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# THE LEGAL FICTION OF THE LAKE MATCHIMANITOU INDIAN SCHOOL

MATTHEW L.M. FLETCHER\*

## ABSTRACT

*Historians, political scientists, sociologists and lawyers, in their respective academic languages, have documented the history of the conquest of the indigenous peoples of the Western Hemisphere, especially those of North America. The histories end with the final dispossession of lands from Indians and their tribes. Despite more than five centuries of conquest, Indians and Indian tribes continue the struggle for survival in the modern era, while non-Indians, many of them politically and socially hostile, surround them. The stories of the conflicts that arise from the continuing interaction between Indians and non-Indians are usually told from the non-Indian perspective. As a result, Indian voices are rarely heard. As more and more Indians and Indian tribes succeed, the outcry of non-Indians demands becomes louder.*

*This Article is a fictional narrative of an Indian tribe that founded a grade school for the purpose of educating Indian students in an all-Indian setting with an all-Indian faculty. While the school starts from modest beginnings and becomes a spectacular success, non-Indians slowly and insidiously take over the school for their own purposes and begin educating non-Indian students. This story is an allegory of the European conquest of the Western Hemisphere.*

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In rethinking our history, we are not just looking at the past, but at the present, and trying to look at it from a point of view of those who have been left out of the benefits of so-called civilization. It is a simple but profoundly important thing we are trying to accomplish.<sup>1</sup>

The Lake Matchimanitou<sup>2</sup> Indian School accepted its first non-Indian student in the fall of 2010. He was a Caucasian male named Charles Cabel and he enrolled in the ninth grade. His family had petitioned members of the Lake Matchimanitou tribal council for three years, in order to convince them to enroll their son.<sup>3</sup>

The tribe chartered the school<sup>4</sup> under its own laws<sup>5</sup> and funded the school with the school's own revenues. The tribal council, which created

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1. See Howard Zinn, *Columbus and Western Civilization*, in THE ZINN READER: WRITINGS ON DISOBEDIENCE AND DEMOCRACY 479, 497-98 (Zinn ed., 1997) [hereinafter THE ZINN READER] (emphasizing the importance of viewing the world from multiple perspectives to develop a more complete understanding of the history of the United States).

2. See generally Matthew L.M. Fletcher, *The Legal Fiction of Gridiron Cowboys and Indians*, 2 INDIGENOUS PEOPLES' J.L. CULTURE & RESISTANCE (forthcoming 2005) [hereinafter *Gridiron Cowboys and Indians*] (relating the fictional story of Lake Matchimanitou's all-Indian football team and problems with the League), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=668102](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=668102) (last visited June 6, 2005).

3. Cf. THE ZINN READER, *supra* note 1, at 479 (citing George Orwell as stating "[W]ho controls the past controls the future. And who controls the present controls the past.").

4. See, e.g., *Legislature Should Close Bay Mills Loophole; End School Fight*, LANSING ST. J., Apr. 21, 2003, at A6 (highlighting proposed legislation to close a loophole that exempts Indian founded schools from the state cap on establishing charter schools); see also *Let Bay Mills College Continue to Improve Educations Options*, DET. NEWS, May 4, 2003, at A14 (explaining that charter schools are public schools and urging county leaders to halt a recent move of Bay Mills Community College from opening more schools); Dave Murray, *GVSU May Open [Two] Schools Using Loophole; If University Releases Control of Two Charter Schools to an American Indian Program, it Could Open Two More Schools*, GRAND RAPIDS PRESS, May 30, 2004, at A17 (describing how Grand Valley State University, with the assistance of an influential charter school company, tried to avoid the state cap by giving up control of two charter schools to an exempt community college in an attempt to authorize two new schools).

5. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 342-43 (1983) (holding that states cannot enforce their hunting and fishing laws on Indian reservations); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (holding that state law will not apply to Indian reservations if it interferes with the Indians' right to make their own laws and be ruled by them); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683, 685 (9th Cir. 1969) (holding that a state had no extradition jurisdiction over Indians on Indian lands); *Bowen v. Doyle*, 880 F. Supp. 99, 138-39 (W.D.N.Y. 1995) (enjoining state court proceedings regarding a tribal election dispute); *Quechan Tribe of Indians v. Rowe*, 350 F. Supp. 106, 110 (S.D. Cal. 1972) (holding that tribal hunting and fishing regulations pre-empted state regulations on Indian lands); *John v. Baker*, 982 P.2d 738, 765 (Alaska 1999) (holding that an Alaskan Native village had jurisdiction to decide an Indian Child Welfare case); *People v. McCovey*, 685 P.2d 687, 698 (Cal. 1984) (holding that the state could not prosecute a Hoopa Indian for violating state gaming laws on an Indian reservation); *In re Marriage of Skillen*, 956 P.2d 1, 15 (Mont. 1998) (holding that a state court had no jurisdiction over a custody action where both parents resided on an Indian reservation); *In re Guardianship of Sasse*, 363 N.W.2d 209, 211 (S.D. 1985) (holding that the state law of defalcation of a guardianship estate did not apply to Indian lands); *Wyoming ex rel. Peterson v. Dist. Court of Ninth Judicial Dist.*, 617 P.2d 1056, 1057-58 (Wyo. 1980) (holding that a state court had no jurisdiction over a tort claim arising on Indian lands).

the school five years earlier, had envisioned that the school would forever remain an option for Indian students to attend school with other Indian students and to receive instruction from Indian teachers. The tribe put up several million dollars, borrowed from neighboring tribes with adequate gaming revenues,<sup>6</sup> and hired a dozen Indian Ph.Ds and professors<sup>7</sup> (nobody knew there were even that many around) to teach sixth through twelfth grades at exceptional salaries. The tribal council promised that Lake Matchimanitou Ottawas could attend free of charge and that Indians from other tribes would pay hefty, “out-of-tribe” tuition akin to eastern private schools, and stated that non-Indians could not attend.<sup>8</sup> The tribal council (also the tribe’s board of education) advertised in national education and

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6. *E.g.*, *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Michigan*, 198 F. Supp. 2d 920, 926 (W.D. Mich. 2002), *aff’d*, 369 F.3d 960 (6th Cir. 2004) (describing the Grand Traverse Band’s gaming revenues); *Taxpayers of Michigan Against Casinos v. State*, 685 N.W.2d 221, 235 (Mich. 2004) (affirming the validity of gaming compacts between the Little Traverse Bay Band of Odawa Indians and the Little River Band of Ottawa Indians).

7. See William Asikinack, *Why Native American Studies? A Canadian First Nations Perspective*, in *AMERICAN INDIAN STUDIES: AN INTERDISCIPLINARY APPROACH TO CONTEMPORARY ISSUES* 111 (Dane Morrison ed., 1998) (citing a book chapter written by Anishinabe from Walpole Island First Nations Band in Ontario and Ed.D. student); Inés Hernández-Ávila, *The Power of Native Languages and the Performance of Indigenous Autonomy: The Case of Mexico*, in *NATIVE VOICES: AMERICAN INDIAN IDENTITY AND RESISTANCE* 35 (Richard Grounds et al., eds. 2003) (referring to a book chapter written by a Nez Percé and professor of Native American studies); Clara Sue Kidwell, *Ethnoastronomy as the Key to Human Intellectual Development and Social Organization*, in *NATIVE VOICES: AMERICAN INDIAN IDENTITY AND RESISTANCE* 5 (Richard Grounds et al., eds. 2003) (citing a book chapter written by a Choctaw/Ojibwe Indian and professor of American Indian studies); Henrietta Mann, *Earth Mother and Prayerful Children: Sacred Sites and Religious Freedom*, in *NATIVE VOICES: AMERICAN INDIAN IDENTITY AND RESISTANCE* 194 (Richard Grounds et al., eds. 2003) (referring to a book chapter written by a Cheyenne Indian and chair of Native American studies); Wayne J. Stein, *American Indian Education*, in *AMERICAN INDIAN STUDIES: AN INTERDISCIPLINARY APPROACH TO CONTEMPORARY ISSUES* 73 (Dane Morrison ed., 1988) (alluding to a book chapter written by a member of the Turtle Mountain Band of Chippewa); Vine Deloria, Jr., *Legislation and Litigation Concerning American Indians*, 436 ANNALS AM. ACAD. POL. & SOC. 86 (1978) (writing by Standing Rock Sioux Tribe member with degrees in science, theology, and law). See generally RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* (Univ. of Okla. Press 1975) (writing by an Osage/Cherokee Indian and law professor); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1990) (referring to a book written by Lumbee law professor); DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* (1997) (writing by Lumbee Indian and associate professor of American Indian Studies, political science, and law); Kirsten Matoy Carlson, Note, *Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies*, 101 MICH. L. REV. 569 (2002) (writing by University of Michigan Ph.D. student and member of the Cherokee Nation of Oklahoma); Donna Brown, *The Perceptions of Selected Tribal College Transfer Students Attending the University of North Dakota* (1995) (unpublished dissertation, University of North Dakota) (on file with author).

8. Cf. Matthew Fletcher, *The Village on the Sea*, 8 DUNES REV. 20, 20-21 (2003) (envisioning a past where Indians successfully prevented European explorers from establishing a presence in the Western Hemisphere). See generally *AMERICA IN 1492: THE WORLD OF THE INDIAN PEOPLES BEFORE THE ARRIVAL OF COLUMBUS* (Alvin M. Josephy, Jr. ed., 1991) [hereinafter *AMERICA IN 1492*] (exploring the rich law, culture and religion of Native Americans and the western world’s view of their inferiority).

Indian publications that they had the best collection of Indian teachers and intellectuals in the nation. Within weeks, the school began to field requests from Indian families and tribes from all over North America. Wealthy eastern and California gaming tribes<sup>9</sup> sent their best and brightest, paying the premium tuition with the pride of knowing that Indians with doctorates from schools like Harvard, Berkeley, Georgetown and Michigan would be teaching the children. The school started classes in four trailers located on the reservation next to the Pee Wee football field. Many of the out-of-tribe students lived with Lake Matchimanitou Ottawa families for the first year. This first year was an outstanding success. Five students won prestigious awards at the Inter-Lakes painting and writing competitions. The four seniors that graduated all moved on to Ivy League universities.

The next year was even more successful. The tribal council opened admission to all students who were eligible for membership in any American or Canadian tribe,<sup>10</sup> as well as indigenous peoples from all over the world.<sup>11</sup> Flush with more capital from the neighboring gaming tribes and from the improved tuition revenues, the school doubled in size of enrollment, moved into a brand-new building across the street from the football field, and hired a second group of Indian M.B.A.s,<sup>12</sup> lawyers<sup>13</sup> and

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9. *E.g.*, Connecticut *ex rel.* Blumenthal v. Dep't of Interior, 228 F.3d 82, 92 (2d Cir. 2000) (describing the Mashantucket Pequot Tribe of Indians' wealth as "tremendous"); Smith v. Babbitt, 100 F.3d 556, 557 (8th Cir. 1996) (noting that complaint alleged that an Indian tribe disbursed four-hundred thousand dollars a year in gaming revenues to each tribal member); Lincoln v. Saginaw Chippewa Indian Tribe of Michigan, 967 F. Supp. 966, 967 (E.D. Mich. 1997) (acknowledging that tribe distributed gaming revenue to its members); Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047, 1069 n.4 (N.Y. 2003) (Read, J., dissenting) (noting that Oneida Indian Nation's casino payroll exceeded seventy million dollars); *see also* K. Alexa Koenig, Comment, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U.S.F. L. REV. 1033, 1034 (2002) (indicating that, despite some moral objections, gaming has proved itself as the most effective route for Indians in overcoming a history of extreme poverty); Kathryn R.L. Rand, *There Are No Pequots on the Plains*, 5 CHAP. L. REV. 47, 85 (2002) (reviewing the history of tribal gaming and arguing that excessive regulation of tribal gaming inhibits tribal sovereignty, while failing to aid Indians suffering from poverty). *See generally* Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381 (1997) (comparing and contrasting the benefits and drawbacks of Indian gaming, and concluding that Congress, not individual tribes, should determine appropriate regulatory measures).

10. *Cf.* 25 U.S.C. § 1903(4) (1994) (defining "Indian child" as any unmarried person under eighteen who is enrolled in a federally recognized tribe, or who is the child of a tribal member and eligible for enrollment).

11. Indigenous peoples are found on every inhabited continent. *See, e.g.*, Mengistu v. INS, 175 F.3d 1015, 1999 WL 170091, at \*2 (4th Cir., Mar. 29, 1999) (mentioning Ethiopian indigenous peoples, members of the Oromo tribe); Southern Ocean Seafood Co. v. Holt Cargo Sys., Inc., 1997 WL 539763, at \*4 (E.D. Pa., Aug. 11, 1997) (mentioning the indigenous peoples of New Zealand, the Maori); Aldan v. Kaipat, 794 F.2d 1371, 1371 n.1 (9th Cir. 1986) (discussing the indigenous peoples of Saipan, the Chomorros, and the indigenous peoples of the Caroline Islands, known as the Carolinians).

12. *See, e.g.*, D.O.J., U.S. Attorney's Office of the W. Dist. of Mich. - Native Am., (listing a notice of contact information for June Mamagona Fletcher, a member of Grand Traverse Band of Ottawa and Chippewa Indians, who holds a M.B.A.), <http://www.usdoj.gov/usao/miw/native.html> (last visited July 3, 2005)

Ph.D.s as instructors. At this stage in the school's development, the tribal council received its first petitions from the non-Indian residents of Lake Matchimanitou County, including some of the same people that had voted to sanction the tribe's Pee Wee football team a few years earlier.<sup>14</sup> It was easy for the tribal council to turn the non-Indian residents down. Of course, there were threats of lawsuits, but the tribe's dedicated lawyer, Bryan Montana,<sup>15</sup> quelled the controversy by writing a letter to the non-Indian ringleaders informing them that the school did not receive any funds from the federal or state governments,<sup>16</sup> and that state and federal law would not restrict the school's policies. The nine graduates of the school that year moved on to colleges and universities around the globe.

During its third year, the school started winning national awards and received attention from the New York Times, CNN and Indian Country Today. Commentators marveled at how the tribe could effectively run a private school of that magnitude and prestige, especially given that the tribe could barely run its own government.<sup>17</sup> Some commentators noted that

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13. *E.g.*, John Petoskey, *Indians and the First Amendment*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 221 (Vine Deloria, Jr. ed. 1985) (citing to a book chapter written by a lawyer and member of the Grand Traverse Band of Ottawa and Chippewa Indians).

14. *See generally* *Gridiron Cowboys and Indians*, *supra* note 2 (relaying, in a fictional story, how non-Indians sought sanctions against the Indian team when they began winning against the non-Indian teams).

15. *See id.* at 12 (referring to the same fictional character who represented the tribe's Pee-Wee team against the League's decision to suspend the team).

16. *See* *Talton v. Mayes*, 163 U.S. 376, 382 (1896) (addressing the question of whether the Fifth Amendment to the Constitution applied to local legislation of the Cherokee nation that required a grand jury to initiate all prosecutions for offenses committed against the laws of the nation). The Court held that the Fifth Amendment restrains the power of the general government, rather than the power of the states. *Id.*; *see also* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 30-31 (4th ed. 2004) (relating a congressional commission's finding that the federal government should reject assimilationist policies with respect to Native Americans). Instead, the commission reaffirmed the status of tribes' status as permanent and self-governing institutions that qualify to receive financial aid. *Id.*; STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 281 (3d ed. 2002) (noting that Congress passed the Indian Civil Rights Act to protect individuals from certain abuses and in acknowledgement of "the unique political, cultural, religious, and financial needs of tribes"); WILCOMB E. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 173-93 (1971) (noting that in our nation's early history, courts denied Native Americans basic constitutional rights); Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1349 (1969) ("[I]ncreasing contact between the federal and tribal governments and the judicial tendency to expand constitutional protection of individual rights against governmental abuses casts doubt on the twin tenets of the constitutional immunity doctrine."). *See generally* *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that although Indian tribes are bound to follow the Indian Civil Rights Act, only tribal courts have jurisdiction over claims brought under the Act); Edward Lazarus, *Title II of the 1968 Indian Civil Rights Act: An Indian Bill of Rights*, 45 N.D. L. REV. 337 (1969) (exploring the ramifications of the Indian Civil Rights Act regarding the relationship between Indians and the federal government).

17. *See* Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899, 961 (1998) [hereinafter *A Proposal*] ("It is extremely expensive and inefficient for the Indian nations to remain dependent on the

there were some flaws, which were mostly minor. They whispered about the lax dress code of the students, the lack of published educational standards, and the lack of Asian, Black, Caucasian and Latino students, but nothing could dampen the school's success.

In the fourth year, the school started a few athletics programs like soccer, lacrosse and field hockey. Since few other northern Michigan schools offered these sports, the teams played intramural. This contributed to the isolation the school was beginning to feel from the Michigan educational system, as well as from the non-Indians of Lake Matchimanitou County.<sup>18</sup> During this year, Charles Cabel's parents petitioned the tribal council to allow their son into the school, offering to pay two or even three times the tuition for out-of-tribe Indian students. Though the council was hard-pressed to reject the offer—it would have helped to pay for the down payment on a new gymnasium—they politely rejected the offer. The Cabels moved on, but the tribal council's denial of Charles's enrollment ignited a debate within the school's faculty, the tribal council and the surrounding non-Indian community. Several members of the faculty were very impressed with Charles's grades and written work from Lake Matchimanitou High. They argued that diversity would be good for both the Indian students<sup>19</sup> and for the public relations of the school, which were

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United States."); see also Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 763-64 (2001) (arguing that tribal government economies are quasi-socialist and therefore very inefficient); Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What are the Issues?*, 7 KAN. J.L. & PUB. POL'Y 72, 78 (1997) (noting that in both large and small tribes, self-governance frequently leads to intra-tribal disputes); Rand & Light, *supra* note 9, at 422 (noting allegations that Indian tribal governments flush with gaming revenues become corrupt). But see Jessica A. Shoemaker, Comment, *Like Snow in the Spring: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 749-50 (arguing that the Bureau of Indian Affairs' inefficient system of "fractionation" causes tribal governments to rely, to their detriment, on an ineffective system of managing Indian lands); Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1820 (1968) (detailing the bureaucratic indifference and inefficiency of the Bureau of Indian Affairs and its impact on tribal governments).

18. Cf. John D. Barton & Candace M. Barton, *Jurisdiction of Ute Reservation Lands*, 26 AM. INDIAN L. REV. 133, 134 (2001) (explaining that the United States government's isolationist policy toward Indians stemmed from colonial attitudes that found English and Native American cultures incompatible).

19. See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body.").

[T]he Law School's admissions policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races. These benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more entertaining and interesting when the students have the greatest possible variety of backgrounds.

*Id.* at 330 (brackets, quotation marks, citations, and ellipses removed). *Contra* Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003) (arguing that the debate over diversity diverts concern with and efforts to "achieve racial justice"). See generally Mary Mack Adu, Brief of Amici Curiae on Behalf of a Committee of Concerned Black Graduates of ABA Accredited Law Schools: Vicky L. Beasley, Devon W. Carbado, Tasha L. Cooper, Kimberlé Crenshaw, Luke Charles Harris, Shavar Jeffries, Sidney Majalya, Wanda R.

starting to deteriorate.<sup>20</sup>

When Charles entered the school in 2010 for his ninth grade year, the local newspapers and television reporters followed him inside the school, trying to recreate the buzz surrounding the desegregation of the schools in the south; however, without the governor standing in the way and the National Guard pointing guns at people, the whole thing was a sham. Charles entered the school, which welcomed him with open arms.

Charles was a good kid. He was polite and respectful, but he was also ambitious and very competitive. When Charles enrolled, he was one of twenty-five ninth graders and one of about 175 total students in the school. About twenty of the students were Lake Matchimanitou Ottawas, about fifty more were Michigan Indians from the various Ottawa, Chippewa and Potawatomi tribes,<sup>21</sup> another twenty-five were Canadian Indians, mostly Ottawa and Chippewa, and about fifty were from out-of-state tribes.<sup>22</sup> The remaining students were indigenous peoples from Central and South America, New Zealand, Australia and Scandinavia.<sup>23</sup>

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Stansbury, Jory Steele, et al., in Support of Respondents, 9 MICH. J. RACE & L. 5 (2003) (arguing that the racial diversity in schools helps eliminate additional social divisions such as those of social status, experience, and access to wealth); Nancy E. Dowd et. al, Diversity Matters: Race, Gender, and Ethnicity in Legal Education, 15 U. FLA. J.L. & PUB. POL'Y 11 (2003) (describing how diversity promotes more interesting classroom discussion and better prepares students as professionals).

20. Cf. Michelle DeArmond, *Former Allies Oppose Tribes*, RIVERSIDE PRESS-ENTERPRISE, May 1, 2003, at A01 (explaining that tension arises when a community's willingness to allow Indian gaming clashes with their unmet expectations of Indian support for restrictions that protect children from gaming hazards); Andy Hall & Scott Milfred, *Tribe Accuses Legislators of 'Insulting' Tactics; Tensions Rose After GOP Gave Little Notice for a Hearing Today on Casino Deals*, WIS. ST. J., Feb. 27, 2003, at A1 (relating the deterioration of tribal relations where the Ho-Chunk Nation accused Wisconsin state legislators of "insulting, demeaning and disrespectful" tactics in handling casino gambling); A.J. Higgins, *Tribal-State Meeting Falls Apart Passamaquoddy's Walk Out in Bitter Response to Casino Vote*, BANGOR DAILY NEWS, Nov. 8, 2003, at A1 (demonstrating the tension between tribal leaders and state officials where Indians were denied the opportunity to open more profitable casinos); Lewis Sahagun, *Tribes Fear Backlash to Prosperity; Rapid Growth of Casinos has Come with Several Missteps, Causing Leaders to Worry About Erosion of Support That Could Put New Wealth at Risk*, L.A. TIMES, May 3, 2004, at B1 (expressing the fear among tribal leadership that rapid enhancement in the quality of life of Indians, due to gaming revenues, would generate community backlash).

21. See Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 68 FED. REG. 68180-01 (Dec. 5, 2003) (indicating that there are twelve federally recognized Indian tribes located within the state of Michigan). They are the Grand Traverse Band of Ottawa and Chippewa Indians, the Little Traverse Bay Bands of Odawa Indians, the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, the Huron Potawatomi, Inc., the Match-E-Be-Nash-She-Wish Band of Potawatomi Indians, the Bay Mills Indian Community, the Saginaw Chippewa Indian Tribe, the Sault Ste. Marie Tribe of Chippewa Indians, the Keweenaw Bay Indian Community, the Lac Vieux Desert Band of Lake Superior Chippewa Indians and the Hannahville Indian Community. *Id.*

22. See 68 FED. REG. 68180-01 (Dec. 5, 2003) (noting that there are over 560 federally recognized Indian tribes located within the United States).

23. See Mattias Ahrén, *Indigenous Peoples' Culture, Customs, and Traditions of Customary Law—The Saami People's Perspective*, 21 ARIZ. J. INT'L & COMP. L. 63, 65 (2004) (explaining that Saami indigenous people "inhabit an area divided by the borders of



Charles had his first fight with a tenth grade boy who was a member of the Saginaw Chippewa Tribe of Michigan. Usually, Charles went straight home after school and did not socialize with many of the Indian kids, who tended to live with local Indian families<sup>24</sup> or in the dormitory with other Indian students. The Chippewa boy, Mark Sales, had spoken up in their sociology class about the Indian boarding school<sup>25</sup> in Mount Pleasant, Michigan, which had housed his great-grandparents in the early nineteenth century.<sup>26</sup> He spoke ill of the Christian religion, drawing a conclusion that because the school had been run under the Christian rubric, the Christian faith must have informed or even mandated the beatings and abuse that took place at the school.<sup>27</sup> As a result, he decided that the Christian religion was patently unjust and borderline evil.<sup>28</sup> Other kids spoke up, including John Pack, whose grandfather had been beaten at a Catholic boarding school near the Little Traverse Bay Bands of Odawa Indians

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four countries: present day Finland, Norway, Sweden, and the Russian Federation"). See generally Lawrence Watters, *Indigenous Peoples and the Environment: Convergence from a Nordic Perspective*, 20 UCLA J. ENVTL. L. & POL'Y 237 (2001/2002) (discussing international law issues and the environment regarding the Nordic Sami Indians and their personal way of life).

24. Cf. *Yavapai-Apache Tribe v. Meija*, 906 S.W.2d 152, 161 n.2 (Tex. App. 1995) (citing Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 601 (1994)) (noting that prior to the passage of the Indian Child Welfare Act, "[eighty-five percent] of the Indian children removed from their homes were placed in non-native American homes").

25. See *New Rider v. Bd. of Educ. of Indep. Sch. Dist. No. 1*, 414 U.S. 1097, 1101 (1973) (Douglas, J., dissenting from denial of certiorari) (explaining that the Bureau of Indian affairs ran boarding schools).

Such schools were run in a rigid military fashion, with heavy emphasis on rustic vocational education. They were designed to separate a child from his reservation and family, strip him of his tribal lore and mores, force a complete abandonment of his native language, and prepare him for never again returning to his people.

*Id.* (citations and quotations omitted). See generally Linda LeGarde Grover, *Chi-Ko-koho and the Boarding School Prefect*, in *SISTER NATIONS: NATIVE AMERICAN WOMEN WRITERS ON COMMUNITY* 82 (Heid E. Erdrich & Laura Tohe eds., 2002) (describing, poetically, the fear of violence students felt toward their prefect if they ever "crossed his path"); Pamela J. O'Connor, *Squaring the Circle: How Canada Is Dealing with the Legacy of Its Indian Residential Schools Experiment*, 28 INT'L J. LEGAL INFO. 232 (2000) (describing Canada's policy of assimilating indigenous children through laws requiring Indian children to attend school).

26. See *THE TREE THAT NEVER DIES: ORAL HISTORY OF THE MICHIGAN INDIANS* 52-54 (Pamela J. Dobson ed., 1978) (describing the Mount Pleasant School, which was run like a military school where students received punishments so severe that scarring resulted from the beatings).

27. See DAVID E. STANNARD, *AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD* 217 (1992) (stating that Spanish conquistadors worked Indians to death, rather than feeding and caring for a long-term resident slave population, because it was the cheapest way to maximize profits). The European habit of indiscriminately killing Indian women and children was more than an atrocity; rather, it was genocide. *Id.* at 118-19.

28. See *id.* at 241 (describing how the New England colonists and religious elite referred to Indians as "ravenous howling wolves" and ordered followers to track, pursue and beat the Indians as the "dust in the wind," until they were "consumed").

reservation in Petoskey and Harbor Springs.<sup>29</sup> Charles, who was not a devout Christian, but who was a believer in Christian benevolence, confronted Mark in the parking lot after school. Although Charles had been fuming since the class discussion, he had felt surrounded by too many Indians to speak openly. Now, he wanted to tell Mark that not all Christians were evil and, without provocation, ended up punching Mark in the face three times and kicking him in the stomach after Mark fell. Charles, who had never been in a fight before, let alone started one, ran off, shocked at his own violence.<sup>30</sup>

The school principal refused to expel Charles; however, he did warn him that the school would not tolerate future violent outbursts. After a week's forced vacation, Charles returned to complete the school year with an earnest determination. While Charles was gone, the school's faculty discussed the incident, disturbed by the sudden violence in their midst. They argued over whether it was a good idea to admit a Caucasian student, whether diversity was necessary in Indian education, and how to proceed with a white student in their midst—a white student surprisingly prone to violence. The teacher in Charles's sociology class, a Ph.D. in sociology and a lawyer, held several classes where they negotiated a methodology for study and drew up a contract between himself, the Indian students and Charles. The Indian students agreed to provide Charles a space within the class to study and reflect on his own when he desired solitude. They also agreed to conduct a serious ceremony where they would incorporate Charles into the school, a formal institutional acknowledgment that their school had changed. Charles agreed to respect the Indian students' sometimes-painful family histories and their need to tell these stories.<sup>31</sup>

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29. See WILLIAM DUNLOP, *THE INDIANS OF HUNGRY HOLLOW* 131-40 (2004) (describing the abuses of the Catholic boarding school in Petoskey, where a priest used a horsewhip to beat students).

30. Cf. STANNARD, *supra* note 27, at 217 (noting that Bartolomé de Las Casas wrote about the Spaniard's atrocities committed against Caribbean Indians in order to protest against the European barbarism).

31. See ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800* 83-97 (1997) (discussing Indian treaties as "stories"); Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2296 (1989) (suggesting that "[n]o version of the American story gives full voice to Native Americans"); Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73, 118 (1999) (arguing that the "white man's" conception of Indian law "ignores that, like Europeans, Indians retained their own unique system of politics, diplomacy, and rituals to early encounters"); N. Bruce Duthu, *Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty Through the Lens of Native American Literature*, 13 HARV. HUM. RTS. J. 141, 165-66 (2000).

Placing Indigenous narrative texts . . . alongside the prominent legal texts in federal Indian law permits a greater degree of textual interrogation precisely because they recall the dialogic nature of intersocietal relations and help steer us away from simplistic, inaccurate, or incomplete tellings and retellings of this nation's many formative stories.

*Id.*; see also *Nevada v. Hicks*, 944 F. Supp. 1455, 1467 (D. Nev. 1996) ("If justice is a product of conversation rather than unilateral declaration, it is more likely to be achieved in

The instructor noted that long ago, Indians and whites negotiated treaties to define their rights and responsibilities with respect to one another and the land;<sup>32</sup> thus, preserving the peace and respect between their different cultures<sup>33</sup> by formalizing relations between them.<sup>34</sup> As everyone in the room knew that the white man broke each of these treaties,<sup>35</sup> this new treaty would be a step in the right direction. Perhaps, the instructor reasoned, they could get it right the second time.<sup>36</sup>

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the context of respectful dialogue rather than majoritarian conclusions about the 'other.'") (quoting FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 193 (1995)). See generally Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (examining the use of stories, parables, chronicles, and narratives to address the need for racial reform); DUNLOP, *supra* note 29 (discussing the stories of Michigan Ottawas growing up in Petoskey, Michigan); Matthew L.M. Fletcher, *Stick Houses in Peshawbestown*, 2 CARDOZO PUB. L., POL'Y & ETHICS J. 189 (2004) [hereinafter *Stick Houses*] (telling the stories of several generations of Michigan Ottawas in fiction); Matthew L.M. Fletcher, *The Legal Fiction of Standardized Testing*, 21 LAW & INEQ. 397 (2003) [hereinafter *Standardized Testing*] (relating fictional stories about several minorities required to take standardized tests for educational and professional purposes);

32. See POMMERSHEIM, *supra* note 31, at 40-41 (describing the use of treaties not only as the foundation for the relationship between government and tribe, but also as a "constitutional benchmark" in regards to Indian sovereignty within a democracy); DAVID E. WILKINS & K. TSINANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 117-42 (2001) (describing treaties as "covenants"); WILLIAMS, *supra* note 31, at 98-123 (discussing Indian treaties as "constitutions").

33. See Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1620 (2000) (citing WILLIAMS, *supra* note 31, at 47, 112) (explaining that Indians believed that the treaties between their respective tribes, the Europeans and the United States created sacred obligations between the groups and imparted duties of good faith and fair dealing). See generally POMMERSHEIM, *supra* note 31, at 11-36 (describing reservations that treaties created as critical to Indian sovereignty and cultural life); WILLIAMS, *supra* note 31, at 124-37 (discussing Indians' view of treaties in terms of trust, commonality, and fairness).

34. See, e.g., *Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1090 (2d Cir. 1982) (describing the Fort Stanwix Treaty of 1784 as a "peace treaty"); see also S. LYMAN TYLER, *A HISTORY OF INDIAN POLICY* 39 (1973) (describing treaties as conduits for military control of Indian tribes); WILLIAMS, *supra* note 31, at 62-82 (discussing Indian treaties as "connections" and protectors of peace).

35. See, e.g., Peter Jacques et. al., *Federal Indian Law and Environmental Policy: A Social Continuity of Violence*, 18 J. ENVTL. L. & LITIG. 223, 230 (2003) (explaining that when the government breaches a treaty, the breach severs the relationship between the Indian tribes and the government, as well as the human nature relationship between the Indian tribes and the land); VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 28-53 (1969) (discussing the many empty promises that the United States government made to Indian tribes); Ball, *supra* note 31, at 2303 (observing that "[t]he immediate default at issue in both *Sioux Nation* and *Lone Wolf* was a treaty violation"). The United States could and should have fulfilled its treaty obligations to Native Americans, but instead, it failed to do so. *Id.*

36. See Brief for Amici Curiae for Nat'l Cong. of Am. Indians et al., at 12-17, 20-27, *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003) (discussing law enforcement agreements between several states, localities, and Indian tribes); see also CANBY, *supra* note 16, at 19 (explaining that it is unlikely that the United States will get a second chance to honor its treaties with Native Americans since Congress banned the President from entering into additional treaties with Indian tribes in 1871). But see 25 U.S.C. § 4116(b)(2)(A) (requiring the federal government to follow the "negotiated rulemaking procedure" before implementing the Native American Housing and Self-Determination Act); Steven Paul McSloy, *Back to the Future: Native American*

Charles and the rest of the students related well for the rest of the school year. A pretty Mohegan girl from Connecticut named Stacy Rogers developed a crush on Charles and they would hold hands in the hallways.<sup>37</sup> Charles and Mark developed a strong friendship after a few weeks of looking at each other with wary eyes. Charles started playing soccer and led his team in goals that spring. The faculty praised the instructor who came up with the idea of the treaty, even though they had originally mocked him, given the actual purpose of most Indian treaties.<sup>38</sup>

A few weeks before the end of the school year in May, Charles stopped coming to class. After a few days of not hearing from the family, the principal called Charles's house to ask about the boy. Charles's father, a lawyer, answered the phone and explained that Charles had not been feeling well. He apologized for not calling in to explain Charles's absence. The principal gave his best wishes to Charles and offered to drop off some homework. Charles's father declined, rather emphatically, and said he would be by to pick up any assignments left for his son at the front desk of the school. Charles's mother and father had decided, upon reading up on autism and vaccinations, that the chance of their boy getting smallpox, polio, whooping cough or any of the classic childhood diseases and sicknesses was remote in comparison to the potential dangers of those diseases. Thus, they never had Charles vaccinated.<sup>39</sup> Presently, however, he had apparently contracted something the local doctors were unable to identify. Charles's parents were horrified they had somehow condemned Charles to an early death by not simply vaccinating the boy and were

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*Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 243 (1993) (explaining that in the 1870s, Congress did away with treaty making and instead used executive orders to define the scope of federal power within the Indian nations); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1102 & n.206 (2004) (recognizing that even if the executive branch technically cannot "direct the internal or external affairs of another nation," there still remains "residual powers" within the executive branch that effectively allow for the creation of favorable policies for certain Indian tribes). See generally TYLER, *supra* note 34, at 78-79; Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 50-51 (2002) (discussing how the 1871 law stripped the Indians of their treaty capacity by refusing to acknowledge Indian tribes as independent powers with whom the United States could contract by treaty); Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1 (2004) (examining the issues a state is confronted with when dealing with collection of taxes and an Indian tribes sovereign immunity).

37. See generally PAULA GUNN ALLEN, *POCAHONTAS: MEDICINE WOMAN, SPY, ENTREPRENEUR, DIPLOMAT* (2003) (describing the multifaceted life of Pocahontas, including her connections with Captain James Smith and the newly founded settlement of Jamestown).

38. See *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1251 (E.D. Wash. 1997) ("[T]he primary purpose in all treaties with Indians was to 'extinguish all Indian title and rights and acquire the land . . . .'").

39. See generally Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REF. 353 (2004) (analyzing the growing trend of complacency towards immunization in America).

reluctant to admit their mistake to the school and the community. When their doctor informed them that Charles was not contagious and could not have spread the illness—whatever it was—to anyone else, they decided to leave well enough alone and keep the school in the dark.<sup>40</sup>

However, it turned out Charles had a strain of the measles and he had spread it to other students before he came down with any symptoms. By the end of the school year, four Indian students, three of whom who had barely survived the massacres in Guatemala;<sup>41</sup> and a fourth, Mark Sales, were dead of measles. A dozen others were severely ill.<sup>42</sup> Federal officials shut down the school and quarantined the whole reservation. The deaths marked a disaster for the community. By the middle of the summer, Charles recovered, but the school did not invite him back for the fall semester.

In late summer of 2011, the tribal council learned that enrollment was expected to decline at the Indian school by nearly fifty percent. Although

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40. See *State v. St. Francis*, 563 A.2d 249, 257 (Vt. 1989) (Mahady, J., dissenting) (accusing the non-Indians of “[h]aving waged genocidal warfare against the native inhabitants of this continent . . .”); John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L. REV. 503, 519-20 n.138 (1991) (noting that Europeans intentionally gave blankets infected with smallpox to Indians, which often resulted in the devastation of close-knit tribal communities where quarantine was nearly impossible). *Contra* Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1145 (2000) (arguing that it is improbable that Europeans used smallpox as biological warfare because they had limited knowledge of infectious diseases). See generally Gloria Valencia-Weber, *The Supreme Court’s Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405 (2003) (describing the white settlers’ and traders’ practice of using blankets infested with smallpox when meeting with tribal opposition leaders).

41. See *Chanchavac v. INS*, 207 F.3d 584, 590 (9th Cir. 2000) (describing several reports of the Guatemalan military beating and killing Mayan Indians during Guatemala’s civil war). “For instance, on one occasion, the Guatemalan military threatened and attacked members of an Indian village who refused to report which villagers had family members who were killed by the guerrillas.” *Id.*; *Xuncax v. Gramajo*, 886 F. Supp. 162, 169 (D. Mass. 1995) (relaying the facts of the plaintiffs, Kanjobal Indians, who fled Guatemala as victims of abuses the Guatemalan military inflicted on them and their families via a campaign of torture, arbitrary detention, and executions). See generally HARVEST OF VIOLENCE: THE MAYA INDIANS AND THE GUATEMALAN CRISIS (Robert M. Carmack ed., 1988) (documenting the massacre of Guatemalan Indians and the Guatemalan military’s perpetuation of genocide against native populations).

42. See *Rice v. Cayetano*, 528 U.S. 495, 506 (2000) (detailing how the introduction of western diseases and infectious agents among Hawaiian peoples resulted in high mortality figures, death from common illnesses, and the spread of a devastating smallpox epidemic in 1853); *State v. McCoy*, 387 P.2d 942, 949 (Wash. 1963) (“The Indians of Puget Sound, unlike those of upper Columbia (Yakima and Nez Perce) were remnants of former large tribes; their numbers were depleted by smallpox and other diseases.”); *Parker Land and Cattle Co. v. Wyo. Game and Fish Comm’n*, 845 P.2d 1040, 1053 (Wyo. 1993) (noting that in 1853, the Indian agent at Fort Pierre reported a new grievance that developed among the Indians, the loss of many of their friends and relatives to smallpox, measles, and cholera); KIRKPATRICK SALE, *THE CONQUEST OF PARADISE: CHRISTOPHER COLUMBUS AND THE COLUMBIAN LEGACY* 33-46 (1990) (describing the disease and famine that was rampant in Europe at the time of the Columbian contact with Indians); STANNARD, *supra* note 27, at 57-147 (explaining that the introduction of European diseases among Native Indians in North America had a genocidal impact).

some of the decline was attributable to the students who contracted measles, the fear of more sickness was the major reason for the negative impact on the school's reputation. Without the tuition of at least seventy-five students, the tribal council would have to close the school. The tribal council prepared to announce the closing of the school when it received petitions from several local non-Indian families and other non-Indians from across the country that were eager to fill the empty slots. They were attracted to the amazing collection of educational resources available at the school. The fact that all the instructors were Indians mattered little to these potential applicants; instead, their primary concern was obtaining a high quality education from the nation's most qualified teachers. These new applicants were willing to come to the school, pay their own boarding, and pay three times the amount of tuition, effectively subsidizing the school until it could retain more Indian students. The tribal council was very wary of adding twenty-five more white students, especially after the disaster of enrolling just one. The all-Indian faculty was also wary, but those who had complained of a lack of diversity said that maybe this was a blessing in disguise. After a week of intense debate and assurances that the school would never enroll more than twenty-five non-Indian students out of its 175 slots, the tribal council agreed to enroll the petitioners. The faculty accepted that the action would save the school for future generations.<sup>43</sup>

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43. Cf. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 341 (1945) (explaining that the discovery of gold in California caused white settlers to populate Indian land, which resulted in the disappearance of game from the Indian's hunting grounds); *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1371 (9th Cir. 2000) ("On January 24, 1848, when James Marshall saw the sparkle of gold on the South Fork of the American River in northern California, the native population of California was about five times as large as the settler population. By September 4, 1850, when California became the 31st state, the settlers easily outnumbered the natives.") (citing BYRON NELSON, JR., *OUR HOME FOREVER: A HUPA TRIBAL HISTORY* 47 (1978)). See generally *Paul v. United States*, 20 Cl.Ct. 236, 240 (1990).

In 1880, the non-native population was less than 300, all but 30 of whom lived in Sitka. When the Citizenship Act was passed in 1924, Alaska natives comprised a majority of the population. It was not until 1939 that non-natives began consistently to outnumber Alaska natives. During and after World War II, increasing numbers of non-natives were attracted to Alaska by the prospect of economic development. By 1960, the approximately 53,000 Alaska natives accounted for only 20 percent of the total one quarter million people of Alaska.

*Id.*; STANNARD, *supra* note 27, at 122 (asserting that the United States government used white settlers to promote the eradication of Indians from the land); William L. Evans, *Who Owns the Contents of Ohio's Ancient Graves*, 22 CAP. U. L. REV. 711, 719 (1993) (suggesting that it was beneficial for settlers to buy land from Native Americans willing to sell land in order to avoid conflict) (citing FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 55 (Rennard Strickland ed., 1982)); Katharine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power*, 39 VILL. L. REV. 525, 580 n.337 (1994) ("Discovery of oil and abundant timber also lured many white settlers and profiteers to southwestern New York. By 1900, the Senecas were outnumbered five-to-one on the Allegany Reservation."); Valencia-Weber, *supra* note 40, at 407 (explaining that although the Indians outnumbered the Europeans' use of weapons and microbes reduced the power of the native people); Sarah B. Gordon, Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1451-52 (1985) ("The United States, Canada, and Australia, where the descendants of

The first semester went quietly and a couple dozen Indian students who had disenrolled came back for the second semester, bringing the number of students back to 125. Yet, the twenty-five non-Indian students, all of them white, rarely interacted with the Indian students; instead, they formed their own cliques right after coming back from the winter break. The students from Manhattan, cast-offs mostly from New York private schools, refused to even talk with any other white students. The local kids from the Lake Matchimanitou area retaliated by sneering and avoiding the other white students. A third Caucasian clique, the leftovers from other parts of the country, tried to act as peacemakers, but failed. The Manhattan students became known as the partiers and the local kids became known as the fighters. The third clique included the art house bunch. The Indian students almost faded from view as the faculty and the staff directed their attention to whichever conflict arose between the Caucasian cliques.<sup>44</sup> The all-Indian faculty and administration were not accustomed to dealing with hyperactive, hypersensitive, and sometimes outrageously violent students. By the end of the school year, the school was in tatters. The tribal council started talking about giving up the school by closing it for good. "Too many chumukmon,"<sup>45</sup> they said under their breath.

The faculty and the families of the Indian students vigorously opposed the school's potential closure. The students who graduated from the school went on to great colleges and did not succumb to the statistical prediction that they would drop out or flunk out.<sup>46</sup> The school created a great deal of

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European settlers far outnumber remaining native populations, all face the perplexing question of the legal rights of native minorities.").

44. Cf. SALE, *supra* note 42, at 31-33 (describing the violence that was rampant in European culture at the time of the Columbian contact with Indians); STANNARD, *supra* note 27, at 129-34 (describing the Sand Creek massacre). "The worst human holocaust the world had ever witnessed, roaring across two continents non-stop for four centuries and consuming the lives of countless tens of millions of people, finally had leveled off. There was, at last, almost no one left to kill." *Id.* at 146.

45. See CHARLES E. CLELAND, RITES OF CONQUEST: THE HISTORY AND CULTURE OF MICHIGAN'S NATIVE AMERICANS 150 (1992) (stating that Indian descendants of Algonquian refer to non-Indian Americans as "Chemokmon," which relates to the first terrifying encounters between Great Lakes warriors and American militias); see also EDWARD BENTON-BANAI, THE MISHOMIS BOOK: THE VOICE OF THE OJIBWAY 111 (1979) (defining "Chi-mook'-a-mon-nug'" as "Long Knives" or "Light-skinned Race"); THE TREE THAT NEVER DIES, *supra* note 26, at 23 (defining "chi-moko-man" as "white people").

46. See *Gutter v. Bollinger*, 137 F. Supp. 2d 821, 864 (E.D. Mich. 2001) (determining that the excessive number of Indians who live in impoverished areas is a major cause of the grade point average gap between Indians and the rest of the country), *aff'd*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); Donald E. Laverdure, *A Historical Braid of Inequality: An Indigenous Perspective of Brown v. Board of Education*, 43 WASHBURN L.J. 285, 293 (2004).

[T]he percentage[ ] of college readiness rates for . . . indigenous students [is] . . . [fourteen percent] . . . . To compound the problem, the already extremely low number of college-ready indigenous students have incredibly high dropout rates in mainstream higher education institutions—[seventy-eight percent] at Arizona State University, for example.

*Id.* (citations omitted); see also Alison McKinney Brown, *Native American Education: A*

pride in the community, even for those who did not have children presently attending it. Dozens of formerly unemployed tribal members worked for the school in various capacities, many of them teaching Anishinabemowin—the Ottawa, Chippewa, and Potawatomi language—and passing down cultural and traditional knowledge. The school provided much for the reservation's economy.<sup>47</sup> Even with all of its problems, too many Indians remained dependent on the school. Thus, the tribal council relented and began to plan for the next school year.

One week before the end of the school year, several parents from Lake Matchimanitou—people who knew about the internal debate going on at the tribe's council meetings—threatened to pull out their children if the tribal council did not hire several non-Indian teachers.<sup>48</sup> Many of the local children did not care to learn Anishinabemowin. Their parents wanted to them to learn Latin, German and Japanese, as these were languages that would not die out in a few decades.<sup>49</sup> They wanted several Caucasian teachers so that their children would feel slightly more comfortable by having someone of the same race to talk to. The parents believed that their reasons for desiring a more diverse faculty reflected the same reasoning behind allowing Native American, African-American, Latino and Asian American students associations at colleges and universities. After all, isn't that why there is affirmative action?

Each year, the school had to replace several faculty members who moved on, usually to faculty positions at university or professional schools, and the current year was no exception. Of the twenty-five full-time faculty members on contract that year, three moved on and the school was looking at three more Indians to replace them. The faculty hiring committee had

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*System in Need of Reform*, 2 KAN. J.L. & PUB. POL'Y 105 (1993) ("The high school dropout rate for American Indians—estimated nationally at [forty-five percent] to [fifty percent] but as high as [eighty-five percent] in the most depressed areas—is the worst such record of any major ethnic [minority group.]" Cf. *New Rider*, 414 U.S. at 1102 n.6 (Douglas, J., dissenting from denial of certiorari) ("Many school administrators and teachers consider Indian pupils inferior to white students, and thus expect them to fail, both in school and in life.") (italics omitted). See generally Allison M. Dussias, *Let No Native American Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819 (2001) (examining past, present and future educational opportunities for Indians).

47. See generally Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. no. 4 (forthcoming 2005).

48. Cf. Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2442, 2445 (1989) (discussing a law school hypothetical where law students viewed the closing of a plant and the resulting massive layoffs as market restructuring that the "invisible hand of the free market" created).

49. See THE TREE THAT NEVER DIES, *supra* note 26, at 55-56 ("Indian children soon found that there was room for only one language at [their Indian school] and that language was English."). "As at public schools, children who spoke only an Indian language had a difficult time understanding their lessons." *Id.* See generally Allison M. Dussias, *Waging War With Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901 (1999) [hereinafter *Waging War With Words*].



already selected three applicants and went to the tribal council for final approval. However, the non-Indian Lake Matchimanitou parents beat them to the punch. The parents produced documents and figures showing how far in the red the school would operate if they pulled their children out in the fall, implicitly threatening to do so if the school failed to hire non-Indian teachers. The tribal council relented under this pressure. On the advice of earnest tribal attorney, Bryan Montana, the tribal council required the non-Indian parents from Lake Matchimanitou to sign a document saying they would never again ask to alter the proportion of Indian instructors on the faculty. The parents signed the document.

That fall, the non-Indian students' parents began to complain loudly that the school's athletics program was pathetic—that a high-quality educational experience mandated a strong extracurricular activity base. Moreover, the parents argued, a strong basketball team would bring pride to the school, pride that it would never acquire with intramural lacrosse or soccer. Many of the Indian students agreed that a basketball team would be a great idea. The Lake Matchimanitou Ottawas were renowned for their basketball playing in the gym that had been built a few years earlier. There were a lot of informal pick-up games and a few adult leagues at the gym. These Indians were ready to play ball. The tribal council agreed, but with some reluctance because it would be an added expense to the school, which was already on a tight budget. The tribal council hired a local, regular gym attendee to coach the team, composed of eleven Indians and one white kid, a real tall but clumsy kid from Manhattan. They lost every game.

The non-Indian students' parents began another campaign in the spring. First, they wanted the local coach fired. Second, they wanted to do what other powerful private schools did all over the country and recruit good basketball players. The tribal council strongly objected over strenuous protests. No way would they populate an Indian school's basketball team with non-Indians—and with a non-Indian coach. One of the more wealthy fathers from Lake Matchimanitou took aside one of the tribal council members, one with a passion for golf, basketball and expense accounts. This father invited the council member to an exclusive basketball camp in North Carolina. He pointed out famous college basketball coaches sweet-talking high school coaches and their players. He introduced the council member to college basketball broadcast personalities and retired pro basketball players. The kicker was that he explained how so many of these exceptional high school players getting all this attention actually played for exclusive private schools, many of them out in the middle of nowhere. The council member was hooked by all the excitement and possibilities. He went back to the tribal council and talked them into hiring a professional coach and allowing that coach to recruit good players from junior high schools. He said five or seven full scholarships would do the trick. Most importantly, if done right, the team would pay for itself. The faculty fought

it, but only half-heartedly. They knew that this would bring in money. Besides, some of the faculty reasoned, diversity was good for the students.

The council agreed and, once again, they called in stalwart tribal attorney Bryan Montana to draft up an agreement for the basketball coach and rules for the team. The tribal council hired, for a substantial sum, a former Duke University standout guard as their coach. He quickly recruited seven African-American ballers—three from Detroit, and one each from Chicago, Brooklyn, Los Angeles and Charlotte, North Carolina.

The presence of twenty-five Caucasian students had dramatically changed the demographics of the Indian school. The presence of a nationally ranked high school basketball team, with its concomitant media attention, demand for tickets, and gambling changed the school even more, and it became a gold mine.<sup>50</sup> The Caucasian students running with the Manhattan and Lake Matchimanitou cliques spent all their time pestering the seven African-American ballplayers for attention, autographs and other favors. The other Caucasian students retreated further away into their modern art and liberal arts concentrations. The Indian students became the silent majority, quieter than even the year before, invisible like ghosts. Over the course of the year, the language arts wing on the east side of the school—about a quarter of the school—became the informal territory of the Caucasian and African-American students. It was there that German and the Romance languages were taught, where the first-year Caucasian teachers had their classrooms; and where, ironically, all the Caucasian student's lockers were clustered. Of the five classrooms in that area, three were the headquarters of the Caucasian teachers. Indian students with classes in that wing walked those hallways with their heads down while the Caucasian students stared at them like museum pieces. Few Indians

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50. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 425 (1980).

[U]nder the circumstances presented in 1877, Congress attempted to improve the situation of the Sioux and the Nation by exchanging the Black Hills for 900,000 acres of grazing lands and rations for as long as they should be needed. . . . [A]lthough the Government attempted to keep white settlers and gold prospectors out of the Black Hills territory, these efforts were unsuccessful.

*Id.*; *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1204 (9th Cir. 2001) (en banc) (“As California grew, due in part to the discovery of gold, clashes between the White settlers and the tribes increased in frequency and severity, usually to the detriment of the Native American populations.”); *Karuk Tribe*, 209 F.3d at 1371 (stating that when the first white settler struck gold on the banks of the American River in northern California, there were about five times as many native Americans in the population as there were white settlers; but just two years later, settlers outnumbered the native Americans). Cf. *Sokaogon Chippewa Cmty. v. Exxon Corp.*, 805 F. Supp. 680, 686 (E.D. Wis. 1992).

[T]he Treaty of the Chippewa, signed in 1842 . . . in which Native Americans conveyed a vast tract of land in Northern Wisconsin and the Upper Peninsula of Michigan to the United States. This area began to attract white settlers in the mid-1800's, as rich mineral deposits had recently been discovered both on and underneath the land.

*Id.* (citation omitted).

actually attended the basketball games played in the name of their school.

At the end of the school year, five Indian teachers quietly announced their intention to leave the school. Before a shocked tribal council could breathe, the three white teachers, aided by a group of white parents, prepared a list of ten highly qualified white instructors they wanted the tribal council to consider. The tribal council thanked the group for the list and the implicit threat contained therein. After a fierce debate, they agreed to hire three more non-Indian teachers, but promised themselves that they would not retain more than six non-Indian teachers at any one time. The two Indian teachers in the language arts wing asked to move their classes to another wing, and when the fall semester started, the white teachers dominated the whole wing and an adjacent classroom. Quickly, the language arts wing had become virtually off-limits to Indian students and Indian teachers.

During the fall semester, four of the white teachers became embroiled in a closed-doors argument with the school's principal over textbooks. The white teachers wanted to use their own selections—textbooks written by non-Indians—while the school had always mandated a strict compliance with its own rule: where possible, teachers must use a textbook authored in whole or in part by an Indian writer; otherwise, they must use a text that the majority of the Indian faculty approved. The dispute was over Howard Zinn's history text, *A People's History of the United States*,<sup>51</sup> which the school had mandated since its inception. The new history instructor disapproved of the text, arguing that it did not provide enough coverage of important events in American history. The principal argued that the text's coverage was more than adequate and declared the discussion ended. The Indian-majority faculty stood behind the principal in a nineteen-to-six vote, but it was clear the lines had been drawn. Within days of the argument and the subsequent vote, white students began to complain about unequal treatment by the principal and some of the more elder Indian instructors. Their parents joined in the chorus and the principal, who was sick of the turmoil, resigned at the end of the semester.<sup>52</sup>

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51. See HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 522 (rev. and updated ed. 1995).

On Thanksgiving Day 1970, at the annual celebration of the landing of the Pilgrims, the authorities decided to do something different: invite an Indian to make the celebratory speech. They found a Wampanoag Indian named Frank James and asked him to speak. But when they saw the speech he was about to deliver, they decided they did not want it.

*Id.*

52. Cf. GREGORY EVANS DOWD, *A SPIRITED RESISTANCE: THE NORTH AMERICAN INDIAN STRUGGLE FOR UNITY, 1745-1815* 26 (1992) (describing the friendships and alliances that the Indians and the French built through trading and their common British enemy, and also noting the Indian's dependency on the British for goods after the French left North America).

The school then entered a crisis of a proportion it had not seen before. The white parents wanted a non-Indian principal, arguing that it was the only way to ensure fairness in the treatment of non-Indian students in comparison to the Indian students. Some of them brought back the old threat of taking their tuition-paying students out of the school and shutting it down for good. After consulting with several of the Indian faculty members, who reminded them that they would maintain a huge majority in any vote related to the school, regardless of the identity of the principal, the tribal council agreed to conduct a national search for a new principal without an emphasis on whether the candidates were Indian or not. The tribal council spent the spring semester searching and then announced it had hired a Caucasian to be its next principal. Four Indian instructors announced their intention to leave immediately thereafter.

With the slow trend toward a more and more non-Indian oriented school came fewer applications for admission from highly qualified Indian students. Other Indian schools, sponsored by more financially independent tribes, began in other parts of the country and the Lake Matchimanitou Indian School no longer retained its exclusivity or prestige. After the tribal council hired the new principal, Louis C. Banes, applications dropped substantially. Principal Banes was a veteran of Yale and a number of exclusive private schools and a real go-getter. He announced, without asking the tribal council *qua* tribal board of education, that teachers could select their own texts, that Anishinabemowin was no longer mandatory for all students,<sup>53</sup> and that his school would be nothing short of a meritocracy.<sup>54</sup> He also announced that there would be no quotas. Lake

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53. Cf. *New Rider*, 414 U.S. at 1101 (Douglas, J., dissenting from denial of certiorari) (“In the late 1800’s . . . the Bureau of Indian Affairs began operating a system of boarding schools with the express policy of stripping the Indian child of his cultural heritage and identity . . .”) (citation omitted); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 519-20 (1819) (explaining that Reverend Eleazar Wheelock established a school where he housed, cared for, and educated Indian children to prepare them to spread the word of the Gospel among their tribes); *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 817 n.4 (10th Cir. 1999) (“As early as 1818, the United States contracted with Christian missionary societies to organize and run boarding schools which enrolled Indian students, either voluntarily or by force.”) (citation omitted); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 8 (D. D.C. 1999) (noting that the Bureau of Indian Affairs would take Indian children from their families and put them in boarding schools designed to teach them English and strip them of their native language and culture) (quoting Kevin Gover, Assistant Secretary of Indian Affairs); *Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1158 (D. Colo. 1998) (stating that federal policy forbade Indian schools from teaching in any Indian language). See generally Dussias, *Waging War With Words*, *supra* note 49 (describing the United States government’s attempt to extinguish native languages).

54. See generally MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY: 1870-2033* (1958) (satirizing “meritocracy”); Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 LOY. U. CHI. L.J. 23, 46 (2002) (“[A]lthough the original application of the meritocracy concept to the college admissions process was done in the name of extending access to students beyond the confines of the New England private preparatory schools, it, too, has become a vehicle for codifying and camouflaging social hierarchy.”) (citation omitted); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968 (1996) (equating “meritocracy” with “testocracy”).

Matchimanitou Indian School would accept all students who had good grades, test scores<sup>55</sup> and an interesting background.<sup>56</sup> The school would not accept Indians just because they were, in fact, Indian. He did not care if Indians started the school long ago; those days of entitlement were gone. The tribal council was shocked to hear these declarations from their prized candidate, who had said no such thing during the interviews, but were cowed into silence by the mere idea of losing the revenue that the non-Indian students put into the school.

That summer, the Indian school enrolled only a hundred Indians students and seventy-five non-Indian students. Most of the best Indian students left the school and non-Indians replaced them. The school expanded the basketball team's scholarships to fourteen, doubling the size of the team. The new principal fired two Indian instructors for failure to attain adequate evaluations from students and parents and replaced those two, as well as the other four teachers who previously resigned with the six non-Indians.

The Indian faculty retained only a thirteen-to-twelve majority. The "thirteen," as they began to call themselves, feared to miss even a single day of class lest the principal call an emergency meeting to change some rule or another. If only twelve Indian instructors were around, then there would be a tie with the twelve non-Indian instructors, a tie that only the principal could break. The Indian instructors knew how the principal would break such a tie.

The principal tested the Indian instructors' theory early in the semester when one Indian instructor called in sick because her son had strep throat. Principal Banes called an emergency meeting of the faculty after classes to discuss whether the cultural and traditional teachings of the Ottawa elders were really necessary; whether it was a waste of time, at best, or a freedom of religion problem, at worst. Several Caucasian instructors complained that few of the Indian students actually followed "the Indian religion" and that the false reverence for these teachings chilled their right to speak freely in class about other religions. Several Indian instructors argued that the teachings were more subtle than that characterization, but they were shouted down. In the fracas, Banes called for a vote of the faculty. After the ensuing tie, he voted to break the deadlock. The next day, he gave pink slips to all the Indian cultural instructors that the school employed. In a

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55. See generally STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 63-65, 67-68, 72, 85-86 (1994) (claiming that the Scholastic Aptitude Test is racist and class-biased); *Standardized Testing*, *supra* note 31 (arguing that standardized test scores are inequitable and functionally valueless).

56. See *Grutter*, 539 U.S. at 367-68 (2003) (Thomas, J., concurring in part and dissenting in part) (identifying the 'legacy' factor, which prefers children of alumni, as one of the exceptions to meritocracy); Lani Guinier, *Admission Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 132 (2002) ("In the 1950s a 'meritocracy' began to substitute 'aptitude' for 'character' (or family) as the ticket into colleges and universities.") (citing YOUNG, *supra* note 54).

fiercely worded resolution, the tribal council condemned, but did not reverse, Banes's decision.

In December, a neighboring tribe's police department caught a group of Ottawa students holding a "kegger." Three days before Christmas, Banes held another meeting to discuss whether to expel these students, who, he reminded the faculty, paid either no tuition or tuition at a fraction of what the non-Indian students pay. The faculty voted thirteen-to-twelve to expel the students,<sup>57</sup> with fourth-year Indian history teacher Francis Alexis switching sides.<sup>58</sup> Just an hour before the meeting to discuss the expulsion, Banes brought Francis into his office to discuss his evaluation of her, which in his terms was "not good." He implied that her vote in favor of his policies and decisions would likely influence his decision to recommend her appointment or discharge at year's end.<sup>59</sup> Francis agreed, but hated herself for doing so. Many of the other Indian instructors ostracized her for the rest of the year. At the conclusion of the school year, Francis resigned.

With the expulsion of the fifteen Indian students ticketed at the holiday house party and their replacement with fifteen non-Indian students, the Indian students found themselves in the minority for the first time.<sup>60</sup> The semester following the mass expulsion was not a good one for the

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57. Cf. *Cobell v. Norton*, 283 F. Supp. 2d 66, 72-73 (D. D.C. 2003) (describing the forced removal of indigenous peoples from their lands as "one of the darkest chapters in American history"); *United States v. Michigan*, 471 F. Supp. 192, 239 (W.D. Mich. 1979) ("Removal was seized upon as the means to rid white settlements of these advanced Indian societies."); CANBY, *supra* note 16 ("[A]ll but a few remnants of tribes east of the Mississippi were moved to the West under a program that was voluntary in name and coerced in fact."); ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 101 (1970) ("Andrew Jackson was elected president in 1828. It was clear to the frontier that, whatever his professions of benevolence, he would remove the Indians to the West by force."); TYLER, *supra* note 34, at 56-59 (noting that President Jackson and his administration favored a policy of forceful removal of native populations from their lands); Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 15-22 (1990) (describing the United States-Dakota War and the large-scale, state-sponsored persecution of native populations that followed).

58. See *Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039, 1041 (5th Cir. 1996) (describing an instance where Indians have sided with Americans); *Oneida Indian Nation of N.Y.*, 691 F.2d 1070, 1077 (2d Cir. 1982) (stating that two of the six Iroquois Nation tribes sided with the states during the American Revolution, the others sided with the British).

59. See Vine Deloria, Jr., *Afterword*, to *AMERICA IN 1492*, at 429, 435 (Albert M. Josephy, Jr. ed. 1993) ("A massive document, the *Apology*, prepared by [Bartolomé de] Las Casas and giving a detailed defense of the humanity of the natives, was suppressed by the Spanish authorities . . .").

60. See HOWARD ZINN, *THE POLITICS OF HISTORY* 240-42 (2d ed. 1990) (chronicling the destruction of Indian populations by white settlers); Eric Kolodner, Note, *Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination*, 27 N.Y.U. J. INT'L L. & POL. 159, 159 (1994) (describing the oppressive nature of the government's "settler infusion" policies); cf. S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 331 (1994) ("Native Hawaiians, who had become not only impoverished but also vastly outnumbered by the settler population, were rendered more and more at the margins of political power in their own lands under colonial administration.").

remainder of the Indian students. Banes located an ambiguous phrase in the articles of incorporation of the Indian school that suggested he had virtually unlimited authority<sup>61</sup> to determine whether a student met “academic qualifications” that would allow him or her to return the next year. Armed with his interpretation of the articles, he informed twenty Indian students the next summer that they did not meet these qualifications and that the school would not welcome them back. He offered them each an opportunity to appeal for reinstatement, but limited their appeal rights to petitioning the faculty for reinstatement.<sup>62</sup> With Francis out of the picture, the expelled Indian students’ appeals were voted down, with Banes breaking the tie in each of the votes. The good news was that ten Indian students successfully graduated and moved on to college.

In the fall, only sixty-five Indian students arrived to start the school year, a clear minority, as there were one-hundred and ten non-Indian students. Forty of the students were from one of the Michigan Ottawa tribes, each of whom were guaranteed slots by virtue of being original investors, and only four students from out of state enrolled. The Indian students’ lockers were clustered in the science and industrial shop wings of the school.<sup>63</sup> In all the

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61. See *Red Lake Band of Chippewa Indians v. Swimmer*, 740 F. Supp. 9, 11-12 (D. D.C. 1990); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1760 (1997); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 43 (1996) [hereinafter Frickey, *Domesticating Federal Indian Law*]; Robert N. Clinton, *The Road: Indian Tribes and Political Liberty*, 47 U. CHI. L. REV. 846, 859 (1980) (book review); cf. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) (articulating the theory that Congress has plenary power over all Indian tribes because they are “dependent” on the United States for virtually everything); see also *United States v. Long*, 324 F.3d 475, 479 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 151 (2003) (citing *Kagama* for the theory that Congress’s tribal “wardship” or trust relationship with Indians justifies Congressional plenary power). Both courts and scholars have strongly criticized this theory of plenary power. *Id.* But see *United States v. Lara*, 124 S. Ct. 1628, 1633 (2004) (endorsing the plenary power doctrine).

62. See WASHBURN, *supra* note 16, at 101-08 (describing the origins of the Indian Claims Commission, which Congress created to provide a venue for Indian land claims, and expressing that the Indian tribes viewed the Commission as a failure); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 771 (1992) (noting that the Commission’s purpose was “to settle tribes’ ancient grievances in order to prepare them for the termination of their special status under United States law”); John T. Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 N.D. L. REV. 325, 335 (1969) (“[T]he Indian Claims Commission has failed throughout the time of its existence . . . .”); cf. *W. Addition Cmty. Org. v. NLRB*, 485 F.2d 917, 940 (D.C. Cir. 1973) (Wyzanski, J., dissenting) (“To leave non-whites at the mercy of whites in the presentation of non-white claims which are admittedly adverse to the whites would be a mockery of democracy.”), *rev’d sub nom.* *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975) (quoted in Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1353 (1992)); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 577 (1984).

63. Cf. POMMERSHEIM, *supra* note 31, at 11-36 (describing how the United States government repeatedly reduced the size and value of the Indian reservations); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1241 n.470 (1995) (“Indian statehood which would have resulted in some structural representation of the affected Indian tribes in the Senate and the electoral college, but, like many promises made to Indian tribes in treaties, these promises remain unfulfilled.”); Kirke Kickingbird, “Way

years of the school, despite all the problems of the teenage years, no Indian student had ever dropped out of Lake Matchimanitou Indian School. But in the fall of 2016, ten Indian students dropped out, most of them under pressure from Banes or one of the Caucasian instructors. The remainder of the Indian students faced increasing verbal and physical hostility from some of the Caucasian cliques, particularly the Lake Matchimanito and Manhattan kids.<sup>64</sup> The tension in the hallways was tangible. At the conclusion of the fall semester, Banes held a meeting with the tribal council, the Indian instructors, and the fifty-five remaining Indian kids and their families. He suggested that they essentially divide the school into two separate areas.<sup>65</sup> He said he had noticed a very serious schism between the non-Indian students and the Indian students.<sup>66</sup> He said he thought the threat of very dangerous violence was real and he could not do anything about it.<sup>67</sup> In order to avoid that eventuality, he proposed that the Indian kids with lockers in the science wing move their lockers to the industrial

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*Down Yonder in the Indian Nations, Rode My Pony Across the Reservation!" From "Oklahoma Hills" By Woody Guthrie, 29 TULSA L.J. 303, 317-20 (1993) (explaining that the United States used a series of laws, treaties, and court decisions to gain control over and drive Indian populations from lands once known as "Indian Territory," which later became Oklahoma).*

64. *See* Cherokee Nation of Okla. v. United States, 782 F.2d 871, 874 (10th Cir. 1986) ("Wary of promises of a permanent home and federal protection, the Cherokees resisted relocation and met with hostility, both from the State of Georgia, where the Cherokees were settled, and the federal government, which was anxious to placate white settlers."); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 361 (7th Cir. 1983) (attributing the few documented incidents of Indian violence or misbehavior to the negative influence of the white settlers); N. Paiute Nation v. United States, 634 F.2d 594, 596 (Ct. Cl. 1980) (explaining that persistent hostilities between relocated Indians and white settlers were obstacles that challenged the successful establishment of Indian reservations).

65. *Cf.* Confederated Bands of Ute Indians v. United States, 64 F. Supp. 569, 575 (Ct. Cl. 1946) (noting that the United States government set apart separate land areas for Indian use in order to protect Indian tribes and their resources from settlers and gold prospectors).

66. *Cf.* Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 341 (1945) (noting that the discovery of gold in California resulted in white settlers arriving on Indian lands and depleting the natural resources, which in turn induced the Indians to commit acts of violence).

67. *See* Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov't, No. F87-0051 CV (HRH), 1995 WL 462232, at \*2 (D. Alaska Aug. 2, 1995) ("The first treaties after the Revolution continued to whittle away at Indian holdings, while white settlers relentlessly encroached on tribal lands without regard to treaty boundaries.") (citation omitted); *In re* Gen. Adjudication of All Rights to Use Water in Gila River Sys. and Source, 35 P.3d 68, 75 (Ariz. 2001) (addressing the fact that although the federal government promised to protect the Indians by permitting them to stay peacefully on the lands allotted to them, the government eventually broke that promise in favor of aiding the western expansion of white settlers). *But see* Sioux Tribe of Indians v. United States, 146 F. Supp. 229, 232 (Ct. Cl. 1956) ("In the early 1870s many white settlers began invading the Indian lands and the United States, living up to its treaty commitments with the Indians, expelled these white people by military force."); *Dennison v. Topeka Chambers Indus. Dev. Corp.*, 527 F. Supp. 611, 616 (D. Kan. 1981) (explaining that some government officials, specifically Indian agents, were opposed to any attempts by the white settlers to purge Indian "half-breeds" from their lands).



shop wing.<sup>68</sup> He said that the classes with a predominantly Indian demographic would be moved to that wing so the students there would not have to travel in “foreign land,” as he called the rest of the school.<sup>69</sup> He said it was the best way to preserve the peace and that, if they would not agree, he could not guarantee anyone’s safety. The tribal council agreed, but another five Ottawa students dropped out, preferring to go to public school with their friends.

The fifty remaining Indian students crowded together in the industrial shop wing. Banes hired temporary instructors to teach most of their courses. They took English literature right next to the power saws and algebra right next to the drafting tables. The students that remained were left completely unchallenged by the classes and the tribal council complained about the lack of quality in their temporary instructors.<sup>70</sup> Moreover, they had to leave their classrooms and go to a run-down trailer with bad heating and ventilation outside when the non-Indian students had shop class. Banes promised to make major changes in the summer.

Banes’s changes included giving pink slips to nine of the twelve remaining Indian instructors and hiring nine non-Indians to replace them. He also changed the school’s letterhead, omitting “Indian” from “Lake Matchimanitou Indian School.”<sup>71</sup> Half of the remaining Indian students

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68. *See* *United States v. Southern Ute Tribe*, 402 U.S. 159, 176 n.1 (1971) (Douglas, J., dissenting).

The white settlers were dissatisfied on learning that the Indians might be allowed to settle in certain valleys which the settlers desired. The allotment, and sale of residue to whites, would leave the Indians in close proximity to the white settlements and will subject the Utes to constant annoyance by evil-disposed persons. The Indians had to be protected from this.

*Id.* (citations, quotations, and parentheses omitted); *Caddo Tribe of Okla. v. United States*, 614 F.2d 272, 274 (Ct. Cl. 1980) (explaining that the Brazos Reservation Indians agreed to move from Texas to Oklahoma because of the hostilities they faced from the white settlers); *Healing v. Jones*, 210 F. Supp. 125, 136 (D. Ariz. 1962) (noting that government officials believed that an Indian “reservation was needed to protect the Hopi Indians from intrusion by other tribes, Mormon settlers, and white intermeddlers”); *cf.* Richard Delgado & Jean Stefancic, *California’s Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1570 (2000) (“One northern California town, forced to accept Indians in school, walled them off with a partition in special rooms, fenced off a part of the playground, and provided them with a separate teacher.”) (citation omitted).

69. *See* *Snake or Piute Indians of Former Malheur Reservation in Or. v. United States*, 112 F. Supp. 543, 568 (Ct. Cl. 1953) (noting the Commission of Indian Affairs’ justification of the government’s decision in refusing to permit the Piutes at Yakima to return to Malheur was due to the hostility of the whites along the route, which “would have been suicidal for the Indians”); *Alcea Band of Tillamooks v. United States*, 59 F. Supp. 934 (Ct. Cl. 1945) (Whaley, C.J., dissenting) (“Due to the intrusion and conduct of certain white settlers, and the resentment thereof by certain Indians, there were open hostilities with the Rogue River Indians, a great many of whom were exterminated.”).

70. *See* *Natonabah v. Bd. of Educ.*, 355 F. Supp. 716, 732-33 (D.N.M. 1973) (holding that the school district discriminated against Navajo students by incorrectly spending federal funds, which led to overcrowding in predominantly Indian schools).

71. *See* CANBY, *supra* note 16, at 25-29 (describing Congress’s policy of “terminating” Indian tribes in the 1950s and 1960s); Mark R. Scherer, Book Review, 20 L. & HIST. REV.

dropped out. Not one Indian student graduated in the spring of 2017.<sup>72</sup> The next year, Banes forced the three remaining Indian instructors into early retirement. For the next ten years, no more than twenty-five Indian students (usually much fewer) enrolled at Lake Matchimanitou School. They were usually students that had been expelled from all the local public schools for fighting or other vices, enrolled only at the pleasure of Banes.<sup>73</sup> The best Indian students could take classes with the white students on occasion, but only if they followed a pre-determined curriculum under rigid guidelines that Banes established.<sup>74</sup> The only other Indians at the school were the four janitors and one part-time snowplow operator.<sup>75</sup> Banes had

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206, 206 (Spring 2002) (“[T]ermination evolved into a misguided, avaricious, and culturally arrogant policy that ultimately wreaked havoc on those Indian groups who bore its full brunt.”) (reviewing KENNETH R. PHILP, *TERMINATION REVISITED: AMERICAN INDIANS ON THE TRAIL OF SELF-DETERMINATION, 1933-1953* (1999)); John E. Silverman, Note, *The Miner’s Canary: Tribal Control of American Indian Education and the First Amendment*, 19 FORDHAM URB. L.J. 1019, 1024 (1992) (“[A]s a result of [Termination], almost half of the Indian population resides in urban centers rather than rural reservations.”) (citing Sheppard v. Sheppard, 655 P.2d 895, 914 (Idaho 1982)).

72. See CANBY, *supra* note 16, at 20-23 (detailing the initiation of the allotment policy, the purpose of which was the gradual extinction of Indian reservations and Indian titles, and explaining that the allotment effectively transferred most Indian land holdings to non-Indians); see also *Draper v. United States*, 164 U.S. 240, 246 (1896) (discussing a congressional act that had the effect of extinguishing Indian reservations and titles through the allotment of land to Indians in severalty); *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1205 (9th Cir. 2001) (en banc) (“One result of allotment was that large swaths of reservation land were lost from Indian control . . . .”); *Cuthair*, 7 F. Supp. 2d at 1158 (“Between 1887 and 1934, approximately two-thirds of the Indian land passed out of Indian ownership into non-Indian hands.”).

73. Cf. TYLER, *supra* note 34, at 90 (implying that Indian students had been forced to attend Indian schools in the nineteenth century in order to justify federal budget requests).

74. See *Dewakuku v. Cuomo*, 107 F. Supp. 2d 1117, 1119 (D. Ariz. 2000) (recognizing that much federal Indian policy has been directed toward assimilating Indians into “mainstream America”), *rev’d on other grounds*, *Dewakuku v. Martinez*, 271 F.3d 1031 (9th Cir. 2001); *Masayevsa v. Zah*, 792 F. Supp. 1160, 1162 (D. Ariz. 1992) (suggesting that Congress passed the General Allotment Act to assimilate Native Americans); *Heffle v. State*, 633 P.2d 264, 268 (Alaska 1981) (stating that one congressional policy is to assimilate Native Americans by including them as citizens of the state in which they reside); see also *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992) (explaining that the goal of assimilation was to “extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into society at large”); *Cuthair*, 7 F. Supp. at 1158-59 (quoting S. REP. NO. 91-501, at 21 (1969)); *Sokaogon Chippewa Cmty. v. Exxon Corp.*, 805 F. Supp. 680, 688 (E.D. Wis. 1992) (“The government hoped that consolidation of Native Americans on reservations would hasten their assimilation into American Society and better enable Indian agents to oversee the tribes’ development.”); *Peyote Way Church of God v. Smith*, 556 F. Supp. 632, 639 (N.D. Tex. 1983) (“[T]he Congress has a power or duty to the Indians to preserve their dependent nations until such a time as they may become so assimilated so as to not be ‘a people apart.’”); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1072 (Okla. 1985) (recalling the past practice of removing Indian children from their families and tribal environments, which impeded the ability of the tribe to perpetuate itself, and resulted in coerced assimilation of the First Americans into a homogenous society) (footnotes omitted), *rev’d on other grounds*, *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 1987).

75. Cf. CANBY, *supra* note 16, at 26-27 (discussing the “relocation” program that encouraged Indians to leave the reservations to work in urban areas).

solved his “Indian problem.”<sup>76</sup>

In early 2028, the United States Supreme Court declared an end to the need for affirmative action in American schools.<sup>77</sup> Although the decision did not apply to a tribally owned, privately-funded school that had not practiced any real kind of affirmative action in over a decade, Banes declared the end of affirmative action at Lake Matchimanitou School as well. At the same time, he announced his retirement. He hand-picked his successor, Larissa Reyna, a Harvard-educated literature instructor with five years experience on the faculty, and who was also the first Latina instructor at the school. She shadowed Banes for a full school year, learned everything she could about education, the school’s system and politics, and bade him a fond farewell with a huge going-away party.

A month after Banes retired, Reyna approached the Lake Matchimanitou tribal council and asked for help in starting an affirmative action program at the school. As if no one knew it already, she detailed how the few Indian students in the school received the lowest-quality education of all the students, received punishment more than any other student demographic, and even received the worst food from the school cafeteria.<sup>78</sup> She had not realized the extent of the discrimination the Indian students faced daily because, as a literature instructor, she never had to venture into the industrial shop wing of the school.<sup>79</sup> She was shocked. Every bone in her body screamed out that she end the injustice.<sup>80</sup> She said the school had originally been the property and the province of the Indians of this country and the indigenous peoples of the world, and that it was a travesty that the local non-Indians had so rudely and insidiously stolen and encroached on Indian property until nothing was left.<sup>81</sup> The tribal council applauded

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76. See *State v. Greger*, 559 N.W.2d 854, 856 (S.D. 1997) (discussing the fact that reformers in the late eighteenth century hoped to improve the welfare of Indian people and “solve the Indian problem” through a plan of assimilation); see also *Cobell*, 283 F. Supp. 2d at 74 (discussing how the United States implemented a new policy of assimilating the Indians as a solution to the “Indian problem”). See generally Matthew L.M. Fletcher, *Sawnawgezewog: “The Indian Problem” and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35 (2003-2004) [hereinafter *Sawnawgezewog*].

77. See *Grutter*, 539 U.S. at 343 (“[Twenty-five] years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

78. See *Cuthair*, 7 F. Supp. 2d at 1158 (describing the living conditions of Indians before World War II as intolerable and stating that Indians were deprived of income opportunities, freedom and their own culture, overall).

79. Cf. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784, 827 (D. Minn. 1994) (illustrating the cultural differences between the Indians and settlers through an example about glass windows where “[s]ettlers regarded them as something to look out of, and the Indians regarded them as something to look into, oblivious of the settlers’ concept of privacy”).

80. See Felix S. Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 145-46 (1940) (characterizing the defense of Indians by non-Indian lawyers in their fight against the state, federal and private oppression of Indians as “the most vigorous defense of the rights of a racial minority” in American jurisprudence).

81. See *Banner v. United States*, 238 F.3d 1348, 1352 (Fed. Cir. 2001).

Reyna and promised her whatever support they could muster.<sup>82</sup> However, long-time and able tribal counsel Bryan Montana informed her that the Supreme Court had long taken away the authority of Indian tribes to regulate non-Indians, even within their reservation.<sup>83</sup> Yet, once Reyna reminded the lawyer about the school's original articles of incorporation,<sup>84</sup> which provided broad authority to the tribe and implicitly to the principal, there was some hope to mend the school, although no one really believed that any court would pay any attention to those archaic articles.<sup>85</sup>

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By entering into a system of treaties, agreements, and statutes, a unique trust relationship has been created between the United States and the Native American tribes. The United States has "charged itself with moral obligations of the highest responsibility and trust," and its management of Native American affairs must be "judged by the most exacting fiduciary standard."

*Id.* (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)); *see also* Shelby D. Green, *Specific Relief for Ancient Deprivations of Property*, 36 AKRON L. REV. 245, 250 (2003) ("[T]he only just and legally sustainable substitutionary relief is substitute land."); Leslie Marmon Silko, *Reasserting Our Claims: An Interview with Leslie Marmon Silko*, 59 NEW LETTERS 43, 51 (1992) (claiming that American Indians will be able to repossess their tribal land, just as African tribes recovered their land from the Europeans).

82. *Cf.* CANBY, *supra* note 16, at 23 (describing "the now-famous Meriam Report" of 1928 as "part of the impetus for a sweeping change in federal [Indian] policy"); PEVAR, *supra* note 16, at 9 (describing the Meriam Report as "a provocative and influential study that chronicled the severe and hopeless conditions faced by Indians, including extreme poverty, devastating epidemics, inadequate food, and inadequate education, that occurred as a result of the federal government's previous policies"); TYLER, *supra* note 34, at 116 (referring to the Meriam Report as the "Bible" for future Indian policy).

83. *See* David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colorblind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 281 (2001) (illustrating that until recently, criminals had a better chance than Native Americans of winning a supreme court case). *See generally* Bethany Berger, "Power Over This Unfortunate Race": *Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957 (2004); Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law through the Lens of Lone Wolf*, 38 TULSA L.J. 5 (2002); Frickey, *Domesticating Federal Indian Law*, *supra* note 60; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2002-2003); Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 367 (2000); Valencia-Weber, *supra* note 39.

84. *Cf.* *Antoine v. Washington*, 420 U.S. 194, 201 (1975) (arguing that states are bound by past treaties under the supremacy clause of the United States Constitution); *Menominee Tribe v. United States*, 391 U.S. 404, 411 n.12 (1968) ("The Treaty of Wolf River was, under Article VI of the Constitution, the 'supreme law of the land.'"); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (stating that the Constitution recognizes past and future treaties as authoritative in resolving current disputes); *United States v. Michigan*, 471 F. Supp. 192, 217 (W.D. Mich. 1979) ("Under the United States Constitution, Article VI, clause 2, a treaty made under the authority of the United States becomes the supreme law of the land."); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 663 F. Supp. 682, 688 (W.D. Wis. 1987) ("Like a federal statute, a treaty is the 'supreme law of the land.'").

85. *See generally* Ralph W. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207 (1972) (discussing a Supreme

Reyna was mostly disheartened by the tribal council meeting, but she unveiled her plan to the faculty and, by then, the entirely non-Indian board of education. The response was mixed. Reyna had expected to be fired instantly, but a firing of the brand-new lead administrator of one of the most prestigious private schools in the world would look very, very bad—and the parents knew it. They agreed to think about it.<sup>86</sup> Meanwhile, Reyna went to work on the faculty. Several of the original non-Indians on the faculty were approaching retirement age and she nudged them on with promises of extended benefits. She recruited several like-minded faculty candidates and began enlightening those that remained. She talked about the poor educations the Indian students relegated to the industrial shop wing received and the value of increased diversity in the student body. By the beginning of her first school year, she had dramatically changed the faculty's outlook. Though she was loathe to make a premature move, she knew she had a bare majority who would favor a limited affirmative action program to attract new Indian students and remediation program for existing Indian students.

After her first school year was over, Reyna sprung her reorganization plan<sup>87</sup> and affirmative action plan<sup>88</sup> on the faculty. She argued with them for hours in the final meeting of the school year before their precious

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Court opinion that neglected to follow treaties in the 1850s, which gave Indians the permanent right to fish in off-reservation waters); Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601 (1975) (noting the common practice of the Supreme Court in abrogating the treaty rights of American Indians).

86. Cf. Ball, *supra* note 31, at 2302.

If the vulnerable story of origins has been corrupted by its official tellers, then United States v. Sioux Nation lends credence to the possibility that soundness can be restored. The polyphony of the story—its integrity and its potential for enlarging and improving the legal order, in this case its potential for including the tribal voices—might yet be preserved and extended.

*Id.*

87. Cf. Indian Reorganization Act of 1934, 25 U.S.C. § 461 (2005) (establishing a new method of allocating land on Indian reservations); CANBY, *supra* note 16, at 24-25 (describing the Act as a statute that preserved Indian lands indefinitely and encouraged self-government for tribes); PEVAR, *supra* note 16, at 10 (explaining that the Indian Reorganization Act tried to "rehabilitate the Indian's economic life" by 1) prohibiting further taking of Indian lands; 2) "authorizing the Secretary of the Interior to add lands to existing reservations;" and 3) encouraging Indians "to adopt their own constitutions, [and] to become federally chartered corporations"); TYLER, *supra* note 34, at 125 (describing the Act as the "Indian New Deal"); Porter, *A Proposal*, *supra* note 17, at 933 (describing the Indian Reorganization Act as "the first federal Indian policy in over 100 years that did not have the explicit purpose of undermining the status of Indian nations"). See generally Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972) (examining the effects of the Indian Reorganization Act on tribal structure).

88. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(i) (excluding Indian tribes from the definition of "employer," and allowing business "on or near an Indian reservation" to give "preferential treatment" to Indians).

summer vacations and they eventually capitulated to supporting the plans by a thirteen-to-twelve margin. On the same day, the Lake Matchimanitou tribal council arose from its slumber and replaced the school's board of education<sup>89</sup> with a majority of Indians.<sup>90</sup> The next day, before the papers could report anything or the sleepy non-Indian parents could mobilize, the new school board approved the plans. On cue, Reyna hit the road to recruit Indian students from all over the country. Once her plans had been advertised in the national educational newspapers and Indian papers, the applications from elite Indian students began to flow into the school's office. However, of the 1,000 applications received for twenty-five sixth grade slots, only 100 were from qualified Indian students. The remaining 900 applications were from predominantly Caucasian students. Reyna sifted through the applications and recommended the admission of ten Indians, four Asian Americans, four Latino/a Americans, four African Americans, and three Caucasian applicants. Before releasing the figures, she issued a memorandum (mostly drafted by trusted and loyal tribal attorney Bryan Montana) explaining that, first, the Supreme Court's decision ending affirmative action did not apply to the Indian school; and, second, even if it did, the school based its admission of Indian students on political status rather than a race-based classification.<sup>91</sup>

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89. See, e.g., *Saginaw Chippewa Tribe of Mich. v. Gover*, No. 99-10327, 1999 WL 33266029, at \*1 (E.D. Mich. Aug. 19, 1999) (allowing the United States government to recognize certain Indians within the Saginaw Chippewa Tribe as tribal representatives where the incumbent tribal council had "nullified four of the past five general and primary elections"); Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 360 (1953) (describing how officials from the Bureau of Indian Affairs governed daily activities of the Blackfeet Indians).

90. See *Navajo Nation v. Dep't of Health & Human Servs.*, 325 F.3d 1133, 1141 (9th Cir. 2003) (noting that Congress intended the Indian Self-Determination and Education Assistance Act to give tribes the authority and ability to administer their own federal programs); *Babbitt v. Oglala Sioux Tribal Pub. Safety Dept.*, 194 F.3d 1374, 1381 (Fed. Cir. 1999) (Gajarsa, J., expressing additional views) (explaining the origin and evolution of the self-determination policy); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997) (analyzing and applying the self-determination provisions of the Indian Self-Determination and Education Assistance Act); *Hopland Band of Pomo Indians v. Norton*, 324 F. Supp. 2d 1067, 1071-73 (N.D. Cal. 2004) (articulating the importance of self-governance in effecting a policy of self-determination).

91. See, e.g., *United States v. Antelope*, 430 U.S. 641, 646-47 (1977) (upholding the disparity of criminal penalties for Indians and non-Indians based on *Mancari*); *Morton v. Mancari*, 417 U.S. 535, 553-55 (1974) (upholding the Bureau of Indian Affairs' enactment of an employment policy providing an Indian preference on the basis that the classification was not race-based, but instead based on the political status of Indian tribes as wards of the United States); *Am. Fed'n of Gov't Employees v. United States*, 330 F.3d 513, 522-23 (D.C. Cir. 2003) (upholding Indian preference in federal contracting), *cert. denied*, 540 U.S. 1088 (2003); *Johnson v. Shalala*, 35 F.3d 402, 406-07 (9th Cir. 1994) (upholding federal employment preference for Indians that were not members of tribes to which the Bureau of Indian Affairs provided services); *Alaska Chapter, Associated Gen. Contractors v. Pierce*, 694 F.2d 1162, 1170 (9th Cir. 1982) (upholding Indian preference in federal contracting); see also CANBY, *supra* note 16, at 230-55 (comparing the rights and protections that state and federal governments afford to Indians to those it affords to non-Indians); PEVAR, *supra* note 16, at 60-62 (explaining Congress's ability to treat Indians differently from non-Indians without offending the Constitution). But see *Williams v. Babbitt*, 115 F.3d 657, 665 (9th

The uproar from the parents of several denied white applications came swiftly. Calls were made to Michigan Senators, the White House<sup>92</sup> and to the tribal council threatening lawsuits and assorted mischief. But the real decision came from the Indian school's board of directors who reviewed Reyna and Montana's memorandum and concluded that it was legally sound. The board based its decision almost entirely on the articles of incorporation for the school, which had somehow acquired treaty status for all practical purposes.<sup>93</sup> Complaints about reverse discrimination, quotas, and leveling the playing field,<sup>94</sup> accompanied by the arguments that this generation of white students had never caused any injury whatsoever to Indians in the past or even the Indians of the school and that they were hostages to history,<sup>95</sup> came freely, but Reyna and the board stood firm. The school year proceeded with a completely different sixth grade. Reyna randomized the locker assignments, and Indians suddenly were running around all over the school. There were signs posted on the school lawn anonymously that said, "Save a student, flunk an Indian"<sup>96</sup> and "Indians are

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Cir. 1997) (limiting *Mancari* to areas that uniquely affect Indian interests), *cert. denied sub nom.*, *Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998). See generally Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943 (2002) (providing several different justifications for the different treatment of Indians); Frank Shockey, *"Invidious" American Indian Tribal Sovereignty: Morton v. Mancari Contra Adarand Constructors, Inc. v. Peña, Rice v. Cayetano, and Other Recent Cases*, 25 AM. INDIAN L. REV. 275 (2000-2001) (discussing the future of the *Mancari* ruling that permitted differential treatment of Indians based on political status rather than race, and discussing the history of the relationship between the federal government and Indian tribes).

92. See Tom Hamburger, *Water Saga Illuminates Rove's Methods: Bush Strategist Works Agencies in Bid to Make Policy Decisions Jibe With Political Goals*, WALL ST. J., July 30, 2003, at A4 (reporting that a presidential advisor influenced the United States Interior Department to decide that Klamath River basin water flows in favor of non-Indian farmers over tribal fishers).

93. Cf. *Lara*, 541 U.S. at 200 (relying on the Indian Commerce Clause to authorize Congress's plenary power over Indian affairs).

94. See FISH, *supra* note 56, at 89-101 (arguing that phrases that appear to be non-discriminatory are actually "code" for phrases that are explicitly intended to preserve the discriminatory status quo). See generally Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611 (2000) (asserting the need to de-code racially neutral legislation in order to unmask the racial bias underlying the legislature's words).

95. Compare Gus P. Coldebella & Mark S. Puzella, *The Landowner Defendants in Indian Land Claims: Hostages to History*, 37 NEW ENG. L. REV. 585 (2003) (opining that the defendant landowners in an Indian land claim were innocent victims and that allowing recovery against the land owners would be unjust), with Arlinda Locklear, *Morality and Justice 200 Years After the Fact*, 37 NEW ENG. L. REV. 593 (2003) (arguing that so-called "hostages to history" are actually direct beneficiaries of illegal and racist theft of property).

96. See *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 41 F.3d 1190, 1192 (7th Cir. 1994).

Spearfishing protesters yelled numerous racial insults at the Indians – among them the accusation that all Indians are on welfare and filling up Wisconsin's jails. STA members called spearers "Tonto," "redskin," "welfare warriors" and "timber niggers" and stated that taxpayers had paid for their boats; protesters also mocked an Indian chant and caricatured an Indian ceremonial dance. STA members were heard to say that Indians could not find their food stamps because they kept them

stupid,”<sup>97</sup> but the school went on with its business.

After the first year of the new sixth grade class, Reyna convinced four alumni of the school, Indians from the old days, to come back and teach at the school. She promised them they would be more than token<sup>98</sup> Indians or house Indians and that they would have a real say in the way the school moved forward. Their hiring prompted a whole new barrage of qualified Indian applicants. In the next sixth grade class of twenty-five, Reyna and her admissions staff had to choose from 250 qualified Indian applicants. They selected fifteen Indians, ten other minority students, and zero white students to make up the sixth grade at Lake Matchimanitou School. In the fall, she changed back the letterhead.<sup>99</sup>

The demographic of the school had changed dramatically in two years. The ninety-five percent white eighth through twelfth grade classes shunned the Indians and other minorities worse than before. There were fights and arguments and several non-Indian parents pulled their children out of school, but Indian transfer students quickly replaced their spots. Indians were a distinct minority at the school, but the numbers were changing quickly. Once again, the school became a source of pride for the Lake Matchimanitou Ottawa community, instead of a source of shame. The tribal council talked of starting a second school, one of elite status, for early elementary school students. Federal law had changed to the benefit of

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under their work boots. In addition to ridiculing Indian culture and traditions, protesters' racist rhetoric took more violent forms as well. The protesters advocated spearing an Indian to save a walleye and urged supporters to drown Indians.

*Id.*; WINONA LADUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 123 (1999) (describing virulent anti-Indian campaigns in Minnesota and Wisconsin); Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 165 n.1, 267 n.533 (2000-2001) (describing racist anti-Indian campaigns against the Makah Tribe in Washington state).

97. See Deloria, *Afterword*, to AMERICA IN 1492, *supra* note 58, at 429, 435 (“[T]he pattern of dehumanization first voiced at Valladolid and applied to American Indians became the justification for the racism that has been a key characteristic of the American experience.”).

98. See generally Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989) (describing in narrative the danger of being a “token” minority in an otherwise all-white faculty).

99. See *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for the W. Dist. of Mich.*, 369 F.3d 960, 969-70 (6th Cir. 2004) (describing the administrative termination of the Grand Traverse Band and subsequent restoration by the federal government 108 years later); *City of Roseville v. Norton*, 348 F.3d 1020, 1022 (D.C. Cir. 2003) (describing the Congressional termination of the Auburn Indian Band and their subsequent restoration); *Long*, 324 F.3d at 480-82 (describing the Congressional termination of the Menominee Tribe and their subsequent restoration); *Oregon v. Norton*, 271 F. Supp. 2d 1270, 1272 (D. Or. 2003) (describing the Congressional termination of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians and subsequent restoration); *Sault Ste. Marie Tribe of Lake Superior Chippewa Indians v. United States*, 78 F. Supp. 2d 699, 705-07 (W.D. Mich. 1999) (describing the administrative termination of the Little Traverse Bay Bands of Odawa Indians and the Pokagon Band of Potawatomi Indians and their subsequent restoration).



Indian tribes and they were able to open schools on their own lands virtually at will.<sup>100</sup> The new schools became cash cows for hundreds of tribes across the country,<sup>101</sup> and modeled their schools after the original and the best—the Lake Matchimanitou Indian School.

With so many new Indian schools starting up, the next summer's batch of Indian applicants was not as likely to accept a bid to the Lake Matchimanitou school. Reyna had to recruit harder than before. She not only had to convince the possible candidates that the school had come back from the grave, but she was forced to market the school as well. It was hard work, but it resulted in an excellent sixth grade class of ten Indians and a mixture of fifteen white, black, Asian, and Latino/a students. The school had re-acquired a racially diverse balance, with Indians students in a clear plurality.

In the 2031-2032 school year, powerful lobbying interests argued that the Indianization of American education was patently unfair and probably unconstitutional, though every challenge to the political status doctrine had failed. They argued that anybody should be able to open a private school and put the anti-affirmative action "Meritocracy" plan into effect. Conservative think tanks and investigative journalists reported that Indian schools indoctrinated Indians and non-Indians alike with some crazed form of hippie<sup>102</sup> Indianness,<sup>103</sup> including respect for the land and for all people,<sup>104</sup> sustainable development,<sup>105</sup> non-retributive punishments for

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100. Cf. Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721 (2005) (codifying and regulating Indian gaming); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (upholding the right of Indian tribes to conduct high-stakes bingo operations on Indian lands).

101. Cf. *Grand Traverse Band of Ottawa and Chippewa Indians*, 198 F. Supp. 2d at 926 (discussing the important social services funded by Indian gaming); *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1063 (D. Ariz. 2001) (finding that gaming revenues allow tribes to fund housing and infrastructure projects); *Kansas ex rel. Stephen v. Finney*, 836 P.2d 1169, 1171 (Kan. 1992) (noting that income derived from Indian gaming is often the sole means by which tribes can end their dependency on federal money and become self-sufficient); Sherry M. Thompson, *The Return of the Buffalo: An Historical Survey of Reservation Gaming in the United States*, 11 ARIZ. J. INT'L & COMP. L. 520, 521 n.7 (1994) (highlighting a sixteen percent decrease in the number of Indian families relying on welfare in a given area after casinos opened nearby); Rand, *supra* note 9, at 76 (noting that non-Indian communities and state economies also benefit financially from Indian casinos).

102. See WASHBURN, *supra* note 16, at 229-30 (describing the obsession of hippies with Indian culture).

103. See Rick Green, *Are State's Indians in the Crosshairs?*, HARTFORD COURANT, Feb. 17, 2003, at A1 (reporting a backlash against Connecticut Indian tribes due to their successful gaming); Daniel B. Wood, *Despite Casino Setbacks, Indian Clout Rises*, CHRISTIAN SCI. MONITOR, Nov. 10, 2003, at 3 (reporting backlash against California tribes for contributing money to the 2003 California recall election campaign); see also Monique L. Vondall, Editorial, *What is Wrong with America?: Latest displays of racism in Northwest & local community raises concerns*, 11 NATIVE DIRECTIONS, Winter 2003, at 21 (describing how individuals at the University of North Dakota vandalized and burned ceremonial property belonging to the University of North Dakota Indian Association).

104. See N. Scott Momaday, *The Becoming of the Native: Man in America Before*

convicted criminals,<sup>106</sup> and economic,<sup>107</sup> social,<sup>108</sup> and environmental justice.<sup>109</sup> They distributed anecdotal evidence that Indian schools treated white students poorly<sup>110</sup> and that tribes exploited the schools to bring in

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*Columbus, in AMERICA IN 1492, supra* note 8, at 13, 16 (describing how the Indian, upon his arrival in North America, had a strong sense of community and intense spirituality toward the environment, even as he faced harsh obstacles and scarce resources).

105. See Clara Sue Kidwell, *Systems of Knowledge, in AMERICA IN 1492, supra* note 8, at 369, 372 (describing how the Indians' spiritual relationship with nature was vastly different from the European's intellectual approach to nature). Through regular observation and study of their natural surroundings, Indians in North America were able "to adapt to a wide range of conditions and evolve their relationships with" the environment. *Id.* at 403.

106. See Jay Miller, *A Kinship of Spirit, in AMERICA IN 1492, supra* note 8, at 305, 307-08.

Even during a crisis, however, a suspect could never be charged directly. People should not be confrontational or directive. In general, indirectness constituted proper behavior. A leader never ordered anyone to do anything. . . . Leaders shared all they possessed to build and keep a following, but followers were free to leave a community if they found better prospects elsewhere or felt affronted. Thus, subtle negotiation was required whenever a leader thought that an action needed to be undertaken. Through these negotiations—often extended councils to create consensus—the task would be accomplished, but not until everyone agreed or became resigned to the outcome.

*Id.* See generally Report on Native American Concerns about Sentencing, 13 FED. SENTENCING REP. 93 (2000), 2000 WL 33522170 (discussing disparities in the criminal justice system that may result in harsher treatment of Indians than non-Indians).

107. See ALVIN M. JOSEPHY, JR., *THE INDIAN HERITAGE OF AMERICA* 52 (1970) ("Wherever farming ultimately took over and groups settled down permanently to till their fields, however, population began to increase and, in time, tended to become concentrated. A more plentiful and secure food supply provided the base for these changes. In addition, surpluses of agricultural products gave people more leisure. . . .").

108. See Miller, *supra* note 8, at 324.

Linked together as kindreds, families were regarded in the broadest, most inclusive manner. These all-embracing relationships made native communities wonderful places to live, filled with close and caring residents who were nevertheless suspicious of outsiders. Community welfare depended on understanding that one's primary responsibility was to the group, not to the self.

*Id.*

109. See Peter Iverson, *in AMERICA IN 1492, supra* note 8, at 85, 105 ("Despite its physical harshness and the relative poverty of its resources, the Great Basin not only was far from void in 1492 but was inhabited by peoples who, over many centuries, had become highly skilled in the management of the environment."); see also Peter Nabakov & Dean Snow, *Farmers of the Woodlands, in AMERICA IN 1492, supra* note 8, at 119, 124.

By 1492 the zoological and arboreal environments of the eastern woodlands had become intentionally tailored and exploited by human beings. The parklike appearance of the New England landscape resulted from native customs of land and game management which were widespread well before the Indians' acquisition of domesticated crops. Most important was the practice of seasonal girdling and burning of trees, together with the torching of underbrush.

*Id.* See generally LADUKE, *supra* note 98 (discussing the symbiotic relationship between the environment and Native American peoples).

110. See, e.g., Scott D. Dahany, Comment, *License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought By Non-Native Employees of Tribally Owned Businesses*, 25 FLA. ST. U. L. REV. 679, 680-82 (1998) (describing an instance of alleged sexual harassment of a non-Indian by her tribal employer).

revenues that they promptly wasted or embezzled.<sup>111</sup> The lobby was incredibly well funded, but despite its vigorous efforts, the initiative failed. Congress had already embraced diversity.<sup>112</sup> African American women, who were educated in Indian schools, chaired the two most powerful committees in the Senate. The Speaker of the House had graduated from an Indian school. The entire Michigan, Connecticut, North Dakota, and Massachusetts delegations had graduated from Indian schools. There were thirty-four Indians in the House and ten in the Senate.

The Supreme Court that overturned affirmative action in 2008 had a couple of retirements before it heard the challenge to the affirmative action program at Lake Matchimanitou Indian School. The four new Justices and the one dissenter from the 2008 case voted as a block to uphold the program, argued ably by Bryan Montana in his last act before retirement as the venerable tribal attorney. In a companion case, the same Court voting block struck down the program that the Louis C. Banes School of Merit opened, on the basis that the supposedly race-neutral tests, which the school administered to determine the qualifications of applicants, were in fact insidiously racist.<sup>113</sup>

Larissa Reyna resigned her position at the school a year after the Supreme Court decision upholding her affirmative action plan and a Michigan Ottawa man named Niko Roberts,<sup>114</sup> who had a doctorate and professional degree from a prestigious Ivy League school, replaced her.

Migwetch.

There was a time when the government moved everybody off the farthest reaches of the reservation, onto roads, into towns, into housing. It looked good at first, and then it all went sour. Shortly afterward, it seemed that anyone who was someone was either drunk, killed, near suicide, or had just dusted himself. None of the old sort were left, it seemed—the old kind of people, the Gete-anishinaabeg, who are kind

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111. See, e.g., Donald L. Bartlett & James B. Steele, *Playing the Political Slots*, TIME, Dec. 23, 2002, at 47 (reporting on the large amounts of money Indian casino operators spend on lobbying, campaigning, and other political endeavors); Donald L. Bartlett & James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002, at 47 (asserting that casino profits often benefit a small number of investors, some of whom are non-Indians, while many Indian tribes remain impoverished). See generally Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 283-84 (2004) (arguing that tribal sovereignty is necessary for an “effective” and “socially just” gaming operation).

112. See *Grutter*, 539 U.S. at 332 (noting our nation’s leaders often come from institutes of higher education, many of which explicitly encourage diversity among their student bodies).

113. See Robert A. Williams, Jr., *Columbus’s Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples’ Rights of Self-Determination*, 8 ARIZ. J. INT’L & COMP. L. 51, 53 (1991) (describing insidious racism of the Old South).

114. See Fletcher, *Stick Houses*, *supra* note 31, at 252 (mentioning a five year old Odawa boy, Niko Roberts, who taught himself how to read); Fletcher, *Sawnawgezewog*, *supra* note 76, at 72 (describing the fictional boy who discovered the fountain of youth).

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beyond kindness and would do anything for others . . . .

Now, gradually, that term of despair has lifted somewhat and yielded up its survivors. But we still have sorrows that are passed to us from early generations, sorrows to handle in addition to our own, and cruelties lodged where we cannot forget them. We have the need to forget. We are always walking on oblivion's edge.<sup>115</sup>

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115. Louise Erdrich, *The Shawl*, in *Sister Nations: Native American Women Writers on Community*, *supra* note 25, at 76.