions.²⁹

Second, land restoration creates a “loss of trust” problem, which may undermine tribal sovereignty or threaten tribal well-being. Some tribes, especially smaller ones or ones with fewer resources, may not possess the political will to abandon the federal trust model, preferring instead precarious trusteeship over potential loss of federal funding and programs.³⁰ Although relinquishing land trusteeship does not necessarily eliminate the federal government trust relationship with tribes in its entirety, such a shift may fundamentally change or eviscerate the modern fiduciary-trust doctrine.³¹

²⁸ See generally *Worcester v. Georgia*, 31 U.S. at 515 (holding that state jurisdiction is repugnant to United States’ Constitution, treaties, and federal laws); *United States v. Kagama*, 118 U.S. 375 (1886) (holding that the federal Major Crimes Act was applicable to tribes despite tribal sovereignty due to constitutional plenary power); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding federal allotment policy on congressional plenary power grounds).

²⁹ See Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1298 (2000) (observing that in the historically-tied relationship between land rights and tribal sovereignty that recent Supreme Court jurisprudence that divests tribal government authority to regulate trust land, ultimately weakens tribal sovereignty).

³⁰ See Ezra Rosser, *The Trade-off Between Self-Determination and the Trust Doctrine: Tribal Government and the Possibility of Failure*, 58 ARK. L. REV. 291, 349-340 (2005-2006) (acknowledging that tribes may fear tipping the balance of a delicate trust-sovereignty scale because meaningful sovereignty presents uncertainty around tribal governmental capacity).

³¹ The modern trust doctrine defines the federal government’s fiduciary trust relationship with Indian tribes or tribal members as opposed to the original doctrine which relied on treaties and agreements. The fundamental “guardian-ward” rationale, however, remains intact. See *United States v. Mitchell*, 463 U.S. 206 (1983) (holding that statutes and regulations established fiduciary federal government trust responsibility to manage property for Indians); *Cobell v. Norton*, 240 F.3d 1081 (2001) (holding that a fiduciary relationship exists when the federal government takes elaborate control over tribal monies or properties even without express statutory authorization).

Many tribes also may face the real threat of state encroachment without federal trust “guardianship.” States, from one perspective, are likely to exercise improper legal power over tribal land to lay claim over natural resources.³² Still, others may argue that illegitimate state encroachment is a favorable risk compared to legally-sanctioned federal encroachment on tribal resources, government, and people. Conceptually speaking, the loss of trust problem poses hard questions about desirability, risk, and fairness, which must be thought-through in the land liberation vision.

I should stress that land restoration is not a new idea, academic idea or legal idea. It is embodied in the American Indian liberation struggle itself.³³ It is embodied from the mournful Cherokee Trial of Tears to Lakota Indian Wounded Knee Massacre. It takes on a new meaning, however, in an anti-colonial, human-rights era. Because land liberation and human rights visions look in the same justice-oriented direction, it is valuable to explore their connections and assess their applications to the protracted United States-American Indian land conflict.

³² The federal government enjoys plenary power over Indians affairs, however, states may exercise jurisdiction under limited circumstances when state interests are arguably involved. *See Nevada v. Hicks*, 533 U.S. 353 (2001) (holding that state regulation applies to non-Indians who allegedly commit an on-reservation crime). However, states may over-reach its legitimate jurisdiction when lucrative resources or enterprise is at stake. *See generally* Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S. D. L. R. 48 (2010) (arguing that the era of “self-determination” for Indian tribes is diminished against recent federal and state encroachment on tribal sovereignty); *see also* Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the “Economic Benefits” Test*, 54 S. D. L. R. 421-422 (2009) (explaining that a considerable non-Indian constituency challenge tribal claims over gaming revenues in legislatures and courts even though tribes maintain stronger claims and possess a greater economic development need).

³³ *See* Robert Odawi Porter, *Tribal Disobedience*, 11 TEX. J. ON CIV. LIB. & CIV. RTS. 137, 318 (recognizing that indigenous peoples in the Americas have employed a variety of advocacy strategies to defend their interests, including warfare, diplomacy, litigation, lobbying, and tribal disobedience). Some advocates have moved toward a self-defined conception of sovereignty to re-center Indian extra-legal experiences for liberation. *See* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 197 (urging for Indian law scholars and advocates to re-define sovereignty to integrate an internal sovereignty notion—cultural sovereignty—into popular sovereignty conceptions to more deeply locate land and home analogies that are central to Indian survival).

II. New Meanings of Freedom, Rights, & Justice

A New Idea of Justice

Amartya Sen's recent work, *The Idea of Justice*, both contributes to, and departs from, John Rawls's seminal 1971 work, *A Theory of Justice*.³⁴ *A Theory of Justice*, regarded today as among the most important political philosophy models of the twenty-first century, laid out Rawls' foundational equality principles for institutionally-based societies to achieve justice. Rawls' theory imagined a scenario in which free and rational persons would agree to accept equality as a term of association and facilitate consensus-building on two conditions.³⁵ The first condition is "justice as fairness,"³⁶ which is the social ideal to be reached within the Rawlsian imagination. The second condition is called the "original position," where all persons involved in the agreement process are stripped of vested interests under a "veil of ignorance."³⁷ Once these two conditions are established, a set of persons known as "legislators" enter agreement stages to reach consensus on other regulatory principles and institutions. Thus, consented-upon principles emerging from this set of agreements are adopted by society and culminate into a more equal society. Rawls' distinct vision certainly revitalized the topic of justice among political philosophers, and slowly shifted the imaginative paradigm on justice over the last forty years.

The Idea of Justice, in contrast, is the accumulation of Sen's critiques of *A Theory of Justice* over several decades. Sen describes Rawls' "justice as fairness" doctrine as "deeply

³⁴ JOHN RAWLS, *A THEORY OF JUSTICE* (Belknap Press, Harvard University Press 1999) (1971).

³⁵ *Id.* at 10.

³⁶ Rawls emphasizes that his conception of justice centers on rational fairness and its relation to social life, otherwise known as "social justice." Equality, liberty, and their social relations constitute the essence of the "justice as fairness" principle. *See id.* at 6-10.

³⁷ *Id.*

relevant” to modern justice theories, including his own.³⁸ Yet he criticizes Rawls’ other main premises as being “seriously defective.”³⁹ *The Idea of Justice* attempts to improve upon Rawls’ theory with a strong emphasis on the delivery of equality *to persons* in a just society. The most relevant contribution from Sen, within an American Indian law context, is his sharp departure from a transcendentalist or institution-driven approach.⁴⁰ His vision has a unique emphasis on human capabilities. This person-centered vision, which has the potential to be invoked by the land liberation vision, supplants the political motivations behind full tribal sovereignty restoration.⁴¹

Sen’s theory builds on Rawls’ “justice as fairness” principle, and, at the same time, responds to its shortcomings. The “justice as fairness” principle, in Sen’s view, can be reduced to the societal value of impartiality—free from bias, interests, and prejudices—in the evaluation of primary goods distribution.⁴² Rawls’ impartiality, within the original position, is achieved under a “veil of ignorance,” which identically (dis)advantages choice-makers who are detached from

³⁸ IDEA OF JUSTICE, *supra* note 1, at 54.

³⁹ *Id.* at 53. *See also* AGAINST INJUSTICE: THE NEW ECONOMICS OF AMARTYA SEN 47 (Reiko Gotoh & Paul Dumouchel eds., 2009) (making a general critique about Rawls’ theory that although it is an economic-justice proposal, its transcendentalist roots (focus on creating a perfectly just society), in essence, contravenes an economic analysis, which, instead, is comparatively-oriented.) Sen elaborates on this point in *The Idea of Justice*, yet it is a more over-arching criticism about Rawls chosen approach that he addresses throughout his body of work.

⁴⁰ Transcendentalism is defined as “a philosophy that emphasizes the a priori conditions of knowledge and experience or the unknowable character of ultimate reality or that emphasizes the transcendent as the fundamental reality.” *See* Merriam-Webster Online Dictionary, *available at* <http://www.merriam-webster.com/dictionary/transcendentalism> (last visited May 14, 2010). Transcendentalism, in philosophical theory of justice terms, denotes a certain set of values or goals is reached by virtue of a procedural mechanism, system, or process.

⁴¹ *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIMES, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 32 – 52 (1987)(arguing that most philosophers agree that sovereignty is absolute, indivisible, and unlimited, which implies that the primary challenge of tribes is to maintain its prerogatives *against* time in the modern federal Indian law).

⁴² IDEA OF JUSTICE, *supra* note 1, at 114 - 123.

individual benefits deriving from any particular choice. Sen's theory challenges two Rawlsian assumptions: that individual liberty would emerge as the foremost principle from consensus and that equality of resources equated to equal qualities of life. He correctly argues that these beliefs are assumptions that require a further investigation.⁴³

Sen concludes that Rawls' assumptions about liberty and equal primary goods distribution are fatal to his theory of justice. He, instead, offers a new model, which retains the "justice as fairness" principle, yet establishes the following:

1. People's actual behaviors—not institutions—must serve as the bedrock for just institutions;⁴⁴
2. Adam Smith's "Impartial Spectator" (I.S.) approach better facilitates fair political choice-making than the classic social contract approach;⁴⁵
3. Universal decision-making models are more relevant today than isolated nation-state models in an increasingly global political environment.⁴⁶

The Idea of Justice consists of the "justice as fairness" principle and these three improvements from Rawls' theory. Sen's improvements rely on notions that reject classic neo-liberalism, which progressive leftists believe has failed to address some of the world's most pressing and enormous problems, like poverty, environmental degradation, and political marginalization.⁴⁷ An improved theory of justice model should speak to neo-liberalism's failures and offer insight into how to solve endemic issues facing societies across the world today.

⁴³ THE IDEA OF JUSTICE, *supra* note 1, at 65-66.

⁴⁴ *Id.* at 67-72.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Noam Chomsky, *Power and Globalization in the New World Order* in NEW PERSPECTIVES ON GLOBALIZATION AND ANTIGLOBALIZATION 159 (Henry Veltmeyer ed., 2008) ("In old fashioned terms, this situation would have been called 'class war'... Their victims should certainly resist the predictable exploitation of crisis, and should focus their own efforts, no less relentlessly, on the primary issues that remain much as they were before: among them, increasing militarism, destruction of the environment, and a far-reaching assault against democracy and freedom, the core of 'neoliberal' programs"); MARCUS G. RASKIN, LIBERALISM: THE GENIUS OF AMERICAN IDEALS 186-187 ("What is clear is that the present dominant policies of the United States are dystopian... The liberal

American Indian tribes continue to overcome many of these endemic social problems, despite the fact that opportunities to address them are within reach.⁴⁸ Worse, continual tribal sovereignty erosion further limits tribes' ability to enforce their laws and govern their lands.⁴⁹ The modern neo-liberal state's refusal to fully restore tribal sovereignty denies tribes the ability to independently act on problems such as reservation poverty, resource preservation, and other challenges without bureaucratic obstruction.⁵⁰ Should a true tribal self-determination era actually arrive, it is imperative to consider which new policy or jurisprudential principles will emerge.⁵¹ While some jurists may express unwillingness to abandon the guardian-ward model, a remedial "justice as fairness" doctrine is a viable alternative foundation to Federal Indian law as it

hope of integrating the wretched and the working class into a world system of manageable decency, as Immanuel Wallerstein put it, will have failed"); Laura Macdonald & Arne Ruckert, *POST-NEOLIBERALISM IN THE AMERICAS 4* (Laura Macdonald & Arne Ruckert eds., 2009)(discussing diverging opinions about neo-liberalism's success but acknowledges that the neoliberal model has become discredited in the United States and lags in expectations for the "developing world" particularly in Latin America where many countries have moved toward a populist socialism).

⁴⁸ About twenty-five percent of American Indians and Alaska Natives were living below the poverty level in 2004 compared to nine percent of non-Hispanic Whites. *See* U. S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, *AMERICAN COMMUNITY—AMERICAN INDIAN AND ALASKA NATIVES: 2004* 16 (2007). Numerous opportunities exist for tribal economic development, yet statutory impediments have slowed growth. Gavin Clarkson has written extensively on various statutes' negative impact on tribes. *See Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. R. 285 (2009) (criticizing existing securities laws as starving private business growth within reservations).

⁴⁹ *See* Ann E. Tweedy, *Connecting the Dots Between The Constitution, The Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J. L. REFORM, 651, 687-688 (2009) (arguing that tribes' jurisdiction enigma, involving tribal, state, and federal governments, often leads to de facto lawlessness).

⁵⁰ I do not mean to suggest that federal support is necessarily obstructive to tribal sovereignty. I merely want to observe that the absence of full tribal sovereignty limits tribal freedom to execute decisions regarding their own best interests. It is possible that tribal interests are best served with transitory reparative support. *See Beyond Reparations: An American Indian Theory of Justice*, *supra* note 23, at 61 (explaining that Justice as Restoration advocates advance rehabilitative support as a means to heal harmed tribal communities) Rehabilitative support may morally obligate the federal government to provide dollars for tribal healing—tangible and non-tangible—for America's original "imposition."

⁵¹ *See* Pommersheim, *supra* note 32. Robert Porter, for example, has suggested that America's legal approach to tribes has remained essentially the same so that a true self-determination era would have to radically depart from this history. *See* Robert Odawi Porter, *American Indians and the New Termination Era*, 16 CORN. J. L. & PUB. POLICY 473, 473-474 (2007) (arguing against conventional wisdom that congressional American Indian policy is cyclical, claiming instead that an assimilationist agenda has driven federal government policy choices for the last 200 years).

currently exists. The “justice as fairness” doctrine presumes full tribal sovereignty recognition, turning the inquiry from *whether* tribes can exercise sovereign authority to *which* equitable remedies are appropriate to restore full sovereignty. In a broad sense, a “justice as fairness” foundation may assist jurists and pro-sovereignty advocates in the difficult undertaking of re-orienting Indian law, yet it may not be enough to propel its positive direction.⁵² Sen’s *Idea of Justice* may serve as an engine to drive non-Indian jurists toward American Indian land justice.

But why is this theory so important to American Indian land justice? I suggest four reasons. First, it may be the first major development in political philosophical thinking on justice, since John Rawls’ theory of justice.⁵³ Second, as mentioned earlier, it serves as a natural complement to existing American Indian justice theories⁵⁴ that advocate for co-extensive nation sovereignty. It is a Western philosophical theory of justice analogue that, in its application, makes a parallel case (on behalf of non-Indian allies) for Indian justice. Third, it is in tandem with, and is borne by, international social justice struggles and trends (e.g. indigenous and human rights movements) that are slowly penetrating American law.⁵⁵ Finally, its flexibility is ideal not only for complex, twenty-first century problems, but it is an ideal transitory model as cultural values,

⁵² I suggest here that a new progressive era in the United States ushered in by global-political transformation may influence jurists thinking about the demands and justice and re-shape their thinking about Indian law’s basic tenets of which the “justice as fairness” doctrine may be a key element in a new political environment. *See also* Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights on Indigenous Peoples*, 41 VAND. J. TRANS-NAT’L L. 1141, 1152 - 1159 (discussing indigenous peoples’ success in creating political pressure for the international community to implement laws and mechanisms designed to finish the de-colonization project and to assert their peoples’ sovereign powers to establish and execute their own laws).

⁵³ *See, e.g.,* Carlin Romano, *Amartya Sen Shakes Up Justice Theory*, THE CHRONICLE OF HIGHER EDUCATION, Sept. 14, 2009 available at <http://chronicle.com/article/Amartya-Sen-Shakes-Up-Justice/48332>.

⁵⁴ *See, e.g.,* Bradford, *supra* note 23, at 69-100 (establishing a “Justice as Indigenism” theory of justice that outlines a detailed truth and reconciliatory process for the United States government and tribes).

⁵⁵ *See* Hon. Michael Kirby, *Constitutional Law and International Law: National Exceptionalism and the Democratic Deficit?*, 98 GEO. L. J. 433, 443 (explaining that while American law does not traditionally rely on international sources interpreting its own laws, a line of recent, controversial cases have relied on international authority including, *Atkins v. Virginia*, *Lawrence v. Texas*, and *Roper v. Simmons*).

identity politics, and legal norms evolve. *The Idea of Justice* and land liberation synergize momentum away from neo-liberal dependent-sovereignty toward new-era self-determination. The next section will examine Sen's critiques of Rawls' theory of justice and similarly, explain how the modern neo-liberal state fails to establish American Indian land justice.

A Theory of Justice Critique

The Idea of Justice is a strong competing theory to John Rawls' breakthrough theory of justice. Sen introduces three major critiques in his theory that relate to modern American Indian law, though, he never explicitly applies his theory to Native land justice. Critical law scholars have expressed the need for sovereignty-based principles in Indian law—ones that go beyond politically-correct lip-service. *The Idea of Justice*'s treatment of freedom, autonomy, and fairness, illuminate how similar ideas of tribal self-determination and land liberation fit into global demands for justice.

Sen's first major critique of Rawls is the assumption that just institutions necessarily produce just conduct. In very simple terms, Sen makes a pragmatism argument, claiming that procedural justice—the mere existence of fairly constructed institutions—cannot govern people's actual behavior, particularly as human behavior is often inconsistent with collective values and norms.⁵⁶ The belief that “just” institutions should rely on actual behaviors, as opposed to theoretical behaviors, is vital because a whole system of justice requires the accommodation of a variety of complex, socio-political and inter-personal factors.⁵⁷ Sen essentially adopts a Legal

⁵⁶ Sen raises two objections under his “relevance of actual behaviors” critique. In addition to his pragmatic argument, he is also skeptical that social “realizations” are accounted for in Rawls' consensus model. This argument is a classic consequentialist objection which claims that proceduralism cannot account for unpredictable consequences. I chose to focus on the narrower pragmatist objection because it is more closely related to the article's discussion to human freedom and normative law.

⁵⁷ THE IDEA OF JUSTICE, *supra* note 1, at 67-68.

Realist position, in which “the centrality of human lives in reasoned assessments of the world in which we live” is paramount.⁵⁸ He argues that a whole system of justice must center real experiences as its primary object of consideration because it is analogous to building a pond without bearing in mind its fish. Sen’s re-orientation reflects a modern theoretical shift away from abstract transcendental analysis to concrete, people-centered problem-solving, especially around issues involving acute human suffering.⁵⁹

A Realist perspective is valuable when examining land justice in American Indian law. Generally speaking, Indian law jurisprudence consistently disfavors original Indian land claims, even during the present “self-determination period.”⁶⁰ Throughout American history, courts have upheld unsavory treaty deals and defended malicious congressional action against tribes due, in part, to a belief that reasonable legal formalities ensure just results.⁶¹ In broad strokes, non-Indian immoral behavior was ignored, tolerated, and sometimes extolled by courts, based on a disingenuous presumption that “fair” judicially-made legal principles would not produce unjust outcomes or that democratically-elected governmental branches would not enact unfair laws.⁶²

⁵⁸ *Id.* at 225.

⁵⁹ Sen is an outspoken advocate against poverty because he believes that it literally and metaphysically deprives people from experiencing the full value of freedom. *See Normative Evaluation and Legal Analogue, supra* note 18, at 250 (arguing that poverty is the deprivation of the most basic human capabilities).

⁶⁰ I should emphasize here that Indian law jurisprudence is not designed to collectively benefit American Indians. It is, in actuality, related to Indian histories, in terms of the Anglo enterprise to control Indians. *See* Robert A. Williams Jr., “*The People of the States Where They Are Found Are Often Their Deadliest Enemies*”: *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. R. 981, 986-987 (1996) (arguing that Anglo law has shaped Indian history in a way that explains today’s legal and real context).

⁶¹ The Cherokee Nation Treaty of New Echota exemplifies coercive U.S. government treaty-making tactics. *See* Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 B. U. PUB. INT. L. J. 91, 92 (2005) (recounting that Congress allowed a minority-supported, white sympathetic Nation representative to dubiously replace the majority-supported, fervent Nation delegate during the treaty-making process, which preceded the infamous Trail of Tears).

⁶² *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) (illustrating an extreme “good faith” trust principle application in this landmark case that declared that the court must presume *perfect* congressional faith in Indian

As Sen explains in reference to the protection of minority rights under a modern justice theory, “there is no chance of resting the matter of ‘safe’ hands of purely institutional virtuosity,” based on the reality that empirical accounts do not justify such ambivalence.

Moreover, contemporary scholars have debunked the pretense that American Indian law or its arbiters primarily sought to help American Indians.⁶³ Quasi-sovereignty is an example of a failed legal doctrine, which while originally fashioned to recognize limited tribal self-determination, has been judicially diminished over the years, amounting to an incredibly bureaucratic governance structure that curtails tribal self-determination.⁶⁴ Neo-liberalism’s promise to expand freedoms through democracy and other open processes continues to fall short, particularly in the American Indian context. Sen’s critique of Rawlsian transcendentalism is really a broader criticism of the modern liberal state’s failure to ensure justice which American Indian legal principles are a poignant example.

This observation about the modern liberal state reveals a much deeper point, however. Institutional failures to actualize justice demonstrate the relevance and power of choice. Individuals’ choices, and social choices made within institutions, shape more than principles of justice. These choices also shape the *operation* of justice. Social choice is not distilled by a pure

affairs despite any contrary, factual evidence showing that Congress exercised its plenary power against tribal wishes to administer the federal allotment policy). *See also* Lincoln Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MD. L. REV. 290, 310 (2009)(commenting that the *Lone Wolf* decision altered the federal trust doctrine from an arguably protective relationship to a power-based relationship with its implication that Congress possesses absolute plenary power to which the courts should show extremely high deference).

⁶³ *See* Robert Williams, Jr., *supra* note 60, at 985 (1996) (“[S]o the familiar story goes, [White Man’s Indian Laws] were developed here by the courts and policy-making institutions established by the dominant white European-derived society into a redemptive force for perpetuating American Indian tribalism’s survival . . . is a classic illustration of what’s completely wrong with most Federal Indian Law scholarship”).

⁶⁴ *See* ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON* 170–173 (arguing that the cultural imperialist basis upon which Indian legal principles were founded allow the Supreme Court to incrementally undermine the “measured separatism” sought by tribes to exercise minimal self-determination).

political process whether it is Rawls' original position or otherwise because as a contract-based consensus may be reached on one end, individuals' choices will surely affect social choices which appear on the other. Therefore, any serious critique of transcendental justice must deal with people as choice-makers. Sen not only advocates for a theory of justice that centers people and their experiences but he further argues that freedom is elemental to actualize justice.⁶⁵ Meaningful choice, in his mind, lives in its fullness— from its scope to its quality. Social and individual prioritization of freedom is the standard by which to evaluate the meaningfulness of choice.

Sen's second major critique deals with Rawls' use of social contract method. In Rawls' theory the way to reach consensus is through mutual agreement within the original position. The social contract method derives from the Enlightenment tradition, which analogizes the relationship between people and government as one of a legal contract whereby persons forfeit a degree of freedom in exchange for (limited) collective governance.⁶⁶ The social contract model contrasts against philosopher Jeremy Bentham's utilitarian model. The utilitarian model, instead, reaches majoritarian agreement through a maximum utility calculation.⁶⁷ Sen argues that Rawls'

⁶⁵ See Amartya Sen, *Justice Means Freedom*, PHIL. & SOCIAL AFFAIRS, Spring 1990 at 113-114 ("Given n different types of functionings, an 'n-tuple' of functionings represents the focal features of a person's living, with each of its n components reflecting the extent of the achievement of a particular functioning. A person's 'capability' is represented by the set of n-tuples of functionings from which the person can choose any one n-tuple. The 'capability set' thus stands for the actual freedom of choice a person has over alternative lives that he or she can lead.") (citations omitted).

⁶⁶ See Rawls, *supra* note 34, at 10 (explaining that his aim was to offer a theory of justice that brought social contract theories of Locke, Rousseau, and Kant to a higher level of abstraction); CHANDRAN KUKATHAS & PHILLIP PETTIT, *RAWLS: A THEORY OF JUSTICE AND ITS CRITICS* 17-35 (1990) (providing more details about the origins of Rawls' conception of the social contract method, including specific parameters around the original position and the veil of ignorance).

⁶⁷ See P.J. KELLY, *UTILITARIANISM AND DISTRIBUTIVE JUSTICE: JEREMY BENTHAM AND THE CIVIL LAW* 69(1990) (explaining that Bentham's utilitarian distributive justice framework guided legislators to act consistent with the principle of utility and its maximization to ensure social well-being).

theory on this aspect is under-developed because it never explored alternative consensus methods other than utilitarianism.⁶⁸ This narrow scope disabled Rawls from effusively critiquing the contract method and its relationship to social choice.

Sen believes that there are at least four problems inherent within social contract method. Namely, Sen criticizes its structural exclusiveness and its presumption that persons make complete social assessments.⁶⁹ Thus, in the Capability Theory, Sen replaces the social contract method with another device—Adam Smith’s “Impartial Spectator.”⁷⁰ The Impartial Spectator (I.S.) method suggests that a consensus model must seek perspectives that are ““a certain distance from us””⁷¹ to form an objective legislative inquiry. I.S. is an observatory device that necessarily supplements the original position. Its purpose is to fill-in the closed social contract method gaps, especially within a sovereign nation context, so that decisions may consider extra-territorial implications.⁷² I.S. advances the view that a watchful eye from distant stakeholders injects a level of accountability that is presently absent from Rawls’ chosen method, and at least is minimally exclusive compared to other models

Sen further contends that this method, unlike the social contract, embodies a more realist buoyancy against human irrationality (a tendency toward incomplete assessment) and avoids arbitrary exclusion. In other words, a degree of flexibility is necessary for a practicable system of justice to ensure fairness because people are as imperfect as their systems. I.S. particularly

⁶⁸ THE IDEA OF JUSTICE, *supra* note 1, at 70.

⁶⁹ *Id.*

⁷⁰ *Id.* at 124-152 (explaining three problems with closed consensus models, including its ambivalence toward relational justice, real implications on decisions on others, and risk for parochialism).

⁷¹ *Id.* at 45.

⁷² *Id.* at 124-125.

responds to Rawls' critics' fears that rigid, elite decision-making processes result in abuse. America's oppressed peoples' histories, including American Indian histories, warrant such fear.⁷³

Sen envisions a more objective set of watchers who are equipped with intervention powers. This concept is similar to Robert Williams' and James Anaya's choice of law appeals for international law application to American Indians and other indigenous peoples.⁷⁴ Sen, as a long-time human rights law advocate, supports strong accountability norms and mechanisms that do not predominantly rely on large centralized institutions. He has advanced a three-step analysis (recognition, agitation, and legislation)⁷⁵ which aims to substantiate the notion of human rights beyond the institutional archetype. Based on his alternative vision, the I.S. method may strike a balance between closed, rigid decision-making processes and exclusive, concentrated institutional control.⁷⁶

Land liberation, as a long-range vision toward American Indian justice, is a progressive idea that contains within it the American Indian collective memory of colonial conflict, institutional abuse, and majoritarian mistreatment, as well as cultural transmission,

⁷³ See Wallace Coffey & Rebecca Tsosie, *supra* note 33, at 202 ("American Indian history has been portrayed by most scholars as a defensive response to European colonization (the 'reservation period,' 'removal era' etc ...), leading to a rather linear appraisal of tribal sovereignty. Thus, tribal sovereignty becomes an account of what tribes once had, how they lost that, and how they are striving to succeed living in a different world than that of their Ancestors.) (citations omitted).

⁷⁴ Robert Williams Jr., *Encounters On the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L. J. 660, 663-664 (1990) (arguing that contemporary international law provides a stage from which oppressed indigenous people can demand rights and share their narratives as a means of their collective survival).

⁷⁵ See Amartya Sen, *Elements of a Theory of Human Rights*, PHIL. & PUB. AFFAIRS (Fall 2004) at 315, 342-345.

⁷⁶ This vision is very much like the existing international law model but with important changes. See James Anaya, *infra* note 262.

organizational cooperation, and political resistance.⁷⁷ Tribes continue to struggle against land divestment, despite neo-liberalism's worn-out promise for justice. Western democracy must renew its commitment to justice against an oppressive historical backdrop. The Capability Theory, consisting of a behavior-centered framework and open accountability device, improve upon Rawls' arguably misplaced hope for a just neoliberal society.

The Capability Theory and Its Relationship to Land Liberation

The Capability Theory diverges from the two prominent schools of thought in political philosophy—Bentham's utilitarianism and Rawls' transcendentalism—by attributing personal advantage not to happiness or income but to real opportunity.⁷⁸ Thus, a just society is judged by its distribution of freedom to persons as opposed to its allocation of wealth or pleasure.⁷⁹ Meaningful freedom, in this sense, is the ability for a person to do what they value.⁸⁰ This perspective is distinct from other justice theories' informational foci that emphasize human continuity (tendency to wholly define happiness in one way or to possess the same set of needs) over human dynamism (tendency to possess pluralistic desires and hold conflicting values).⁸¹ The strength of this perspective, Sen suggests, is that its freedom cherishes a core value for the

⁷⁷ Writers must be careful not to suggest that all of U.S.-American Indian is negative. It is a complex history which consists of a mostly poor record. See VINE DELORIA, JR., & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* xi (1983) (describing a complex American Indian history in which tribes were forced to retain the better parts of old culture while adjusting to new realities posed by European overtures and intrusions).

⁷⁸ The IDEA OF JUSTICE, *supra* note 1, at 231.

⁷⁹ *Id.* at 228 (describing that freedom contains two distinct values, including an opportunity aspect, which involves the freedom to pursue a particular activity notwithstanding the outcome—the quality of choice, and a process aspect, which involves way in which we make free choices—the freedom of execution). The opportunity aspect is the most relevant part to the land liberation analysis, however, the process aspect, which is accentuated in Rawls' theory of justice, remains important, though, not as vital for the purposes of the article.

⁸⁰ *Id.* at 231-232.

⁸¹ *Id.* at 233 (explaining that a plurality of different features affect our lives and affect our moral choices).

quality of life rather than the mere, auxiliary means that may sustain life, such as wealth or pleasure.⁸² The Capability Theory elevates a value of high moral relevance today—freedom—as the primary assessment threshold for a just society. Better yet, it affirms human dynamism as a core value, which also forms the foundation for the land liberation vision.

Importantly, the Capability Theory is not an individualist justice framework. It accounts for individual existence within communities and other social phenomenon by explaining that people’s ability to do what they value is subject to social influence.⁸³ Sen recognizes that it is, in fact, impossible to detach the individual from the world within she or he lives. Capability Theory affirms that communities play an important role in shaping people’s totality from their values to their *beliefs* about their own ability.⁸⁴ Pluralism is a main principle of Capability Theory that can be applied to the land liberation vision as well.

The Capability Theory offers a way from which to resolve the dialectic interplay between representatives’ (tribes and trust guardians) and individuals’ competing interests within the land liberation vision. American Indians are not a monolith nor are tribes perfect proxies for individual tribe members.⁸⁵ When representatives’ and individuals’ interests clash, tension may be eased by a Capability Theory freedom-of-opportunity analysis, which examines the potential limitations on actual opportunity to one interest-holder or the other. An ideal choice would accommodate multiple stakeholders’ freedom interests. Most significantly, a Capability theoretical analysis opens up possibilities for fair resolutions based on actual happenings, unlike

⁸² *Id.* at 233-34 (stressing that actual opportunity is freedom’s core in a philosophical and practical sense).

⁸³ *Id.* at 244 (countering the methodological individualism critiques of the Capability Theory which argue that it simply promotes free individual decision-making rather than collective justice-building).

⁸⁴ *Id.* at 246 (emphasizing that the denial of a person’s multiple and complex identities and memberships has the paradoxical effect of denying persons the freedom to be themselves).

utilitarian or transcendental models. When applied to the land liberation vision, Capability Theory supports tribal land restoration, but may not require non-Indian forced relocation or other seemingly unfair outcomes, either. A freedom-centered model, though intricate, more directly leads to fair restorative justice solutions than the other prevailing models.

The Capability Theory also encompasses three other relevant values to the land liberation vision: non-exploitation, non-discrimination, and complex need. Sen persuasively argues that none of these values are fully secured within utilitarianism and resource-transcendentalism because the provision of happiness or primary goods do not necessarily satisfy human desire to be free from harm or deprivation.⁸⁶ Need, in contrast, is an affirmative act, which is often deep and multi-faceted. Justice theories for which exploitation, discrimination, and complex need are not addressed seem to undermine the demands of twenty-first century justice.

A close analysis reveals this point. Exploitation and discrimination are values that may co-exist with happiness and wealth. A person, for example, may feel happiness from being significantly compensated for use of her land, but may be a victim of commercial exploitation, in which a company may under-compensate her for the land use. Although utilitarian and transcendentalism defenders may point out that she is happy and compensated, therefore, under-compensation is immaterial, it is indeed important because the company unfairly took advantage of the land-owner to its benefit, and worse, should the predatory behavior continue, the community is at-risk for further harm. Its aggregate impact implicates a broader concern that invokes feelings about injustice.

⁸⁶ Sen, *supra* note 18, at 327-328 (describing a comparative hypothetical involving a physically-disabled man in which the man is not helped by utilitarian model because it would give him less money than physically fit person and likewise, he is not helped by resource-transcendental model (Rawls' model) because although he would be given more money, the institution is disinterested in his severe disability; the capability model addresses the man's true needs by offering him sufficient income and accommodations for his disability, if necessary).

Perhaps most unsettling is that the law may not be a justice-serving tool in this scenario within an Indian law context. An actual example that is similar to the previous hypothetical is illustrative. In *United States v. Navajo Nation*⁸⁷ the Supreme Court held against the Nation's claim that the Secretary of Interior abrogated its fiduciary trust duty in its approval of a coal lease amendment when the Secretary delayed contractual review, and placed the Nation in a near-impossible negotiation position with Peabody Coal Company. Navajo Nation specifically claimed that the Secretary failed to make a timely royalty rate recommendation, in which the delay occurred after the Secretary had an ex-parte meeting with the coal company.⁸⁸ The majority ruled against the undue influence claim on technical grounds, arguing that ex-parte meetings were not statutorily barred, and therefore, permissible.⁸⁹

The dissent, however, accurately isolated and portrayed the real issue—undue influence. Once the Secretary secretly met with the coal company and misled the Nation into believing that an adjustment decision was not imminent, the Nation was forced into a weak bargaining position. The Nation, therefore, had little choice but to accept the lower royalty rate.⁹⁰ Navajo Nation's outcome underscores the reality that exploitation occurs despite legal intervention, and in this case, legal intervention facilitated exploitation. Sadly, federal government trust abrogation is not

⁸⁷ 537 U.S. 488 (2003).

⁸⁸ *Id.* at 512.

⁸⁹ *Id.* at 512-514.

⁹⁰ *Id.* at 520 (“The purpose and predictable effect of these actions was to induce the Tribe to take a deep discount in the royalty rate in the face of what the Tribe feared would otherwise be prolonged revenue loss and uncertainty. The point of this evidence is not that the Secretary violated some rule of procedure for administrative appeals, or some statutory duty regarding royalty adjustments under the terms of the earlier lease. What these facts support is the Tribe's claim that the Secretary defaulted on his fiduciary responsibility to withhold approval of an inadequate lease accepted by the Tribe while under a disadvantage the Secretary himself had intentionally imposed.”)(citations omitted).

uncommon,⁹¹ and as a result, tribes continue to suffer from institutional failures that primarily benefit non-tribal members.

Equally important is that the utilitarian and resource-transcendental models do not address complex needs other than happiness or income. Neither theory evaluates *conditions* surrounding persons' respective needs. Instead they merely evaluate and prioritize the needs themselves.⁹² Need is complex in a way that the mere possession of tangible goods is not always satisfactory. Also, for example, when needs become urgent from long-time deprivation or abuse, then a whole justice system must contain time-sensitive and adequate responsiveness. This is a significant blind-spot for the prevailing models. Historically, political justice theories have simply equated justice with basic needs being met one way or another without regard to the way in which needs are met.⁹³ When utilitarian and transcendental models fail to respond to critical needs, it harms real people and demoralizes the collective pursuit for justice.⁹⁴

⁹¹ See generally Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307 (2002-2003) (arguing that the Department of Justice holds an inherent conflict of interest in challenging government trusteeship violations); Raymond Cross, *The Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine?*, 39 TULSA L. REV. 369, 386-387 (2003) (explaining that trust duty conflict arises within many federal agencies which are expected to balance the "public" interests with tribal interests within the context of another recent canonical case, *Nevada v. Hicks*); Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271 (2003) (arguing that Indian ancestral interests are often marginalized in public trust land considerations).

⁹² IDEA OF JUSTICE, *supra* note 1, at 251.

⁹³ See Amaryta Sen, *supra* note 65, at 327 (arguing that the two "welfarist" equality theories, utilitarianism and transcendentalism, fail to provide an adequate informational focus even when both approaches are combined).

⁹⁴ See, e.g., Edward Sifuentes, *Tribal leaders rip Census Bureau officials*, NORTH COUNTY TIMES (May 9, 2010) available at http://www.nctimes.com/news/local/sdcounty/article_1698cfa7-dadc-547e-b366-703c4f440c71.html (reporting that San Diego County tribal leaders, the County with the largest number of federally-recognized tribes, sent a joint letter to the Census Bureau describing a breakdown in cooperation with assigned liaisons, which could mean the difference of millions of dollars in federal aid).

Overall, it seems as though the Capability Theory better balances widely cherished values—lack of deprivation (need), happiness, material security, non-exploitation and non-discrimination. Its capacity and freedom nexus intrinsically ties each of these values together rather than puts them in competition with one another because each value is an equal part of the justice formula. The Capability Theory also better responds to modern state discrimination, exploitation, and abuse, which tend to live in the gap between institutional duty and delivery. The denial of justice in the modern neo-liberal state systemically occurs through limitations to access or opportunity, as well as divestment, coercion, and other abuses of power. Sen’s vision reiterates that the imperative of a twenty-first century theory of justice is to identify and respond to subtleties in our existing laws, administering institutions, and norm that manifest unfairness, exclusion, and deprivation.

This vision closely aligns to one long-held by American Indian advocates for land liberation. Part III further explores the land liberation vision with this theoretical backdrop, and evaluates its implications and possibilities for American Indian land justice in the not-so-distant future.

III. Liberating Land and Life: A Closer Look at the Land Liberation Vision and Its Implications

wakoⁿda moⁿshita! wakoⁿda uidseta! witzigoe ski ikoe! wiⁿachnoⁿ miⁿkshe.⁹⁵

Land liberation is a prophetic aspiration for many American Indian people, which conjures hope and uncertainty. It symbolizes a reunion with their cultural wholeness and a form

⁹⁵ GEORGE E. “TINK” TINKER, *AMERICAN INDIAN LIBERATION: A THEOLOGY OF SOVEREIGNTY* 17 (2008) (translated from Osage to English as “Grandmother! Grandfather! Sacred One Above and Sacred One Below. Thank you for this day, for life itself, and especially for this gathering of relatives in the struggle for liberation”).

of spiritual renewal.⁹⁶ Land restoration is the legal element for a moral realization, yet land restoration bears little moral significance without its liberation from colonial control. Thus, Robert Porter's land liberation vision is a richly powerful idea that contains layered meanings and opportunities during the human rights revolution.

American Indian law is a significant barrier that stands between the "current state of things" and land liberation.⁹⁷ Land ownership and access between Indians and non-Indians continues to be the legal site of conflict since colonization.⁹⁸ Land restoration, therefore, implicates basic American Indian legal principles, and presents the potential to transform these basic, though arguably very harmful principles, such as quasi-sovereignty, plenary congressional power, and the trust doctrine. Land liberation, which is one step beyond land restoration, is a policy proposal that builds a transitory bridge in the tribal-United States relationship from

⁹⁶ *Id.* at 9 (noting that among four major Euro-Indian cultural differences is Indian "filial attachment" to particular places which fosters cultural and spiritual values of responsibility, communitarianism, and inter-relatedness).

⁹⁷ See CHARLES WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 55-87 (1987) (detailing that tribes retained some level of sovereignty after contact but that this sovereignty was gradually eroded by court decisions through the twentieth century); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 122-125 (2006) (arguing that Congress and the Executive have adopted a reactionary approach to policy-making, which has left Indians and the judiciary to answer pressing policy questions, however, the judiciary is usurping more and more policy-making power that is dangerous to Indians and their sovereignty). The other primary barrier, of course, is non-Indian political reluctance to restore original Indian title.

⁹⁸ See Singel & Fletcher, *supra* note 26, at 21 ("Indian land claims have long been a foundational and fundamental subject of American law."); VINE DELORIA & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 12 (1984) ("It is important to understand the primacy of land in the Indian psychological makeup, because, as land is alienated, all other forms of social cohesion also begin to erode, land having been the context in which the other forms have been created."); Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-Envisioned, Reinvigorated, and Re-Empowered*, 2005 UTAH L. REV. 443, 487 (2005) (noting that land-less tribes find it much more difficult to establish sovereignty).

imperialist-imposition to sovereign co-existence.⁹⁹ Land liberation, as a vision, expresses a long-time Indian demand for enduring peace, political integrity, and cultural respect.

The land liberation vision contains at least three meanings. One meaning is land restoration—reinstating original land claims and access that many American Indian tribes and tribal members lost. Another meaning is justice—making amends for the ways in which tribes and tribal members lost land through unsavory land deals, federal government divestment policies, and violent force.¹⁰⁰ A third meaning is political emancipation¹⁰¹—reserving tribes and tribal members full ability to use and govern land in a way that honors their needs and desires.¹⁰² The freedom to choose is at the heart of the land liberation vision and at the theoretical core of tribal sovereignty.

⁹⁹ See Robert Clinton, *Comity and Colonialism: The Federal Courts' Frustration of Tribal-Federal Cooperation*, 36 ARIZ. ST. L. J. (2004) (explaining that the current American Indian law regime is designed to prevent federal-tribal cooperation which is counter-intuitive to the reality that sovereign neighbors often have mutual interests upon which to have a cooperative relationship).

¹⁰⁰ See WARD CHURCHILL, *A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS, 1492 to the Present* (1997) (providing a general picture of colonial violence against Indians in the Americas).

¹⁰¹ Indian affirmative action challenges have been struck down in a line of cases that affirm that Indians are properly classified as political members of quasi-sovereign nations rather than a distinct race-based group. See *Morton v. Mancari*, 417 U.S. 535 (holding that Bureau of Indian Affairs employment preference did not constitute invidious discrimination because Indians constitute a unique political group subject to rational basis review, and that Indian tribes as political sovereigns maintain the right to further self-government); *United States v. Antelope*, 430 U.S. 641, 645 (1977) (holding against petitioners' equal protection claims based on opinion that federal legislation related to Indians is not race-based but instead it is "legislation expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.") Some scholars affirm these cases by arguing that Indians are better described as cultural-political minorities rather than racial minorities under the existing legal regime although there is clear indication that courts have held culturally bigoted and racist views of Indians. See generally Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians As Peoples,"* 39 U.C.L.A. L. REV. 169 (arguing against David Williams' claim that Indians enjoyed special exceptions under the law because they are inappropriately categorized as political minorities out of reach of racial equal protection scrutiny). See also *Ex Parte Kan-gi-Shun-Ca* (otherwise known as *Crow Dog*), 109 U.S. 556, 568 (1883) (holding that tribes as "distinct political bodies" retain sovereignty to enforce criminal laws onto its own citizens). *But see id.* at 571 (characterizing "civilized" White Man's laws as demonstrative of racial superiority). See also Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333 (2004) (arguing that American Indian tribes should be seen as racial, cultural and political minorities who exist as separate legal sovereigns).

¹⁰² See Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1190-1199 (2004) (acknowledging that sovereignty may mean the choice to more closely align with the United States government).

Connecting Theoretical Principles of the Capability Theory and Land Liberation

Globalization has fundamentally changed the international political landscape.¹⁰³ Politics are no longer contained within a nation-state or within a geographical region—they spill all over the world map. Political communities have emerged across, through, and in-between national boundaries as justice demands from clean water to adequate housing are on the rise.¹⁰⁴ These political communities march under the broad human rights’ banner and they have become a mounting force that credits its growth to two sides of globalization, one side that facilitates distant relationship-building and another side that creates similar political and economic pressures against which communities struggle.¹⁰⁵

Economist, Amartya Sen, is a child of the human rights movement, and significantly contributed to its development into a full-fledged political and legal revolution over the last thirty years.¹⁰⁶ “Human rights” as we know it today, however, could not exist without the failed European colonialist enterprise. Its remnants, along with the human rights movement’s

¹⁰³ See Noam Chomsky, *supra* note 47.

¹⁰⁴ See Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations It Creates*, 4 NW. U. J. INT’L HUM. RTS. 331 (2005) (arguing that the necessity of water and growing scarcity should establish it as a fundamental human right under international law); Padraic Kenna, *Globalization and housing rights*, 15 IND. J. GLO. L. S. 397 (2008) (calling for a shift from a neo-liberal housing-as-property regimes to a positive housing rights model).

¹⁰⁵ See GLOBALIZATION AND THE CONNECTION OF REMOTE COMMUNITIES: ENVIRONMENTAL, ECONOMIC AND SOCIAL IMPACTS PROJECT, NATIONAL SCIENCE FOUNDATION & MICHIGAN STATE UNIVERSITY, <http://www.globalchange.msu.edu/nicaragua/overview.html> (last visited May 11, 2010); NAOMI KLEIN, NO LOGO (2002) (explaining the rise of corporate power and its grip on branding, identity, and original thought).

¹⁰⁶ See POLLY VIZARD, CENTRE FOR ANALYSIS OF SOCIAL EXCLUSION, THE CONTRIBUTIONS OF PROFESSOR AMARTYA SEN IN THE FIELD OF HUMAN RIGHTS (2005) *available at* <http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper91.pdf>.

ascendancy, formed the conditions for the international indigenous movement and its demand for collective rights.¹⁰⁷

Post-imperialism justice, whether human rights or indigenous rights, takes on a certain resemblance from struggle to struggle in this century. Human rights-seekers and imperialist resisters have encountered tension in their justice pursuits, yet, they have, in large part, helped inform each other about their mutual struggles.¹⁰⁸ This background explains the implicit connection between Amartya Sen's human rights' justice vision and Robert Odawi Porter's American Indian justice vision.¹⁰⁹ Behind these visions is the belief that the hard, complex realities lived by their local and world communities can be transformed—they simply need the access and freedom to realize their own communal power and balance.

Sen's and Porter's justice visions mutually reinforce each other through four shared values: dynamism, pluralism, flexibility, and responsiveness. These four values, missing from modern neo-liberal justice, are engendered in the land liberation vision. Dynamism and pluralism, for example, are exhibited by sovereign tribal nations themselves in their divergent and evolving needs, governance, and heritages.¹¹⁰ Yet federal Indian law, in contrast, is exceptionally slow to change. The conservative, United States' common law system, commitment to dual federalism, and judges' unfamiliarity with American Indian tribes and law,

¹⁰⁷ See S. James Anaya, *infra* note 262 and accompanying text.

¹⁰⁸ See S. James Anaya, *supra* note 17.

¹⁰⁹ There will be several Capability Theory elements discussed in the previously section, which I will not describe in-depth in the land liberation section, including the Impartial Spectator method and international law comparative analysis. This comparison will be re-visited in Part IV.

¹¹⁰ There are 564 federally-recognized tribes and 74 state-recognized tribes as of March 2009. See National Council of State Legislatures, "Federal and State Recognized Tribes," <http://www.ncsl.org/?tabid=13278#state> (last visited April 26, 2010).

instills rigidity into American Indian law that disfavors tribal self-determination.¹¹¹ Accordingly, Indian law does not facilitate responsiveness to tribal and tribal members' needs as much as it facilitates Indian control. A newly-established United States and tribal nations' relationship must work toward a practical kind of peace that allows tribes and tribal members to effectively respond to their needs.

Sen's *Idea of Justice*, in turns, extracts these four important values from modern neo-liberalism's remains. His proposed Capability Theory emphasizes the natural dynamism that exists in our human behavior; the necessity for justice to operate within a plural environment, among persons, and communities; the importance of flexibility to evaluate plural interests¹¹²; and most significant, responsiveness to actual events to account for harms, such as non-discrimination, non-exploitation, and extreme inequality.

With radical change, however, comes challenging transition. Given human rights' purpose to redistribute power and resources, and land liberation's purpose to establish full tribal emancipation, questions emerge as to how the law will facilitate or impede progress; which political barriers must be overcome to realize the visions; and how best to anticipate practical

¹¹¹ See Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. J. ON C.L. & C.R. 1 (2003) (arguing that the Supreme Court refuses to recognize tribes as a third-sovereign because it imbalances the United States' firmly-held dual-sovereign system); Tonya Kowalski, *The Forgotten Sovereigns*, 36 FLA. ST. U. L. REV. 765 (stating that most of the legal community overlooks tribal sovereigns within a federalist government context); Vine Deloria Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 203-205 (explaining that the void of knowledge about tribes, tribal histories, and specific-Indian law principles, in part, has created a patchwork body of law, which is consistently misunderstood by courts and even each generation of Indian law scholars who accept popular narratives as true despite evidence to the contrary).

¹¹² As discussed in the previous section, Sen argues that each person contains multiple and often conflicting interests. See Amartya Sen, *supra* note 1, at 233. Some Indian advocates, in recent years, have argued that tribes, in addition to their single tribal identities, should assume Pan-Indian identities. JOANNE NAGEL, AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE 9 (1996) (arguing that despite tribal diversity, many tribes have undertaken similar patterns of "ethnic resurgence"); DONALD L. FIXICO, THE URBAN INDIAN EXPERIENCE IN AMERICA 123-140 (2000) (noting the rise in Pan-Indianism, analogized to kinship or community emphases in many tribal traditions, is on the rise as increasing numbers of Indians leave their reservations).

challenges along the way. *The Idea of Justice* will guide this analysis into land liberation's theoretical meaning for American Indian justice, separation, and sovereignty, regarding two specific problems: the "plenary power" problem and "loss of trust" problem.

The Plenary Power Problem

The first challenge is the plenary power doctrine. The plenary power doctrine is a judicially-created principle that grants Congress exclusive authority over Indian affairs as a condition of post-contact "discovery."¹¹³ The doctrine has evolved over time to establish a federal government-tribe "guardian-ward" relationship,¹¹⁴ to restore certain sovereign powers back to tribes,¹¹⁵ to cede jurisdictional power to states,¹¹⁶ and most significantly, to allow

¹¹³ See *Kagama*, 118 U.S. at 379-380 ("The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by congress. What authority the state governments may have to enact criminal laws for the Indians will be presently considered. But this power of congress to organize territorial governments, and make laws for their inhabitants, arises, not so much from the clause in the constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else."); *United States v. Lara*, 541 U.S. 193 (2004) (holding that Congress possessed constitutional power to lift or relax tribes' criminal jurisdiction per its "plenary and exclusive" powers under the Indian Commerce and Treaty Clauses). See also, Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, supra note 26; Matthew L.M. Fletcher, supra note 97, at 163-164 (1996) (noting that although it is known as the congressional plenary power doctrine, some scholars have argue that it in reality "judicial plenary power" reins over the United States-tribe relationship because there is so little constitutional and legislative guidance that courts have largely dictated Indian policy as well as Indian law).

¹¹⁴ The original trust doctrine established a guardian-ward relationship. See *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832). See also *United States v. Sandoval*, 231 U.S. 28, 39 (1913) (expressly re-affirming the guardian-ward relationship by claiming that Pueblos were regarded and treated like "other Indian communities" which required "special consideration and protection").

¹¹⁵ Congress has established landmark legislation to reverse explicitly anti-Indian policies and to restore minimal tribal sovereignty. See Indian Reorganization (Wheeler-Howard) Act of 1934, ch. 576, 48 Stat. 984, as amended at 25 U.S.C. §§ 461 – 79 (1970) (permitting tribes to adopt appropriate constitutions to re-gain certain sovereign powers and granting eligibility for economic development funding). See also *United States v. Wheeler*, 435 U.S. 313, 329 (1978) (rejecting contention that tribes derive power from the federal government but retain their powers as independent sovereigns).

¹¹⁶ See *Nevada v. Hicks*, 533 U.S. 353 (2001) (holding that tribes lacked regulatory authority over state officers investigating alleged off-reservation crimes); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that tribes lacked subject-matter jurisdiction over personal injury claims that occurred on highway running through reservation); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (holding that state cigarette tax may be imposed on reservation distributors); *Oliphant v. Suquamish Indian Tribe*, 435 U.S.

Congress to govern internal tribal affairs.¹¹⁷ Tribes, however, have not regained their full pre-constitutional sovereignty under the doctrine's expansive policy scheme. The plenary power doctrine poses a legal barrier for the land liberation vision for the reason that the United States federal government and tribes cannot functionally reserve concurrent sovereignty. Tribal sovereignty divestment is a political vestige that can be addressed with restorative policies.

There are three frameworks from which to address the plenary power problem: full pre-constitutional restoration, remedial judicial restoration, and non-judicial restoration. Each of these frameworks may lead to a more pro-sovereignty solution than the present, yet each one possesses varying "ebbs" of sovereign Indian power. Land liberation, as a vision similar to Sen's Capability Theory, strives for the highest ebb of broadly-defined tribal sovereign power. The question then becomes this: is there a way to reach the "highest ebb" through the existing legal regime?

Full Pre-Constitutional Restoration

The first framework is full pre-constitutional restoration. Full pre-constitutional sovereignty existed when American Indians tribes lived as independent peoples 'by nature and necessity' prior to European contact, and whereby "tribes managed their own affairs without outside source legitimization of their governance."¹¹⁸ Full pre-constitutional sovereignty trumps the Marshall Trilogy so to speak, the early landmark Indian law cases that shrewdly asserted federal sovereignty over tribes. The Marshall Trilogy authoritatively diminished *full* pre-

191 (1978) (holding that tribes do not have inherent criminal jurisdiction over non-Indians who commits on-reservation crimes).

¹¹⁷ See *Duro v. Reina*, 495 U.S. 676 (1990) (holding that tribal sovereignty does not extend to criminal sanctions against non-member Indians). This decision was later overturned by 25 U.S.C. § 1301(4).

¹¹⁸ See Tweedy, *supra* note 49, at 654 (explaining in the Supreme Court's view that the establishment of the United States legitimately divested inherent tribal sovereignty).

constitutional sovereignty under United States federal law.¹¹⁹ These foundational cases legitimized the application of Anglo-colonizer law to tribes¹²⁰ and remain the source of much scholarly discussion regarding Justice Marshall’s political compromise and its impact on modern American Indian law today.¹²¹ Yet there is legal consensus among Indian law scholars that these cases limited tribes’ inherent sovereign power in the eyes of the United States’ federal government.¹²²

¹¹⁹ See *supra* note 22 and accompanying text.

¹²⁰ I undoubtedly fall into the “critical” camp who views colonial power to exercise legal authority over another sovereign as inherently suspect. See Sarah Krakoff, *Undoing Indian Law One Case At A Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1192-1193 (2001) (observing that there are at least three doctrinal camps when examining the Marshall Trilogy—foundationalists, pragmatists, and critics—but noting that there is consensus that tribes retain inherent sovereign authority). But see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) (arguing that Marshall’s “foundational approach” effectively balanced colonialism and constitutionalism between dual sovereigns). See also Patrice H. Kunesh, *Constant Governments: Tribal Resilience and Regeneration in Changing Times*, 19 KAN. J. L. & PUB. POL’Y 8, 9 (2009) (explaining that Marshall’s foundational “sovereignty” principles represent a vacillation of contradictory quasi-sovereign policies). I agree with Kunesh’s analysis that the correct literal reading of the Marshall Trilogy is of one that nominally preserved pre-constitutional powers. A broad reading is necessary to contextualize the decisions, however. See Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993) (“[D]istancing of the temporal and moral aspects of the issue represents a social avoidance mechanism by which non-Indian American society has marginalized questions relating to the fallout of colonization of America’s aboriginal peoples.”). The thrust of my point is to the extent that the Marshall Trilogy has established foundational principles, as long as the Supreme Court strays from those principles, and hence, from full pre-constitutional sovereignty, political emancipation grows an ever-distant reality.

¹²¹ See, e.g., Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N. D. L. REV. 627, 648-661 (2006) (arguing that the Marshall Trilogy’s importance resides not in its precedential value but in its “origin story” that give rise to major Indian law doctrines, including plenary power and the trust doctrines); Jen Camden & Kathryn E. Fort, *“Channeling Thought”: The Legacy of Legal Fictions from 1823*, 33 AM. INDIAN L. REV. 77 (2009) (using the literary and critical race theory of “legal fictions” to explain how false narratives within the Marshall Trilogy live on today).

¹²² The Marshall Trilogy cases divested tribal sovereigns of two powers: tribes’ right to alienate land except to the United States federal government through the doctrine of discovery (*McIntosh*, 21 U.S. (8 Wheat) at 543) and tribes’ right to engage with foreign nations (*Cherokee Nation*, 30 U.S. at 1). A later case, *Oliphant*, 435 U.S. at 191, divested tribes from exercising criminal jurisdiction over non-members. The reversal of the long-time inherent sovereignty doctrine, emerging in a line of recent cases beginning with *Oliphant*, is known as implicit divestiture. See John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen’s Handbook Cutting Room Floor*, 38 CONN. L. REV. 731 (2005) (observing that these cases have divested tribes of originally preserved civil and adjudicatory powers).

The full pre-constitutional sovereignty framework's goal is to re-establish co-extensive sovereignty among the United States and tribal Nation, restoring tribes to the "highest ebb" of its sovereign power. To do so the Marshall Trilogy must be examined anew.¹²³ Its legal and historical impact is analogous to the infamous *Dred Scott* decision,¹²⁴ which upheld Black Americans' diminished legal personhood until it was overturned years later by the passage of the Fourteenth Amendment in 1868.¹²⁵ Though the analogy is imperfect—Black Americans were never part of independent political Nations—it is consistent with the comparison that Anglo-law was imposed onto free persons for the purposes of legal de-humanization and control. Likewise, as the passage of the Fourteenth Amendment signaled an outgrowth of changed political thinking,¹²⁶ the Marshall Trilogy and its doctrinal derivatives are not sacred doctrines.¹²⁷

There is an alternative view to the belief that the United States' founding legitimized colonial reign. Others who have countered the Marshall rationale argue that the Constitution's

¹²³ See Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L. J. 579, 580 (arguing that the Supreme Court does not hear Indian law cases to dis-entangle Indian issues but hears these cases to examine broader constitutional issues, which suggests that Indian law is a "vessel" to constitutional jurisprudence that is not centered on establishing justice for Indians).

¹²⁴ See Nathan Goetting, *The Marshall Trilogy and the Constitutional Dehumanization of American Indians*, 65 *Guild Pract.* 207, 207-210 (2008) (putting the Marshall Trilogy into a "bad law" context that is analogous to other politically-driven "compromise" decisions *Dred Scott v. Standford*, 60 U.S. 393 (1856), and *Korematsu v. United States*, 323 U.S. 214 (1944)).

¹²⁵ U.S. CONST. amend. XIV § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

¹²⁶ See Goetting, *supra* note 124, at 207-208.

¹²⁷ The lack of coherence is a long-acknowledged characteristic of Indian law particularly around political sovereignty and its relationship to tribes. See Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 154 (2008) ("Implicit in this argument is that the judiciary would be stretching its authority and legitimacy by striking down such a vast body of law in one fell swoop. This response is indicative of how this area of constitutional and Indian law is superficially theorized.") (internal citations omitted).

silence on tribal sovereignty should presume that the United States' creation did *not* change pre-constitution sovereignty, because its architects could have expressed their intent to “conquer” Indians.¹²⁸ Jurists' unwillingness to re-visit the foundational Indian law cases is strange but curable. For the sake of argument I will describe this philosophy as the “Scalia solution.”¹²⁹

The Scalia solution is a case for strict constitutional construction on Indian affairs. It is strategic for land liberation because it draws a clean line to full pre-constitutional sovereignty. There is limited constitutional text on federal government and Indian affairs, reading that Congress shall have the power to: “To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”¹³⁰ A narrow textual construction serves to create the confines in which Congress may interact—not govern—tribal sovereigns. The approach recognizes full pre-constitutional sovereignty, provides for a complementary, judicial re-interpretation of constitutional text without change to the text itself, and reduces Congress' legislative discretion from plenary power to diplomacy. Plus, it nullifies convoluted Indian jurisprudence, neutralizes the Court's arbiter role as Indian policy-makers, and negates broad-based, non-Indian endorsement of Indian sovereignty as may be required through a constitutional amendment.¹³¹ A true fundamentalist constitutional reading fulfills the land liberation vision by

¹²⁸ *But see* Lara, 541 U.S. at 201 (arguing that federal government supremacy over tribes rests on ‘necessary concomitants of nationality’ if not affirmative constitutional powers) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)); Erin Ruble & Gerald Torres, “*Perfect Good Faith*,” 5 NEV. L. REV. 93 (2004) (arguing that federal supremacy over tribes arose not from enumerated constitutional powers but from the structure of government necessary to legitimize a new republic on the world stage).

¹²⁹ There is a sad irony to this moniker. *See* Hicks, 533 U.S. at 361 (dismissing full tribal sovereignty as a view held by Justice Marshall that was “long ago” in his majority opinion which held that tribes did not have civil adjudicatory jurisdiction over a state official whose alleged misconduct occurred on-reservation despite often traditionalist views on textual construction and *stare decisis*).

¹³⁰ Indian Commerce Clause, art. I, Sec. 8, cl. 3.

¹³¹ *United States v. Carolene Products Co.*, fn. 4, 304 U.S. 144, 152-153 n. 4 (1938) is credited with fortifying politically unpopular minorities from majoritarian assault. American Indians, however, for a number of reasons, are

restoring full Indian sovereignty and by providing a pragmatic rationale on which to base this vision.

Critics will immediately question the likelihood of a judicial U-turn. While I am under no illusion that the Court would not radically change American Indian jurisprudence absent any changes in composition or political climate, change is inevitable. The real question becomes in which direction change will head, and how it will head that way. A coalition of new Indian-friendly judges and old strict constructionist judges may make for a more viable likelihood given the right case.¹³² Plus, political pressure can play an influential role. Although electoral politics should not prescribe sovereignty, political environments undoubtedly affect shape jurisprudence.¹³³ As political attitudes change and increasing political pressure is applied, a future court may exhibit a willingness to revisit its foundational principles.

Full pre-constitutional judicial restoration is the simplest and truest way to provide for co-extensive sovereignty among the United States and tribes. It is also the most consistent with American Indian justice as it affirms Indians' plurality, preserves Indians' autonomy, and upholds Indians' choice. Short of a remarkable event or a constitutional amendment,¹³⁴ however, there are two other options to at least gradually fulfill the land liberation vision.

not afforded the same kind of jurisprudential protection like other political minorities. The irony, of course, is that tribes should not have to condition its sovereignty restoration on non-Indian democratic approval.

¹³² See Fletcher, *supra* note 97, at 165 (observing that Justice Thomas, for example, opined in *United States v. Lara* that Congress may be over-reaching its constitutional authority under the plenary power doctrine and for that reason that the court may wish to re-visit the issue.)

¹³³ See Charles R. Epp, *External Pressure and the Supreme Court Agenda* in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONIST APPROACHES 255 (Cornell W. Clayton & Howard Gillman eds., 1999) (arguing that outside political pressures play an important role as well as institutional factors to influence Justices' opinions).

¹³⁴ A number of Indian law scholars have proposed constitutional amendments. See, e.g., FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 307 (2009) (proposing a constitutional amendment which emphasizes "dignity, essential sovereignty, and durable inclusion," stating "The inherent sovereignty of Indian tribes within these United States shall not be infringed, except by powers expressly delegated

Judicial Restoration

The second option for land liberation is judicial restoration. Judicial restoration can assume a two-prong strategy: judicial minimalism and judicial restraint. Legal advocates can engage in strategic, case-by-case advocacy toward land liberation to unravel harmful, recently-developed Indian law policies, even if the approach relies on judicial decision-making.¹³⁵

Recent judicial trends, in particular, have significantly hurt American Indians. This option suggests that Indians will fare better with congressional policy-making over judicial policy-making by means of judicial inaction. As detrimental as congressional policy-making has been for Indians, the judiciary has been arguably worse. The Supreme Court, over time, has adopted its own set of incongruous, interpretative policies to make up for Congress' lack of clear Indian policy.¹³⁶ Matthew L.M. Fletcher has observed although the conservative Rehnquist Court correctly doubts congressional plenary power based on existing, narrow constitutional language (particularly related to the Commerce Clause¹³⁷) that the Court has chosen to supplement the text with extra-constitutional, anti-Indian policies rather than adhere to strict constructionism.¹³⁸ This

to the United States by the Constitution. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article.”).

¹³⁵ It is likely that the larger American Indian advocacy groups are pursuing this objective in some regard, though, I am not privy to their internal strategies. This discussion is simply meant to contribute to the broader discussion on advocacy strategy.

¹³⁶ Remarks from Professor Taiawagi “Tai” Helton, *Current Issues in Native American Law*, 51 U. KAN. L. REV. 250, 251 (2002) (“While federal policy over the last few decades has shifted repeatedly, the statutes passed in any given policy era virtually have been overruled or repealed. As a result, federal Indian law is a complex web of often-conflicting treaties, statutes, and cases. Courts are often in the difficult position of having to review a statute based on the enacting Congress’s intent and policy, despite the fact that a later Congress expressly repudiated that policy and enacted contrary legislation.”)

¹³⁷ See Matthew L.M. Fletcher, *supra* note 97, at 164-166 (explaining that the Supreme Court took great pain, departing from all of its other jurisprudence, to strike down Indian-commerce statutes, on the ground that Congress exceeded its Commerce Clause authority, for the first time since the Lochner-era).

¹³⁸ *Id.*

trend results in gradual and unpredictable tribal sovereignty divestiture that makes it difficult to anticipate legal outcomes and to preserve tribal governmental integrity.¹³⁹

Judicial minimalism is a legal philosophy that promotes democratic deliberation over policy issues, and one which when applied to Indian tribes may serve as a longer-term strategy for sovereignty restoration.¹⁴⁰ Scholar Sarah Krakoff developed judicial minimalism's application to Indian law, observing that the previous Court's "minimalist core" (O'Connor, Ginsburg, Breyer, and Souter) often issued narrow, unitary¹⁴¹ holdings that sought to limit the judiciary's policy influence on Indian affairs.¹⁴² Despite other political and institutional forces that led these minimalist Justices to issue anti-tribe decisions,¹⁴³ Krakoff compellingly argues that a minimalist judicial philosophy paired with a pro-sovereignty commitment may be a viable advocacy strategy.¹⁴⁴

There are two tactical prongs to this strategy. The first tactic is to explicitly punt policy decisions back to Congress as suggested by Krakoff and others. This tactic is strategic insofar that Congress has guiding judicial norms from which to deliberate policy choices.¹⁴⁵ Given the Rehnquist Court's departure from the Indian law's basic tenets, including a presumption of tribal

¹³⁹ See LaVelle, *supra* note 122.

¹⁴⁰ See Krakoff, *supra* note 120, at 1179; *see also id.* at 1182-1191.

¹⁴¹ Krakoff uses the term unitary to describe "shallow" rulings that obscure normative law underlying precedent. *Id.* at 1215.

¹⁴² *Id.* at 1178-1179.

¹⁴³ See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

¹⁴⁴ *But see id.* at 1265 (distinguishing between judicial minimalism and incomplete theorization, in which the latter is a judicial abrogation of its duty to clearly state jurisprudential underpinnings when norms attached to an issue are "up for grabs").

¹⁴⁵ *Id.* (explaining that minimalism is beneficial only if there is the normative law underlying an issue affirms tribal sovereignty).

sovereignty preservation, judicial minimalism is probably only helpful in a limited set of narrow issues.

The other tactic is consistent with common-sense understandings of minimalism which takes the form of judicial restraint.¹⁴⁶ Judicial restraint can neutralize the Court's policy-making to mitigate further sovereignty divestment. Sovereignty restoration thus emerges from long-term policy neutralization and eventual reversal. Urging judges to exercise restraint may be a plea on non-existent ears but it may also appeal to specific judges' philosophies or case dispositions. One fewer anti-Indian decision is not only one fewer precedential decision—it is another chance to fight the political battle outside the courts.

Both of these judicial restoration tactics strive toward land liberation, though, in a less sharp manner than the “Scalia solution.” This option is effective from the view that it keeps a judiciary-created problem out of non-Indian democratic control. It also reduces judicial risk-taking in the sense that the Court need not uproot a body of law. Judicial restraint, with whichever tactical approach, curbs extra-constitutional policy-making and allows the Court to implicitly repudiate its divestment rulings on tribal adjudicatory authority,¹⁴⁷ and civil regulatory authority¹⁴⁸ without as much overt politicization.¹⁴⁹

¹⁴⁶ See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 62 (1999).

¹⁴⁷ See, e.g., *Oliphant*, 435 U.S. at 191; *Lara*, 541 U.S. at 193.

¹⁴⁸ See, e.g., *Montana v. United States*, 450 U.S. 544, 565 (1981) (concluding that tribes' inherent sovereignty does not extend to hunting and fishing regulation of non-Indians).

¹⁴⁹ It is unlikely that the Roberts' Court sees any political cost regarding Indian cases. Should a plurality wish to adopt minimalism, it at least insulates the Justices from “activist judge” attacks. This particular Court, however, is not shy to engage in so-called judicial activism on one hand. See STEPHEN E. GOTTLIEB, *THE JURISPRUDENCE OF THE ROBERTS COURT* 53 available at http://works.bepress.com/cgi/viewcontent.cgi?article=1018&context=stephen_gottlieb (“Once again the extreme hypotheses are obviously false – everyone votes to apply or uphold Congress some of the time and not others. All of the conservatives, however, are more than twice as activist toward Congress as the liberals, and Scalia three times as activist toward Congress”) (internal references omitted). On the other, it has exercised restraint around political

Non-Judicial Restoration

Legislative restoration is another option that may inspire less skepticism than strict constitutional construction or judicial restoration.¹⁵⁰ This approach does not require any change to the Marshall Trilogy or judicial philosophy. Rather, it leaves the plenary power doctrine as settled policy. It proposes that Congress may exercise its broadly-conferred powers by legislating full sovereignty restoration as a general act or a series of specific acts.¹⁵¹ Some may find this option more attractive because it seems more feasible than a judicial sea change. Congress, after all, unlike the Court, has more ardently supported tribal self-determination during the last thirty years during the “self-determination period.”¹⁵²

Affirmative congressional action may be desirable for two additional reasons:¹⁵³ first, shifting Indian policy-making back to Congress returns Indian advocates into an arena in which they may actually win in the near future¹⁵⁴—or at least not lose as badly, and second, it offers

sensitive issues, such as voting rights. *See, e.g.,* Northwest Austin Municipal Utility District No. 1 v. Holder, (June 2009) available at <http://www.supremecourt.gov/opinions/08pdf/08-322.pdf> (declining to rule on the constitutionality of congressional authority to require federal election oversight over certain jurisdictions deemed to have a history of minority voter suppression).

¹⁵⁰ *See* Lara, 541 U.S. 193 (2004) (Souter, J. dissenting) (stating that there are only two ways that tribes can re-gain sovereign powers—express congressional delegation or repudiation of the diminished sovereignty doctrine).

¹⁵¹ *See* Tweedy, supra note 49, at 702-711 (proposing that divested powers that may be congressional restored are reinstating tribal tax authority on fee lands, reinstating zoning authority on all on-reservation fee lands, and reinstating criminal jurisdiction over non-Indians who live and are intimately involved with an Indian).

¹⁵² The self-determination era is widely described by scholars and historians as beginning in 1961 until present. *See* CASES AND MATERIALS ON FEDERAL INDIAN LAW 215-257 (David H. Getches, Charles F. Wilkinson, & Robert A. Williams, Jr. eds., West Group 1998).

¹⁵³ I should qualify this paragraph by making clear that I do not believe that non-Indians have the moral right to determine Indian policy in its democratic system either through direct electoral vote or in-direct congressional action. Given the limitations at hand, however, there seems to be few options for persistent, strong advocacy. Lobbying is a short-term solution, and even an essential part to the inevitable transition, from tribal control to full sovereignty.

¹⁵⁴ *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267, 281 (providing an extremely powerful graph displaying favorable Supreme Court decisions for tribes from the 1958 to 2000 terms dropping from 80% to below 20%).

more hands-on Indian policy shaping and the opportunities for ingenuity. Its main disadvantage is that while Congress may be willing to restore limited tribal sovereign powers, it is virtually unwilling to wholesale cede its own power, especially without widespread non-Indian constituent support.¹⁵⁵ Any significant political windfall leading to a full-fledged restorative measure is a tall order even as national American Indian organizations continue to aggressively advocate for tribal sovereignty.¹⁵⁶ Nonetheless, the legislative reform remains an important piece of the larger land liberation puzzle.

Robert Porter offered another suggestion. Porter recommended that advocates lobby President Obama to use his executive authority to do Indian justice.¹⁵⁷ He reminded advocates that the Executive should not be an overlooked resource. A progressive administration *should* be put into a position to exert some of its power. He urged policy advocates to pressure the President to issue executive orders to restore tribes, transfer tribal land, and direct other executive powers toward land liberation. Further, he pointed out that it was a low-risk political

¹⁵⁵ Political pragmatism is a source of heated controversy among Indian law scholars known as the “Rob-Bob Debate.” See Robert A. Williams Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1986)(criticizing plenary power as inherently detrimental to tribal sovereignty and well-being, which must be reversed to approach Indian self-determination); Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams’ Algebra*, 30 ARIZ. L. REV. 413 (1988) (refuting Professor Williams’ claim that plenary power is inherently detrimental because plenary power is not absolute and harmful to the degree that Congress engages in sovereignty divestiture); Robert A. Williams Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence’s Learning to Live With the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439 (1988) (responding to Professor Laurence’s defense of the plenary power doctrine as tolerant of the belief that American Indian Nations will never reclaim their fundamental human rights to self-determination).

¹⁵⁶ Unfortunately national Indian advocates have been put on the defensive due to anti-Indian Supreme Court rulings in the last ten years. See, e.g., National Congress of American Indians, Tribal Sovereignty Protection Initiative, <http://www.ncai.org/index.php?id=29&type=123> (describing a multi-faceted campaign designed to promote tribal sovereignty through legislation affirming tribal jurisdiction power, grassroots education for tribal governments, media awareness effort, and fund-raising to support efforts). See also the Native American Rights Fund (NARF) Tribal Supreme Court Project, <http://www.narf.org/sct/supctproject.html> (describing an effort to coordinate tribal advocacy to best fight tribal sovereign divestment).

¹⁵⁷ See DC Indian Law Conference, *supra* 19.

maneuver, as executive orders tend to be more discrete ways to establish administration-favored policies.¹⁵⁸ Most important, while acknowledging that executive power is limited to that which is necessary to achieve political emancipation,¹⁵⁹ presidential leadership does sets the tone for other leaders, advocates, and players to seriously consider the land liberation vision.

The fundamental problem, however, is that under the plenary power doctrine Congress or the President can change their minds at the stroke of a pen. Sovereignty with strings, in other words, is really no sovereignty at all. It is difficult to accept the something-is-better-than nothing rationale when the value of freedom is contingent on its facilitation of enabling a person to achieve what one wishes. Given the highly-politicized nature of the American Indian legal canon, it seems precarious to rely on the judiciary to do Indian justice. Moreover, advocates cannot lose sight that the very vision of land liberation is that non-Indians should not dictate Indian life or justice.¹⁶⁰

If the American Indian liberation memory—one that invokes pre-colonial freedom—is is real, then it cannot be realized through an ephemeral, political fiction. In the same way, if the historical memory it is real, it cannot disappear because of outsiders’ denials. So to the extent that provisional sovereignty helps Indian people (as opposed to tribal elite) then it is part of the liberation vision. The challenge is to ensure that full emancipation remains in sight. The ideal

¹⁵⁸ President’s issuance of executive orders on Indian affairs, especially reservation-related affairs, is a long-time practice. *See, e.g.*, GOVERNMENT PRINTING OFFICE, SIXTY-FIRST ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS TO THE SECRETARY OF INTERIOR 1892 876-878 (1892).

¹⁵⁹ The Executive branch, from the President’s executive order power to administrative agency statutory enforcement, contains a vast and deep source of power related to tribes. *See generally* Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 B.Y.U. J. PUB. L. 1, 25-138 (2004) (carefully detailing the wide array of trust responsibilities which fall under the B.I.A.).

¹⁶⁰ The attempt to re-center federal Indian policy to affirm Indian autonomy is distinct from Sen’s contention that communities do not live exist in isolation. The federal government may still maintain a relationship with Indian sovereigns, if sovereigns still choose, but this possibility is much different from the compulsory, guardian-ward relationship.

political and legal solution to the plenary power problem, therefore, lies in all three strategies, to mediate imperialist histories with modern realities. Once legal liberation is achieved, the next question—one of functional liberation—then centers our attention.

The Loss of Trust Problem

The second major land liberation hurdle is the “loss of trust” problem. This problem manifests the real consequences of an imperialist occupier’s withdrawal¹⁶¹ in three ways: strained access to essential resources, internal consensus-building, and outsider predation. Each of these challenges is vital to address because the residual impact of withdrawal is potentially great. The inherent risks are undeniably present but there are means that may mitigate the severity of the transition. Liberation, in a Capability Theory context, must be viewed as the continual means to preserve Indian homeland prosperity. In other words, freedom becomes a continuum from which choosing the course of action is equally important to realizing a tribe’s capacity to freely survive. Tribes, when referring to land liberation, must be given a true opportunity to once again exist as sovereigns, however, such an opportunity must be meaningful.

Strained Access to Essential Resources

Adequate federal government appropriations to tribes are a cornerstone to its modern fiduciary and land trust responsibilities.¹⁶² The National Congress of American Indians’ (“N.C.A.I.”) fiscal year 2010 budget reported a need for billions of dollars for housing, education, economic development, historic preservation, tribal governance and other

¹⁶¹ America’s occupation in Iraq is a prime example about the risk of deterioration after external occupation and its subsequent withdrawal. See Markus E. Bouillon, Ben Rowswell & David M. Moore, *Looking Ahead: Preventing a New Generation of Conflict* in IRAQ: PREVENTING A NEW GENERATION OF CONFLICT 297 (Markus E. Bouillon, Ben Rowswell & David M. Moore eds. 2007) (explaining that the fragile-state under Saddam Hussein’s leadership fell into chaos after external military “intervention,” which remains today a fragile or failed state) (quotations inserted).

¹⁶² See NATIONAL CONGRESS OF AMERICAN INDIANS, INDIAN COUNTRY FY 2010 BUDGET REQUEST 1, *available at* http://www.ncai.org/fileadmin/Final_Budget_Doc.pdf.

infrastructural support.¹⁶³ The tangible consequences of sudden, federal-funding stream closure are dire when considering that Indian Country has experienced economic conditions comparable to the Great Depression for the last 12 *decades*.¹⁶⁴ Land liberation, therefore, can be seen as the Ultimate Termination policy without careful consideration.¹⁶⁵ Its impact—intended or not—could be tantamount to a self-effacing starvation plan for many tribes. The United States’ federal government’s trust dilemma arises from a centuries-old legacy of compulsory tribal dependency. As the federal government has consistently abrogated its trust duty and continues to do so despite a renewed commitment to self-determination, federal investment into Indian Country is then necessary and obligatory as a form of reparative relief.

Tribes are entitled to United States reparative relief based on the federal government’s *current and on-going* trust abrogation as well as decades of past grievances resulting from broken promises. Two specific promises come to mind: the government’s general trust duty to support tribes for their land secession¹⁶⁶ and its fiduciary duty to serve as trustee for land and other resources. The federal government has abrogated its general trust duty to support tribes as reflected in budget cuts in recent years, yielding an under-funding and termination of vital Indian

¹⁶³ *Id.* (although the budget does not contain a total budgetary figure, “billions” is an estimate from the Executive Summary expenditures).

¹⁶⁴ *Id.* at 8.

¹⁶⁵ There are two meanings to “termination” in this context. In addition to the literal “termination” discussed in this section, “termination” may also take on a more abstract meaning, such as the Termination Period (1945-1961) whereby Congress expressly tried to assimilate Indians into non-existence. Robert Odawi Porter has argued that Indian assimilate-to-terminate agenda undergirds all of various federal government policies over the years. *See* Robert Porter, *supra* note 51.

¹⁶⁶ “Secession” is a slippery word in the American Indian historical context. This point will be discussed later. But trust abrogation has been a consistent pattern in the federal government regardless of the party in power. *See* DELORIA & LYTLE, *supra* note 77, at 181.

programs.¹⁶⁷ Similarly, the federal government has proven to be an irresponsible fiduciary trustee that is unable or unwilling to effectively police itself.¹⁶⁸ For example, the Obama Administration finally settled the well-known Cobell case,¹⁶⁹ the longest running trust mismanagement class action lawsuit in U.S. history, in the breath-taking amount of 1.4 billion dollars.¹⁷⁰ The Secretary of Interior is accused of mismanaging oil, gas, and grazing royalties of individual Indian beneficiaries since 1887.¹⁷¹ The United States' ability to ignore its trust obligations, and yet, maintain substantial control¹⁷² over tribes and tribal affairs is unmerited and inequitable at best. Indian reparations, therefore, should compensate tribes for previous funding shortfalls and continued programmatic funding deficit.¹⁷³

¹⁶⁷ See NATIONAL CONGRESS OF AMERICAN INDIANS, ANALYSIS OF PRESIDENT'S FY 2009 BUDGET REQUEST 1 (Feb. 5, 2008) available at http://www.ncai.org/fileadmin/08_014_budget_analysis1.pdf (citing a potential 8.2% budget cut for fiscal year 2009 alone).

¹⁶⁸ See Juliano, *supra* note 86.

¹⁶⁹ Cobell v. Salazar, No. 08-5500 (D.D.C. 2009) available at http://www.cobellsettlement.com/docs/accounting_revived.pdf.

¹⁷⁰ Rob Capriccioso, *Obama administration moves to settle Cobell*, INDIAN COUNTRY TODAY (Dec. 8, 2009) at <http://www.indiancountrytoday.com/home/content/78778397.html>.

¹⁷¹ *Id.*

¹⁷² For instance, the Cobell settlement is not finalized until Congress passes authorizing legislation, which to-date, has not been completed. See *id.*

¹⁷³ This view may stand in contrast to prevalent views that long-standing Indian claims are inherently "ancient." See *Sherrill v. Oneida*, 544 U.S. 197 (2005) (holding that the equitable remedy of laches applied to Indian claim for tax exemption of a land parcel purchased from city within reservation boundaries) ("Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. And at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders") (Ginsburg, J.) *Id.* at 203.

Reparations are also due for past destructive policies which have impaired tribal existence¹⁷⁴ and economic growth. N.C.A.I. has recently requested funds for “land consolidation” in the meager amount of 145 million dollars over six years.¹⁷⁵ Land consolidation is intended to correct the disastrous late nineteenth century allotment policy¹⁷⁶ administered from 1871-1928 which fragmented 130,000 land tracts among 4 million ownership interests.¹⁷⁷ Tribes are precluded from productive land use without owner permission; consequently, purchasing land rights is imperative for the future reservation infrastructural economy.¹⁷⁸

Finally, reparative relief is due to concretize the federal government’s official apology to American Indians issued in late 2009.¹⁷⁹ President Obama signed the “Native American Apology Resolution” in December, which is, on one hand, a tremendous symbolic victory for tribes. On the other hand, the apology was discretely rolled into a defense spending bill to which the administration drew no attention.¹⁸⁰ The resolution included a disclaimer stating that it should

¹⁷⁴ Indian tribal leaders and law scholars have discussed at-length the need for Indian genocidal redress. *See, e.g.*, American Indian Movement Grand Governing Council, *Press Release: Resolution of Apology* (Sept. 21, 1994) AIM WEBSITE available at <http://www.aimovement.org/moipr/resolution.html>. *See also* Bradford, *supra* note 23, at 8-10. It is important to remember Indian ethnic cleansing in American history; however, I decline to engage in this discussion in this article because scholars have thoroughly documented and advocated for redress.

¹⁷⁵ *See* INDIAN COUNTRY FY 2010 BUDGET REQUEST, *supra* note 162 at 31 (explaining that the American Indian Probate Reform Act authorized this amount until FY 2010).

¹⁷⁶ The 1887 Dawes Act provided for allotment of tribal land to break-up the tribal land base. Allotment established reservations in severalty to individual tribe members as a means to “civilize” tribes through the adoption of individual property ownership and to open up land for white settlers. *See* CASES AND MATERIALS ON FEDERAL INDIAN LAW, *supra* 141. *See also* S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 71-88 (1973).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 32.

¹⁷⁹ Rob Capriccioso, *A sorry saga*, INDIAN COUNTRY TODAY (Jan. 13, 2010) at <http://www.indiancountrytoday.com/archive/81343107.html>.

¹⁸⁰ *See* Rob Capriccioso, *Obama signs apology to Native Americans, but doesn’t say it out loud, nor issue announcement*, TRUE/SLANT, at <http://trueslant.com/robcapriccioso/2010/04/27/obama-signs-apology-to-native-americans-but-doesnt-say-it-out-loud-nor-issue-announcement/> (observing that the administration issued no press releases and have not agreed to a public ceremony as pushed by its Republican sponsor, Sen. Brownback).

not be construed as supportive of any legal claims against the United States government.¹⁸¹

Reparative relief offers an earnestness that is absent in the administration's disposition thus far. It is far from hush-money, as some may say. Paired with land liberation or steps toward it, reparations signal a true tide toward tribal self-determination.

Reparations can also take several forms—monetary restitution, land restoration, and rehabilitative relief, for example. Each reparation form is appropriate for a particular claim class. Reparations, in other words, is neither a “one-size-fits-all” curative step nor the only step within land liberation. Indeed, the provision of diverse reparative relief is critical step toward land liberation because it meets the multitude of existing needs among tribes and tribal members.

Monetary restitution is appropriate for treaty breach damages and interest.¹⁸² Tribal land dispossession largely took place through formal mechanisms such as treaties rather than through brute force.¹⁸³ Scholar Nell Jessup Newton qualifies that although some treaties resulted from “arm's length negotiations” that the majority were executed through fraud, duress and under other dubious conditions.¹⁸⁴ While some tribes have brought successful contractual claims to federal courts, many more cases have been unsuccessful.¹⁸⁵ Moreover, individual claims do not

¹⁸¹ See Capriccioso, *supra* note 179.

¹⁸² It should be noted that 5th Amendment Takings Clause does not apply to American Indian land claims; therefore, no interest is awarded to these claims. See Howard M. Friedman, *Interest on Indian Claims: Judicial Protection of the Fisc*, 5 VAL. U. L. REV. 26, 46 (1970).

¹⁸³ See *cf.* FATHER FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: A HISTORY OF POLITICAL ANOMALY 6 (1994) (“In fact, even though in the beginning the treaties were of diplomatic nature—being negotiated by separate political powers dealing with each other on grounds of rough equality—very soon the United States came to negotiate treaties from a position of overwhelming strength”); Newton, *supra* note 26, at 458.

¹⁸⁴ *Id.* at 459 (arguing that such conditions blurred the line between consent and coercion in treaty and other land deal-making).

¹⁸⁵ See, e.g., Lone Wolf, 187 U.S. at 553.

reflect the aggregate material and emotional harm from treaty breaches or wrongful treaty agreements that resulted in widespread displacement and death.¹⁸⁶

Land restoration, for similar reasons, is appropriate to provide equitable remedy for treaty breaches and congressional policies that facilitated land takings. There are, of course, many practicalities that emerge from restoring tribal title in large areas of land but feasibility does not necessarily detract from the legal entitlement, and certainly from the political-moral entitlement.¹⁸⁷ It was attempted before through the Indian Claims Commission but due to numerous factors, including the Commission's limited tenure and remedial power, it did not effectuate its potential to achieve land liberation.¹⁸⁸

Lastly, rehabilitative relief is necessary for tribal stabilization.¹⁸⁹ Tribes may benefit from in-kind resources that will enable tribes to restore customary (or other) legal systems, commercial infrastructure, and environmental preservation efforts, in addition to monetary restitution and land restoration.¹⁹⁰ The United States may offer expertise, experience, and other

¹⁸⁶ See *supra* note 61 and accompanying text.

¹⁸⁷ I do not mean to suggest that complete land restoration may not be desirable to Indians or non-Indians for a variety of reasons. The “how much” question is one that is informed by Capability Theory, however. Capability Theory may suggest that the area of land restored should approximate that which allows tribes to meet their present and anticipated needs.

¹⁸⁸ See Sandra C. Danforth, *Repaying Historical Debt: The Indian Claims Commission* (Note), 49 N.D. L. REV. 359, 402 (1973) (stating that the narrow concept of “just redress” set as the Commission’s mandate was inconsistent with the meaning of losses to many claimants).

¹⁸⁹ See William Bradford, *supra* note 23, at 61 (noting that Justice as Restoration theorists call for rehabilitative measures designed to “nurture the capacity of victim groups to engage in meaningful self-determination”).

¹⁹⁰ See, e.g., Richard Walker, *New technology used for genetic analysis of salmon*, INDIAN COUNTRY TODAY (Mar. 9, 2009) available at <http://www.indiancountrytoday.com/archive/40960437.html>. Tribal members are also trailblazing with technological breakthroughs. See Ron Selden, *Blackfeet Entrepreneur delivers the latest computer technology*, INDIAN COUNTRY TODAY (Oct. 2003) available at <http://www.indiancountrytoday.com/archive/28179964.html> (reporting about a Blackfeet member who founded Crew Technology Systems to help tribe members learn about cutting-edge computer software). Technological transmission among tribes and the United States should be dialectal relationship like with other countries and nations across the world.

technical knowledge desired by some tribes, which should be made available due to the federal government's role in dismantling once functional tribal systems.¹⁹¹ Rehabilitative relief may alleviate many tribal governments' pressures to generate income in a way unlike the other two reparative forms.

The material "loss of trust" problem must be put into perspective. The United States has *never* satisfactorily fulfilled its trust responsibility and is least likely to do so during recessionary times.¹⁹² The federal government continues to nominally support tribal sovereignty and at the same time, continues to undermine tribal sovereignty under its legal and bureaucratic systems. This contradictory position, defined by forced tribal dependency, correlates with the United States' political solemnity about tribal sovereignty. Once the United States becomes serious about tribal sovereignty it can ensure a careful and adequate tribal transition to full sovereign nationhood, primarily through material means. While tribal sovereignty—tribes' status as a free and independent nations—is not contingent on United States' willingness to fulfill its political, legal, and moral obligations, tribes are no less entitled to it, and they should no less demand it, as a matter of justice.

The material "loss of trust" problem will ultimately depend on each tribe's economic circumstances and leadership if the United States fails to take the momentous step toward reparative relief. Given that the United States continues to cut tribes' funding, however, seeking full sovereignty may be more of a political calculation of risk than a mathematical calculation of

¹⁹¹ See Indian Reorganization (Wheeler-Howard) Act of 1934, *supra* note 151.

¹⁹² The foreseeable U.S. deficit is a significant concern to many people, especially Congress. See Lori Montgomery, *Senate panel approves budget plan with more cuts than Obama's*, WASH. POST (April 23, 2010) available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/22/AR2010042205134.html> (reporting President Obama's proposed non-defense spending "freeze").

dollars. The political calculus may add up for some tribal leaders—current (dire) economic conditions plus potential revenue-generation with sovereignty status may be greater than a future of steady federal cutbacks and limited revenue-generation as quasi-sovereigns. Political risk will reach a different outcome for others, particularly if economic opportunity and federal cooperation have proven to be a lucrative match.¹⁹³ The key point from this section's discussion is that tribes should be able to choose their economic destinies, especially if either outcome leads to scarcity and deprivation. At least full sovereignty, for many tribes, will offer a brighter, freer future.

Internal Consensus-Building

The internal consensus-building issue is mostly one of procedural justice. There are inherent ontological tensions between self-determination and the pursuit of independent sovereign status. How can a single sovereign or a collection of sovereigns determine for another sovereign that it must establish its independence to fully enjoy its political and legal sovereignty? Or alternatively, how can a single sovereign or collection of sovereigns preclude another sovereign from its independence? Quite simply, neither scenario should be possible but it is the former question that is of most significance to the “loss of trust” problem. This tension between self-determination and status is among the biggest challenges for the land liberation vision: how to provide the option of full, independent sovereignty without imposing it onto tribes?

Importantly, tribes must possess the political-will to pursue political emancipation.

Emancipation cannot legitimately be thrust onto tribes because the United States determines it

¹⁹³ Some tribes have substantially profited from Indian gaming, for example. The Foxwoods Resort is the most visible Indian gaming “success story.” See, Paul Grimaldi, *Economic indicator: Gambling revenue up at Foxwoods*, PROVIDENCE JOURNAL online (May 11, 2010) available at <http://newsblog.projo.com/2010/05/foxwoods-celebrates-milestone.html> (reporting that Foxwoods earned 61.6 million in March which is a 1.3 percent revenue increase from a year ago).

should be so. Such an outcome directly contradicts self-determination at its core. Nor can the United States federal government decide which internal consensus process tribes ought to use. It has made this mistake before and it yielded bad results.¹⁹⁴ Scholar, Rob Dickinson, describes the conceptual meaning of self-determination from a legal perspective:

Secession is the ultimate potential result of self-determination, although not the only one, and may be defined as ‘the separation of part of the territory of a State carried out by the resident population with the aim of creating a new independent State or acceding to another existing State.’ While secession is just one of the panoply of outcomes that may pertain under the concept of self-determination, it is the one with the most far-reaching consequences, although secession is not of itself a right of self-determination. External self-determination through secession may be contrasted with internal self-determination, which may be seen as a protection of the right ‘of national or ethnic groups within the state to assert some degree of ‘autonomy’ over their affairs, without giving them the right to secede.’ Internal self-determination can therefore be understood as ‘forms of self-government and separateness within a state rather than separation (so-called ‘external’ self-determination) from the state.’¹⁹⁵

The layered meanings of self-determination are also sufficiently inter-related that it is difficult to untangle its practical meaning. An external self-determinative right to secede implicates the internal self-determinative right to decide whether to secede and how to do so, for example. A rational evaluation does not offer much guidance.¹⁹⁶

¹⁹⁴ See Duane Champagne, *Remaking Tribal Constitutions: Meeting the Challenges of Tradition, Colonialism, and Globalization* in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 18 (Eric D. Lemont ed. 2006) (“Colonists and the American government have often tried to remake tribal governments in their own images. Finding Native government too decentralized, with too many local authorities and leaders, and consensual decision-making processes too slow, deliberate, and cumbersome for their tastes and needs, early European and American agents worked to establish more centralized authorities and to discourage traditional government forms and political processes”).

¹⁹⁵ See *Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet*, 26 ARIZ. J. INT’L & COMP. L. 547, 548 (2009) (internal citations omitted).

¹⁹⁶ See MARC WELLER, *ESCAPING THE SELF-DETERMINATION TRAP* 154 (2008) (noting that the external and internal self-determination distinction is slowly dissolving due to a number of “innovative” settlements that re-define the meaning of self-determination in a post-colonial context).

International law does not smooth this tension either, especially regarding indigenous peoples' rights.¹⁹⁷ The International Labor Organization (ILO) Convention 169 states that a people's right to self-determination excludes secession.¹⁹⁸ Further, the UN Declaration on the Rights of Indigenous Peoples' Article 3 declares that that indigenous people reserve the right to "freely determine their political status," yet Article 46 explains that nothing in the declaration should be viewed as an authorization or endorsement of action against the territorial unity of states.¹⁹⁹

Interestingly, American Indians may be a unique position under international law for two reasons. First, American Indians have always been viewed at least nominally as political sovereigns, not ethnic minorities,²⁰⁰ therefore, if tribes succeed in land restoration—in a legal sense—then territorial unity is not threatened. Second, this provision should be read against a backdrop of the United Nation's goal to avoid "breaches of peace."²⁰¹ The likelihood of widespread physical violence seems low. Even the United States will not engage in a violent onslaught against tribes that opt for a changed political status for the entire world to see in the age of digitized media. It seems, at the very least, that American Indian tribes may be able to use

¹⁹⁷ Many observers have noted the biting irony that self-determinative (minority) rights are declared in international instruments that are written, affirmed, and approved by nation-states. *See, e.g., id.* at 32 ("The right to opposed unilateral secession stands in obvious tension with the claim to territorial integrity and unity of existing states. Governments have enshrined the doctrine of territorial unity in countless international declaration and other instruments often tied to, or twinned with, declarations concerning self-determination.")

¹⁹⁸ *Id.* at 24-25 (2008).

¹⁹⁹ *Id.*

²⁰⁰ *See supra* note 101 and accompanying text.

²⁰¹ *See* Ronald Thomas, *The Distinct Cases of Kosovo and South Ossetia: Deciding the Question of Independence on the Merits and International Law* (Note), 32 FORDHAM INT'L L. J. 1990, 1993 (2009) (explaining that a similar tension embedded in the U.N. Charter must be read against a historical background of the United Nation's goal to prevent violence, particularly regarding disputes over self-determination and territorial integrity).

the Declaration as a guiding source for legitimization in its emancipation pursuit even if its self-determination definitions remain murky. Advocates must keep in mind, as well, that all international law instruments are by-products of political compromise, which are subject to change as political winds change.

Nonetheless, land liberation should encompass a classical self-determination definition without legal qualification. In this spirit, tribes should enjoy multiple pathways by which they *can* choose to assert their sovereignty. The Puerto Rico Democracy Act of 2010²⁰² is an interesting model. It provides for a two-part plebiscite²⁰³ (the first on whether Puerto Rico should seek out a different political status and the second listing four political statuses from which voters should choose).²⁰⁴ American Indian tribes, unlike Puerto Rico, vary in customary and modern governance so that a majority voting system may not be appropriate for all tribes.²⁰⁵ Instead, the bill is a reminder that there are a variety of sovereign statuses from which to choose.

The Puerto Rico Democracy Act of 2010 lays out four status options in the second plebiscite: independence, sovereignty in association with the United States, statehood, and

²⁰² See H.R. 2499 111th Congress (April 30, 2010) available at <http://thomas.loc.gov/cgi-bin/query/D?c111:4:./temp/~c111Av785Y::>

²⁰³ BLACK'S LAW DICTIONARY (8th ed. 2004) ("A binding or nonbinding referendum on a proposed law, constitutional amendment, or significant public issue" or within international law, "[a] direct vote of a country's electorate to decide a question of public importance, such as union with another country or a proposed change to the constitution.")

²⁰⁴ *Id.*

²⁰⁵ See DELORIA, JR., & LYTLE, *supra* note 77, at 15 ("While a number of opportunities for Indian revitalization were initiated under the IRA, its promise was never fully realized. The era of allotment had taken a heavy toll on the tribes. Many of the old customs and traditions that could have been restored under the IRA climate of cultural concern had vanished during the interim period since the tribes had gone to the reservations. The experience of self-government according to Indian traditions had eroded and, while the new constitutions were akin to the traditions of some tribes, they were completely foreign to others").

commonwealth.²⁰⁶ As with the full sovereignty discussion earlier, each status assumes various sovereignty “ebbs” along a continuum, from independence being the “highest ebb” to commonwealth (its present status) being the “lowest ebb.” Commonwealth status is the most questionable under international law,²⁰⁷ which is very similar to tribal quasi-sovereignty. It vests substantial self-governance powers to Puerto Rico but the federal government claims to reserve plenary power over Puerto Rico.²⁰⁸ Unlike tribes, however, the federal government elects not to exercise its legal right as a matter of “legislative grace,” although the United States retains its power.²⁰⁹ Based on this imprecision, some view Puerto Rico’s political status as more akin to a colonial than a sovereign entity,²¹⁰ and thus, argue that Puerto Rico ought to seek a different sovereign status, including full independence.²¹¹

Sovereignty with association is perhaps the most curious and least well-known choice among the options. It is perceived as an intermediate status between statehood (integration into the United States) and independence.²¹² Sovereign powers are divided between an associate body and a principal body (United States) and the associate body drafting and implementing its own constitution without external interference.²¹³ While this may be a viable option for Puerto Rico, it

²⁰⁶ See PUERTO RICO DEMOCRACY RESTORATION ACT, *supra* note 202.

²⁰⁷ See Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico’s Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1127 (2009).

²⁰⁸ *Id.* at 1143-1144.

²⁰⁹ *Id.* at 1144.

²¹⁰ *Id.* at 1147-1149.

²¹¹ *Id.* at 1192.

²¹² Gary Lawson & Robert D. Sloane, *supra* note 207, at 1138.

²¹³ *Id.* at 1138-1139.

may not appeal to some tribes which experienced the Indian Reorganization Act (“I.R.A.”). This political status seems precariously close to it, though without constitutional template, because the theoretical absence of external interference, considering American Indian history, may not actually bear out in reality.²¹⁴ Other tribes, on the other hand, may be drawn to this choice because it is the closest status that preserves self-determination short of full political emancipation. Ultimately, tribes should elect to choose their political status, among these choices and all others as consistent with international law, in the matter in which they choose.

The political will “loss of trust” problem is a complex one, from a legal perspective, particularly if it were pursued without the United States’ consent. Should the United States consent or tribes exercise civil disobedience,²¹⁵ the tough theoretical question becomes how can all parties proceed while preserving tribal self-determination? The central value implicit in this analysis is choice. There are a plethora of reasons why tribes may choose to remain as quasi-sovereigns or seek a different status whether it is sovereignty with association, independence, or something else.²¹⁶ Tribes ought to reserve a choice in status and a choice in how to achieve internal consensus regarding the status issue. There may be concerns about elite or majoritarian control but it is no more a concern than it is with any other sovereign. This does not mean that I dismiss these claims but it means that they are not any more exceptional, and therefore, should not alone preclude addressing the political status question. Internal consensus should remain fundamentally internal with as little external interference as possible.

Outsider Predation

²¹⁴ See DELORIA JR. AND LYTLE, *supra* note 77.

²¹⁵ See Robert Porter, *supra* note 33.

²¹⁶ I excluded “Commonwealth” from this list because there is a compelling case that this status is no more than a colony which is now rejected by modern international law.

Another “loss of trust” concern is outsider predation. “New” nation-states, particularly ones experiencing transition from secession, often exhibit political and economic vulnerability, ripe for internal or external exploitation.²¹⁷ External exploitation, by one nation-state or another, is the subject of intense ethical and political concern in international law. Encroachment by states and individual non-Indians over emancipated tribes is a serious concern in this context, and it is an issue that warrants critical examination.

State encroachment over tribes is a specific and unique concern that arises based on tribes’ historical relationship with states.²¹⁸ The historical tribal-state relationship derives from an early federal protectionist policy articulated in *Worcester v. State of Georgia*.²¹⁹ Justice Marshall declared federal plenary power over Indian affairs to avoid a thorny patchwork of state dealings with Indians during the early treaty-making years and to assert federal supremacy over states during the Supreme Court’s infancy.²²⁰ The *Worcester* decision attempted to insulate the

²¹⁷ These political and economic vulnerabilities vary, yet international development scholars are yet to fully understand the determinants for “successful” states. See S.C.M. Paine, *Introduction* in *NATION BUILDING, STATE BUILDING, AND ECONOMIC DEVELOPMENT: CASE STUDIES AND COMPARISONS* 3 -5 (S.C.M. Paine ed. 2010) (arguing that intuitive assumptions about likely determinants do not bear out in actual case studies). State encroachment is a particularly interesting issue in the context of America’s early beginnings when the early republic was vulnerable to external forces, political self-implosion, and state rebellion. See JAMES ROGER SHARP, *AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS* 31-52, 72, & 92-112 (1993).

²¹⁸ See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 178-184 (1999) (describing various tribe removal tactics employed by the State that culminated into an Executive removal order issued by President Taylor in 1850 that the State later unsuccessfully argued abrogated the tribe’s usufructuary rights); *Rice v. Olson*, 324 U.S. 786, 789-792 (1945) (emphasizing the long federal law history of preventing state jurisdiction over Indians and holding against Nebraska in its claim that the Indian defendant implicitly waived his constitutional right to counsel during burglary trial).

²¹⁹ 31 U.S. (6 Pet.) 515, 561 (1832) (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States”).

²²⁰ *Id.* at 571 (“Where, by the constitution, the power of legislation is exclusively vested in congress, they legislature for the people of the union, and their acts are as binding as are the constitutional enactments of a state legislature on the people of the state. If this were not so, the federal government would exist only in name. Instead of being the

Indian Commerce Clause against Georgia’s challenge, which was established to correct an Articles of Confederation defect that failed to prohibit state interference with tribes, by declaring federal pre-emption over Indian affairs.²²¹ Subsequent cases re-affirmed what one scholar calls the “deadliest enemies” model²²² of tribal-state relations.²²³ This adversarial relationship between states and tribes is the traditional perspective once embraced by courts, Congress, and legal scholars.

More recent examples of tribal-state collaboration, however, are complicating this historical picture. Some tribes and states have embarked on joint initiatives to solve common problems, such as cross-deputization of law enforcement officers, and specialized, concurrent jurisdiction courts for domestic violence and substantive abuse.²²⁴ Similarly, some tribes and states have cooperated well under the Indian Child Welfare Act (“I.C.W.A”) with the implementation of indigenous-based practices to settle tribal-state child welfare disputes.²²⁵ In

proudest mounment [sic] of human wisdom and patriotism, it would be the frail memorial of the ignorance and mental imbecility of its framers”).

²²¹ See David H. Getches, *supra* note 154, at 269 (“In *Worcester v. Georgia*, Marshall traced the origins of the clause, from the colonies’ motives for including a provision dealing with Indians in the Articles of Confederation to the later embodiment of congressional power over Indian affairs in the Commerce Clause.”).

²²² See Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 42 TULSA L. REV. 73 (2007) (arguing that the anti-state, federal plenary power regime is an antiquated model in light of the demonstrated cooperation between tribes and states regarding contract execution). See also Frank Pommersheim, *supra* note 32, at 49 (explaining that more recent self-determination jurisprudence does not unilaterally reject or invite state encroachment but suggesting instead that the Supreme Court responds more positively to “defensive” sovereignty claims than to “offensive” sovereignty claims).

²²³ See, e.g., *Williams v. Lee*, 358 U.S. 217 (1959) (holding that Arizona lacked jurisdiction over a civil lawsuit brought by a non-Indian against an Indian for actions arising on reservation land).

²²⁴ See, e.g., *Cross-deputization helps solve jurisdictional issues in Oklahoma*, INDIAN COUNTRY NEWS (May 28, 2007) available at http://indiancountrynews.net/index.php?option=com_content&task=view&id=603&Itemid=109 (citing examples of successful collaboration resulting from Chickasaw 28 cross-deputization agreements over reservation that spans 13 counties); Hon. Korey Wahwasscuk, Hon. John P. Smith, Hon. John R. Hawkison, *Building A Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction*, 36 WM. MITCHELL L. REV. 859 (2010).

²²⁵ See Remarks of Justice Michael F. Cavanaugh, *State Court Administrative Office—Court Improvement Program*, 89 FEB. MICH. B. J. 23, 25 (2008).

some instances, tribes and states are initiating ways in which they can better serve their mutually-affect citizens, while in other instances, tribes and states seek to improve compulsory relationships springing from comprehensive, federal Indian legislation, like I.C.W.A.

The most notable example of tribal-state collaboration, however, is Indian gaming,²²⁶ which was ushered in by the Indian Gaming Regulatory Act (“I.G.R.A.”)²²⁷ enacted in 1988. The twenty-six billion industry²²⁸ brought jobs and much-needed revenue to many tribes, providing funding for schools and other social service programs suffering from federal cuts.²²⁹ Over 200 tribes operated 350 gaming establishments in thirty-states in 2005.²³⁰ It is undoubtedly “big business” that some scholars believe presents an opportunity for full tribal sovereignty.²³¹

Indian gaming has at least nuanced the today’s tribal-state relations. Tribal-state cooperation, after all, is an appealing choice during a period when non-federal jurisdictions face

²²⁶ See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48 (1996) (“Congress passed the Indian Gaming Regulatory Act in 1988 in order to provide a statutory basis for the operation and regulation of gaming by Indian tribes. The Act divides gaming on Indian lands into three classes-I, II, and III-and provides a different regulatory scheme for each class. Class III gaming-the type with which we are here concerned-is defined as “all forms of gaming that are not class I gaming or class II gaming,” § 2703(8), and includes such things as slot machines, casino games, banking card games, dog racing, and lotteries”) (internal citations omitted).

²²⁷ 25 U.S.C. § 2719.

²²⁸ National Indian Gaming Commission, *NIGC Announces 2007 Indian Gaming Revenue Revenues* (June 18, 2008) available at <http://www.nigc.gov/ReadingRoom/PressReleases/PressReleasesMain/PR93062008/tabid/841/Default.aspx>.

²²⁹ See Suzianne D. Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311, 318-319 (2010).

²³⁰ STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, *INDIAN GAMING & TRIBAL SOVEREIGNTY* 8 (2005). It is also worth noting that Indian gaming only makes up one-fourth of the gambling industry, an industry that has also grown enormously in the past two decades. *Id.*

²³¹ *Id.* at 7 (arguing that economic stability derived from gaming may allow tribes to more fully assert their full sovereignty by, in essence, eliminating the material “loss of trust” problem).

similar limitations from budget deficits.²³² Experts, Andrew Light and Kathryn Rand argue that the Indian gaming phenomenon represents a series of compromises—some bore out of mutual agreement between tribes and states and many more through federal and state imposition.²³³ Tribal-state relations are no longer arms-length, adversarial relationships as much as they are perhaps close rivalries.

Some others argue, however, that Indian gaming is a new phenomenon that it has simply re-vitalized an *old* concept: tribal-state compacts and collaborative agreements.²³⁴ Gaming revenue-sharing compacts arguably represent a more positive turn in tribal-state relations from protracted jurisdictional battles of the last hundred years that often led to tribal loss.²³⁵ Ironically, it is I.G.R.A. that severely cripples tribal self-determination, which requires state and local municipal revenue-sharing, yet pursuant the Supreme Court *Seminole Tribe* decision, failed to authorize tribes to sue states that fail to negotiate compacts in “good faith.”²³⁶ As Wendell Chino, Chairman of the Mescalero Apache, and Roger Jourdian, Chairman of the Red Lake Band of Chippewa generally warned in 1987 before I.G.R.A.’s passage: “the implementation of any gambling act would infringe upon the sovereign rights of the Indian nations.”²³⁷

²³² *See id.* at 8 (nothing that nontribal jurisdictions benefit from tribal casinos because states and nearby non-Indian communities accrue “extensive economic and social benefits”).

²³³ *Id.* at 2.

²³⁴ See Matthew L.M. Fletcher, *supra* note 60, at 81-83.

²³⁵ *See* Oliphant, 435 U.S. at 191; Hicks, 533 U.S. at 353; Lara, 541 U.S. at 193.

²³⁶ *See* *Seminole Tribe of Florida*, 517 U.S. at 44 (invalidating the I.G.R.A. provision allowing tribes to sue states that fail to negotiate in “good faith” under the theory that the Eleventh Amendment state sovereign immunity cannot be waived by Congress). *See also* Ezekiel J.N. Fletcher, *supra* note 25.

²³⁷ Tim Giago, *Tribes Have Traded Sovereignty Rights for Casino Profits* in INDIAN GAMING AT ISSUE 42 (Stuart A. Kallen ed. 2006).

I.G.R.A. may be regarded as a double-edged sword for tribal sovereignty, fatally sharp on both sides. In terms of Indian gaming and tribal relationships, the federal government may be an unnecessary “middle man” detrimental to tribes despite the Congress’ intentions to anticipate gaming regulatory and revenue battles.²³⁸ It is also possible, on the other hand, that the federal government’s preemptory action was a constructive way to afford tribal economic development, save for its statutory defect regarding state sovereign immunity. It remains unclear to exactly assess the impact on gaming on tribes. Yet it has shown innovation is undeniably at the helm of tribal-state relations.

The broader question is whether recent tribal-state “success” stories translate into the silencing of state encroachment fears for all or even most tribes? The answer to this question is probably not. States may no longer be tribes “deadliest enemies” but many states are cooperative only insofar that they exercise power over tribes.²³⁹ Forced tribal dependency through I.G.R.A. compels tribal leaders to make another set of difficult, unpredictable choices: to venture in gaming to raise desperately needed revenue to cure devastating poverty in exchange for sovereignty; to march down the road to sovereignty for the purposes of making short-term compromises; or to refuse the potential pot of gold entirely.²⁴⁰ I.G.R.A., in its present form, is

²³⁸ See Raymond Cross, *De-Federalizing American Indian Commerce: Toward A New Political Economy for Indian Country*, 16 HARV. J. L. & PUB. POL’Y 445 (1993) (arguing that federal de-regulation will help foster private entrepreneurship among tribal members and with private industries).

²³⁹ LIGHT & RAND, *supra* note 230, at 149 (stating that I.G.R.A. sacrificed tribal rights for states’ rights by requiring state consent for Indian gaming; however, the invalidation of I.G.R.A.’s “good faith” control significantly harms tribal interests and sovereignty). See also Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MAR. L. REV. 971 (2007).

²⁴⁰ Interestingly, Navajo Nation, the largest tribal Nation residing within the United States, voted twice against gaming until 2004 but now seems poised to begin entering the gaming scene. See Felicia Fonseca, *1st Navajo gaming chief say tribe still can cash in*, NEWS FROM INDIAN COUNTRY (September 2007) available at http://indiancountrynews.net/index.php?option=com_content&task=view&id=1437&Itemid=33. Despite this development, many tribes have not benefited from gaming and the ones that do substantially vary in revenue generation. See LIGHT & RAND, *supra* note 198, at 91 (reporting that tribal casinos in California and Connecticut accounted for nearly 40 percent of the industry’s revenue); see also LIGHT & RAND, *supra* note 198, at 138-140

not the model for tribal-state relations. State encroachment remains a persistent problem in light of state abuse of tribes and political disenfranchisement resulting from the industrialization of Indian gaming.²⁴¹

The rise of states' rights jurisprudence and political rhetoric is of particular concern for tribes with long-term aspirations for full sovereignty restoration.²⁴² Some conservative forces have mounted public campaigns against gaming-enriched tribes, arguing that they are "abusing" their sovereignty or gain an unfair advantage over private businesses because of their tax-exempt status among other sovereign "benefits."²⁴³ These charges are, of course, unfounded, as they are seldom based on any knowledge about Indian law, tribal-state relations or Indian Country conditions, yet it illustrates non-Indians' reluctance to embrace tribes' exercise of sovereign autonomy (to the extent that it exists). States, political creatures driven by sometimes misguided public pressure, cannot be trusted to simply leave tribes alone should they become independent sovereigns.

(noting disparate perceptions regarding whether gaming has raised tribes to expected prosperity levels). *But see* Jacob Coin, *Most Native Americans are Not Profiting from Gaming*, INDIAN GAMING AT ISSUE 14-21 (Stuart A. Kallen ed. 2006) (noting that while a small number of tribes have grown rich from gaming, and that despite the "rich Indian" myth, many Indians remain impoverished who still relying significantly on state as well as federal welfare programs). Others have raised non-sovereignty concerns with gaming, including crime escalation. *See generally* EARL L. GRANOLAS & DAVID B. MUSTARD, CASINOS, CRIME AND COMMUNITY COSTS (2005) available at <http://www.maine.com/editions/2006-05-15/images/20060531000107C.pdf> (finding that over time casinos increase crime rates in local counties in which 8 percent of all country crime is attributable to casinos alone).

²⁴¹ LIGHT & RAND, *supra* note 230, at 149.

²⁴² *See generally* David Getches, *supra* note 154, at 273-287 (explaining the Rehnquist's Court departure from basic Indian law principles for its application of an expansion of states' rights policies); Kirk Johnson, *States' Rights Is Rallying Cry for Lawmakers*, N.Y. TIMES (Mar. 16, 2010) available at <http://www.nytimes.com/2010/03/17/us/17states.html>.

²⁴³ *See, e.g.*, Jan Golab, *Tribes Abuse Their Sovereign Status to Avoid Government Regulation* in INDIAN GAMING AT ISSUE 44-53 (Stuart A. Kallen ed. 2006); Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 OREGON L. REV. 175, 209-218 (stating that many non-Indians believe that their property values are negatively affected by Indian land ownership because title is ultimately reserved in the federal government, which is a presumption held by the Supreme Court in the *Oneida* case, despite evidence to the contrary).

Yet there seem to be few options for state constraint. The likely pitfall for state constraint options is that they will resemble tribes' historical relationships with the federal and state governments. If tribes are considered special sovereigns, for example, with full or limited state relations, then state encroachment is a potential problem, especially for smaller tribes.²⁴⁴ If tribes are considered more like foreign sovereigns, then the federal government must lord over tribal-state relations to reign-in non-compliant states but risk over-reaching so that relations may more resemble its present quasi-sovereign relationship.

Perhaps any diplomatic experimentation should err toward a special sovereign model with some sort of federal mechanism that simultaneously monitors states and restricts federal authority over tribes and includes close international oversight for a specified duration after tribal sovereignty is established. The final consensus on how to constrain state encroachment will require much more attention than the short discussion in this article. Nonetheless, state encroachment remains a very authentic and chilling reality for the land liberation vision.

Land Liberation as a Path toward a Free World

We must not become confused... There is no such thing as military power; there is only military terrorism. There is no such thing as economic power; there is only economic exploitation. That is all that it is. They try to program our minds and fool us with these illusions so that we will believe that they hold the power in their hands, but they do not... The Power... We are an extension of the Earth; we are not separate from it. We are a part of it... The Earth is a Spirit, and we are an extension of that Spirit. We are Spirit. We are Power. They want us to believe that we have to believe in them and depend upon them, and we have to assume these consumer identities, and these political identities, these religious identities, and these racial identities. They want to separate us from our Power.²⁴⁵

- John Trudell of the American Indian Movement

²⁴⁴ Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281, 1300-1305 (1995) (arguing that geographical characteristics and tribal membership have influenced Supreme Court decisions defending state attempts to dismantle tribes, shrink Indian land, and claim governmental authority over tribal members, such as in *Oklahoma Tax Commission v. Sac and Fox Nation*).

²⁴⁵ *We Are Power* in THE INDIGENOUS VOICE: VISIONS & REALITIES 738 (Roger Moody ed., 1988).

Indeed, the concentration on the transcendental approach has had, I would argue, a seriously negative effect on practical discussion of justice in general and global justice in particular. We can think of many changes that would manifestly advance world justice as we see it, without getting us to a ‘perfectly just world.’... Thus, the theory of justice, as formulated in this transcendental approach, reduces many of the most relevant questions of justice in the world as being simply inadmissible when they would seem to be the most strongly needed. This is a pity: when people across the world agitate to get more global justice, they are not clamoring for some kind of ‘minimal humanitarianism.’²⁴⁶

- Amartya Sen

Justice is something more than reparations, land restoration, or apologies. It is simply the possibility of living a peaceful and free life. Colonialism—its physical, cultural spiritual, and psychic violence—has made this possibility even harder, though not impossible, for many American Indians. Neo-liberalism, once believed to deliver justice, has merely transformed into neo-colonialism. It will take the firm commitment to justice, from all people, to escape this destructive cycle. As Chippewa-American Indian activist, Winona La Duke said, “[w]e can no longer say, ‘it’s too bad that those things are happening to those people, but it couldn’t happen to us.’”²⁴⁷ Unrealized justice is the lock of the shackles that all communities wear.

A full appreciation of justice is to understand the plenary power and “loss of trust” problems. Each problem presents its own set of solvable legal and political challenges. They are ones that bear transformative potential should the opportune conditions arrive. Opportune conditions do not appear, however, they are made. Plenary power, advocates must remember, is a man-made construct that can also be unmade. Advocates must remember, too, that the tribal-United States’ trust relationship was never real, but a shadow of a promise, that ought to be fully

²⁴⁶ *Global Justice* in GLOBAL PERSPECTIVES ON THE RULE OF LAW 62 (James J. Heckman, Robert Nelson & Lee Cabatingan eds. 2010).

²⁴⁷ “*A Nation Divided cannot become self-sufficient*” in THE INDIGENOUS VOICE: VISIONS & REALITIES 624 (Roger Moody ed., 1988).

realized or not. The superficial humanitarianism myth, expressed by Amartya Sen in this section's epigraph, is a dangerous fiction that should no longer placate justice-seekers. Justice is whole and pervasive like the air we breathe, and like the metaphysical water in which the fish of nyaya swim.

Robert Porter's land liberation vision, from legal and political perspectives, inspires advocates to think critically and creatively about these challenges and their aims. This vision, paired with Capability Theory, center four ethical values: dynamism, pluralism, flexibility, and responsiveness. Each land liberation-inspired idea should nurture these four values in its justice pursuit. Similarly, land liberation strategy should view each pursuit from a Realist position in which every effort symbolizing a tool designed to dismantle the colonists' weapon: the separation of people from Power. In more concrete terms, as Indian advocates fight for legal justice, they can also re-shape the very bureaucracy created to control Indians.

This section intended to lay out a Capability-centered, theoretical discussion within a land liberation visionary context, generally. The last section intends to further explicate several possibilities in the human-rights and global justice contexts.

Part IV. Capability-Centered, Land Liberation Possibilities

What does all this mean for land liberation as a political strategy during a national and global transitory era? It may mean that tribes need fuller sovereignty to better address changing internal conditions and needs; that the United States must recognize all Native Nations, Bands, and Collectives, as existing, self-governing entities; and that international law and the international community must play a more effectual role in demanding indigenous justice. These necessary changes should ultimately lead to land restoration, reparative relief, and potentially political emancipation, to reach tribal-United States co-extensive sovereignty. There is no single

road to take but there are several possibilities within reach. In this section, I deliberately focus on concrete Executive and Congressional action that can facilitate land liberation. As mentioned earlier, I argue that the appropriate role for non-Indians in the land liberation vision is serving as allies, which translates into demanding Indian justice from the non-Indian powers-that-be alongside Indian advocates. The following section contains several briefly-discussed ideas that speak to this point.

What the President Can Do

President Obama can assert his power as Chief Executive to do Indian justice. There are at least two Department of Interior directives that he can issue by executive order that are consistent with the land liberation vision.

First, President Obama can expedite federal tribe recognition petitions. The federal tribe recognition process is widely acknowledged as broken.²⁴⁸ Only eight percent of currently recognized tribes have been approved through the Bureau of Indian Affairs (“B.I.A.”) regulatory process since 1960.²⁴⁹ Several hundred tribes are reportedly waiting on federal recognition, many of which will be unable to meet the rigorous criterion that requires extensive historical and anthropological data.²⁵⁰ The President should direct the B.I.A. to reform its regulatory rules to facilitate the recognition process, and set a deadline by which the B.I.A. must report to the White House of its progress before the end of the administration’s term.

²⁴⁸ See generally TESTIMONY OF THE NATIONAL CONGRESS OF AMERICAN INDIANS ON FIXING THE FEDERAL ACKNOWLEDGMENT PROCESS TO THE S. SEN. COMM. ON INDIAN AFFAIRS (Nov. 4, 2009)(Remarks of Frank Ettawageshik) available at http://indian.senate.gov/public/_files/FrankEttawageshiktestimony.pdf.

²⁴⁹National Congress for American Indians, *Federal Recognition*, <http://www.N.C.A.I..org/Federal-Recognition.70.0.html>

²⁵⁰ *Id.*

Second, President Obama should fully fund land consolidation and the protection of land use rights. The elimination of IIM accounts should substantially save the Office of the Special Trustee (“O.S.T.”) at the Department of Interior in administrative costs. The OST does not charge administrative fees for the 131,600 IIMs that carry \$15 or less, which OST claims often costs more in maintenance than the account itself. This funding and any Department of Interior discretionary funding should be re-directed to satisfy statutory-mandated spending for the land consolidation and land use rights’ protection programs. The National Conference for American Indians reports that the Trust National Resources and Real Estate Service Programs, requiring at least 19.2 million for water resource and rights protection, were at-risk for a one-fourth budget cut in 2010.²⁵¹ Moreover, the Rights Protection Program, which funds 49 tribes treaty and adjudicatory rights enforcement in the Pacific Northwest and Great Lakes regions, were at-risk for reduction to 2004 levels from approximately \$22.2 million to \$19.8 million, which is a 26 percent decrease.²⁵² The President should ensure that these programs are fully funded in the amount of at least \$41.4 million.

President Obama, the “change” champion, can do significant Indian justice without risking political capital.²⁵³ It is also apparent that the Executive’s powers are inevitably limited. The Executive is but one of three federal branches that handles Indian affairs. Still, at the same time, it is the most accessible for Indian advocates who have had variable success with Congress

²⁵¹ See NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* 162, at 30.

²⁵² *Id.* at 30-31.

²⁵³ President Obama has adopted a friendly posture toward Indian tribes. See NATIONAL CONGRESS OF AMERICAN INDIANS, RESOLUTION OF THE NATIONAL CONGRESS OF AMERICAN INDIANS ON PRESIDENT BARACK OBAMA’S FIRST ANNUAL MEETING WITH TRIBAL LEADERS: REAFFIRMATION OF THE NATION-TO-NATION RELATIONSHIP (Oct. 2009) available at <http://www.N.C.A.I..org/fileadmin/resolutions/PSP-09-008%20final.pdf>.

and courts in recent years. Perhaps President Obama's leadership can set a positive political tone in the years to come.

Other Possibilities

Congress is probably the other most accessible branch to Indian advocates.²⁵⁴ There were at least 65 Native bills introduced during the 111th Congress, most of which were pro-Native, including the Native American Business Development Enhancement Act of 2009, Unrecognized Southeast Alaska Native Communities Recognition and Compensation Act, Native Hawaiian Government Reorganization Act of 2009, Southeast Alaska Native Land Entitlement Finalization Act, and Job Creation Through Entrepreneurship Act of 2009.²⁵⁵ Most of these bills, however, did not have many co-sponsors, and many also died in committee. There does not seem to be any landmark Native or Indian sovereignty legislation on the congressional horizon.

Interestingly, the most important Native legislative development this year is a non-Native bill: the previously discussed Puerto Rico Democracy Act of 2010. Indian advocates, on the coat tails of this legislation's passage in the House, may demand a Sovereignty Taskforce to examine the unique issues faced by non-sovereign Nations and Peoples under United States legal control, including American Indian tribes, Native Hawaiians, Alaska Natives, Guam, American Samoa,

²⁵⁴ See, e.g., Rob Capriccioso, *A legislative lesson: The making of IHCIA 2010*, INDIAN COUNTRY TODAY (May 11, 2010) (stating that the reauthorization of the Indian Health Care Improvement Act in March may be "a possible precedent for how future pieces of major Indian law may proceed in Congress").

²⁵⁵ OFFICE OF HAWAIIAN AFFAIRS WASHINGTON BUREAU, *111th Congress Bills at a Glance*, available at http://www.oha.org/index.php?option=com_content&task=view&id=996&Itemid=253.

Midway Islands, U.S. Virgin Islands, the Federated States of Micronesia, and Puerto Rico.²⁵⁶

Although a taskforce alone may not actualize many concrete changes, it can facilitate a broader sovereignty discussion, which is essential to any congressional movement on American Indian justice.

Lastly, one of the most important congressional legislation for land liberation is American Indian Probate Act's Land Consolidation Program appropriation renewal. This Program's funding is set to expire this fiscal year.²⁵⁷ The Consolidation Program allows tribes to slowly re-build their land base short of an executive order or other congressional action on land restoration.

There is always, of course, non-conventional action toward land liberation. Tribal community leaders will continue to re-claim land²⁵⁸ and resist sovereignty divestment.²⁵⁹ I will not speculate on these possibilities because Indian community leaders can speak for themselves, and because, really, the possibilities are boundless. Indian liberation allies should be prepared to support the creative range of individual, communal, and collective action that may explode over the next decade.

²⁵⁶ U.S. GOV WEBSITE, http://www.usa.gov/Agencies/State_and_Territories.shtml (last visited May 11, 2010).

²⁵⁷ *See supra* note 162.

²⁵⁸ *See* Radical Seattle Remembers (posting), *March 8, 1970: Daybreak Star's Groundbreaking* (March 10, 2010) available at <http://radsearem.wordpress.com/2010/03/08/march-8-1970-daybreak-stars-groundbreaking/> (recounting when 100 protestors from the Seattle's United Indian People's Council (UIPC) occupied Fort Lawson as an attempt to reclaim land that was "up for grabs" but foreclosed as a location for an Indian cultural center by non-Indian officials).

²⁵⁹ *See* Associated Press, *American-Indians walk across U.S. for cause*, MSNBC (July 1, 2008) available at <http://www.msnbc.msn.com/id/25484434/> (reporting on the Longest Walk, an annual protest march to bring awareness to tribal sovereignty divestment).

Finally, a word on international law. Renowned international indigenous rights law scholar, S. James Anaya, convincingly argues that indigenous rights has “gained a foothold” within the human rights framework, in contrast to the normative nation-state sovereignty framework,²⁶⁰ by noting that some international systems have been welcoming to human rights demands from indigenous peoples.²⁶¹ Anaya advocates, despite the overture of critical voices about the prospect of change through international law,²⁶² a “realist interpretative” approach that supports the integration of indigenous rights into normative human rights standards, which increasingly considers claims against the norms of overall context, the body of larger international law, and the maximization of human rights (known as pro homine principle).²⁶³ The Realist trend is as promising as any local, regional, and national indigenous rights developments in the United States and elsewhere. Moreover, it approximates Sen’s “Impartial Spectator” mechanism that seeks to minimize the influence of vested interest and eradicate the impact of local parochialism. Mounting internal and external pressure for indigenous rights is the justice-making encompassed within the capability-centered, land liberation vision.

Conclusion

Land liberation is an ages-old struggle against American colonialism. It is not an original idea but one that is revitalized during a transitory period defined by justice. The new contributions by long-time, East Indian, justice-seeker, Amartya Sen, may lead the human rights movement into its twenty-first maturity, as American Indian pioneering intellectuals, like Robert

²⁶⁰ *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend* (Panel: Indigenous Rights, Local Resources, and International Law), 16 *COLO. J. INT’L ENVIL. L. & POL’Y* 237, 242 (2005).

²⁶¹ *Id.* at 243.

²⁶² *Id.* at 250-252.

²⁶³ *Id.* at 256-257.

Porter, attempt to place persisting American Indian tribes' justice demands into the human rights' era context. This article explained receding political philosophy justice theories; discussed their shared flaws with neo-liberalism and its demise; de-constructed Sen's emerging theory of justice; fleshed out an iteration of the land liberation vision and implications; and finally, offered a glimpse into concrete possibilities within the land liberation vision, toward the goal of situating the two visions as ones that are directed toward similar—not competing—aims. For in the words of one Native leader and Dene member, George Erasmus, “The only thing that is going to guarantee a new society is solidarity, allies who have a dialogue, who can learn from each other.”²⁶⁴

²⁶⁴ *The seed of something different* in THE INDIGENOUS VOICE: VISIONS & REALITIES 562 (Roger Moody ed., 1988).