

**RECONCEPTUALIZING TRIBAL RIGHTS: CAN SELF-  
DETERMINATION BE ACTUALIZED WITHIN THE U.S.  
CONSTITUTIONAL STRUCTURE?**

by  
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*In September 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples. Although the United States originally dissented, President Barack Obama reversed this position in 2010. The U.S. Department of State issued a formal statement of support in January 2011, maintaining that the Declaration is a non-binding statement of policy that comports with U.S. federal Indian law and policy. This Article evaluates the premise that the Declaration is consistent with U.S. law and policy by comparing the central principles of federal Indian law with the emerging norms of international human rights law that are reflected in the Declaration. The Article suggests that existing rights for Native peoples within the United States could be enhanced by applying human rights norms to the interpretation of Native rights, and posits that the Declaration also has broader implications for U.S. policy, particularly with reference to cultural rights and the rights of non-federally recognized indigenous groups. The Author concludes that there are areas of domestic law that could be reconfigured to better protect the core human rights of indigenous peoples within the borders of the United States.*

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## I. INTRODUCTION

In September of 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples<sup>1</sup> after more than 25 years of negotiations, hearings, and intensive dialogue between representatives of the nation-states and indigenous representatives.<sup>2</sup> The Declaration maintains that indigenous peoples have a right of self-determination as “peoples,”<sup>3</sup> and sets forth a series of standards that might be employed by nation-states in securing the human rights of indigenous peoples, which are largely related to their distinctive cultural and political status, and their longstanding relationship to their traditional lands.<sup>4</sup>

Although the United States originally joined Canada, New Zealand, and Australia in voting against the adoption of the Declaration,<sup>5</sup> the Obama Administration recently reversed this position, following the lead of the other dissenting governments, which also reversed their opposition.<sup>6</sup> President Barack Obama made the initial announcement in support of the Declaration during a White House Conference hosted for tribal leaders in December 2010, saying that “[t]he aspirations it affirms, including the respect for the institutions and rich cultures of Native peoples, are one we must always seek to fulfill,” and also that his administration was committed to taking “actions to match those words.”<sup>7</sup> The State Department then issued the official Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, noting that the decision “to support the Declaration was the result of a thorough review of the Declaration by the relevant federal agencies,” and a series of consultation sessions with tribal leaders.<sup>8</sup> The State Department also asserted that the Declaration was consistent with U.S. federal Indian policy, thereby justifying the Administration’s decision to support the Declaration as a statement of non-binding federal policy.<sup>9</sup>

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<sup>1</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter Declaration].

<sup>2</sup> E.S.C. Res. 1982/34, U.N. Doc. E/1982/82 (May 7, 1982).

<sup>3</sup> Declaration, *supra* note 1, art. 3.

<sup>4</sup> *Id.*

<sup>5</sup> U.N. GAOR, 61st Sess., 107th plen. mtg. at 18–19, U.N. Doc. A/61/PV.107 (Sept. 13, 2007).

<sup>6</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, UN PERMANENT FORUM ON INDIGENOUS ISSUES, <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.

<sup>7</sup> Remarks at the White House Tribal Nations Conference, 2010 DAILY COMP. PRES. DOC. 1076 (Dec. 16, 2010).

<sup>8</sup> *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP’T OF STATE 1–2 (Jan. 12, 2011), <http://www.state.gov/documents/organization/154782.pdf> [hereinafter *Announcement of U.S. Support*].

<sup>9</sup> *Id.* at 1.

At some point in the future, the Declaration might become the basis for a human rights convention, and nation-states would have the option to sign onto a legally binding treaty. At the moment, however, the Declaration is purely an aspirational statement of principles for nation-states to consult as they articulate their domestic laws and policies governing indigenous peoples.<sup>10</sup> Although some critics might dismiss the importance of the Declaration because it is not yet an enforceable treaty, the document is of tremendous value in articulating a series of modern benchmarks for crafting more just relationships between indigenous peoples and the nation-states that now encompass them.

In that spirit, this Article evaluates the premise that the Declaration on the Rights of Indigenous Peoples is consistent with U.S. federal Indian law and policy. Part II of the Article examines the importance of international human rights law as a structure for articulating indigenous rights. Part III of the Article compares the rights framework that exists for native peoples under U.S. Constitutional law (which is the basis for federal treaties and statutory law) with the emerging norms of the human rights framework that defines the rights of indigenous peoples. In Part IV, the Article evaluates how existing rights for indigenous peoples within the United States might be enhanced by appeals to human rights norms, and suggests that this approach has broader implications for U.S. policy, for example in relation to the claims of tribal communities that currently lack federal recognition.<sup>11</sup> The Article concludes by arguing that there are many provisions within the Declaration that attest to the need for a more robust version of the collective rights of indigenous peoples, which may ultimately require the United States to reconfigure its domestic law to better protect the core human rights of indigenous peoples within its borders.

## II. THE IMPORTANCE OF INTERNATIONAL HUMAN RIGHTS LAW FOR INDIGENOUS PEOPLES

The concept of human rights gained traction after World War II in the aftermath of the horrific torture and genocide that occurred during that war.<sup>12</sup> Human rights are deemed to be “universal” in the sense that they extend to every living person, and thus they do not depend upon governments for recognition through positive law.<sup>13</sup> Rather, human rights exist as normative precepts.<sup>14</sup> Those precepts may be implemented by governments through international treaties and conventions, and the standards may then become incorporated within a nation’s domestic laws. However, until then, human rights are political norms that serve as

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<sup>10</sup> Declaration, *supra* note 1, Annex.

<sup>11</sup> See *infra* notes 117 and 136–42 and accompanying text.

<sup>12</sup> JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 7–8 (2nd ed. 2007).

<sup>13</sup> See generally *id.* at 9–10 (describing the “defining features of human rights”).

<sup>14</sup> *Id.* at 7, 10.

standards to evaluate and critique existing laws.<sup>15</sup> Human rights are deemed to set “minimum standards” for effective and just governance.<sup>16</sup> “[T]hey do not attempt to describe an ideal social and political world.”<sup>17</sup>

In 1948, the United Nations adopted the Universal Declaration of Human Rights, which operated as an international bill of rights, proposing standards for civil and political rights, such as equal protection, nondiscrimination, due process, privacy, personal integrity and political participation.<sup>18</sup> The document also incorporated a limited set of standards for economic and social rights, such as an adequate standard of living, health, and education.<sup>19</sup> The Universal Declaration of Human Rights served as the foundation for the treaties that were promulgated by the United Nations to implement these guarantees.<sup>20</sup>

In 1966, the United Nations promulgated the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.<sup>21</sup> Both Covenants require signatory nations to adequately protect the human rights of individuals within their boundaries.<sup>22</sup> Article 27 of the Covenant on Civil and Political Rights affirms the rights of persons belonging to ethnic, linguistic, and religious minorities to enjoy their cultural practices in association with one another, which constitutes a marginal acknowledgment of “group rights” and “cultural rights.”<sup>23</sup> However, there is no specific mention of the rights of indigenous peoples in either Covenant.

The notion that indigenous peoples were entitled to a distinctive set of human rights under international law first received attention from the International Labour Organization (ILO), which expressed concern about the exploitation of indigenous peoples that was associated with the rapid industrialization and development of many nation-states.<sup>24</sup> ILO 107, issued in 1957, represented the organization’s inaugural effort to produce a convention that would trigger international consensus on the basic human rights of indigenous peoples, designated at that time as “populations.”<sup>25</sup> ILO 107 identified the need to protect “indigenous and other tribal or semi-tribal populations” pending their full integration with their respective national communities.<sup>26</sup> In that sense, indigenous

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<sup>15</sup> *Id.* at 10.

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

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

<sup>18</sup> *Id.* at 8–9.

<sup>19</sup> *Id.* at 9.

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

<sup>21</sup> G.A. Res. 2200 (XXI) A, U.N. DOC. A/RES/2200(XXI) A (Dec. 16, 1966).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See *History of ILO’s Work*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/indigenous/Aboutus/HistoryofILOswork/lang-en/index.htm>.

<sup>25</sup> International Labour Organisation, Indigenous and Tribal Populations Convention, June 26, 1957, No. 107, 328 U.N.T.S. 247 [hereinafter Convention 107].

<sup>26</sup> *Id.* pmbl., at 248–50.

peoples were protected as individuals living in distinctive cultural groups. ILO 107 posited that they should enjoy protection for their cultural distinctiveness to the extent that this was not incompatible with national goals.<sup>27</sup>

In 1989, the organization developed ILO 169, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, which rejected the assimilationist focus of ILO 107 and proclaimed that indigenous peoples were “peoples,” though they were not entitled to the identical rights of other peoples for purposes of the Covenant on Civil and Political Rights (CCPR).<sup>28</sup> Under the CCPR, all peoples are entitled to a right of “self-determination” or autonomous self-government, which may, in some instances entitle the group to secede from a nation-state that suppresses this right of self-government under conditions of extreme injustice.<sup>29</sup> Secession is an extraordinary remedy, but is justifiable in particular cases.<sup>30</sup> Not surprisingly, it is that aspect of the right of self-determination that effectively blocked recognition that indigenous peoples actually constitute peoples under international human rights law.<sup>31</sup> ILO 169 attempted to create a middle ground, claiming that indigenous peoples were entitled to the full measure of human rights accorded to others, and that their unique social, cultural, religious and spiritual values and practices should be recognized and protected.<sup>32</sup> On the one hand, tribal members were persons with equal rights to enjoy the benefits of civil society, and on the other, they were entitled to practice the unique customs of their ancestral communities. They were not, however, entitled to secede as distinct national entities from the larger nation-state.<sup>33</sup>

The Declaration on the Rights of Indigenous Peoples is the most comprehensive and far-reaching document articulating the rights of indigenous peoples to date. For the first time, an international declaration proclaims that indigenous peoples are peoples entitled to the right of self-determination.<sup>34</sup> Moreover, the document outlines several

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<sup>27</sup> *Id.* art. 7, para. 2, at 254.

<sup>28</sup> International Labour Organisation, Indigenous and Tribal Peoples Convention, art. 1, para. 3, June 27, 1989, No. 169, 1650 U.N.T.S. 383, 385 [hereinafter Convention 169].

<sup>29</sup> G.A. Res. 2200 (XXI) A, *supra* note 21.

<sup>30</sup> See S. JAMES ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW 109 (2nd ed. 2004) (observing that secession may be “an appropriate remedial option in limited contexts,” but is not a “generally available ‘right’”).

<sup>31</sup> *Id.* at 110–11 (noting that it was difficult to commend a global consensus on the notion that indigenous groups were “peoples” with a right of self-determination because of the pervasive tendency to equate “self-determination” with an “absolute right to form an independent state”).

<sup>32</sup> Convention 169, *supra* note 28, arts. 3–5, at 386.

<sup>33</sup> See *id.* art. 1, para. 3, at 385. See also Declaration, *supra* note 1, art. 46; G.A. Res. 2200 (XXI) A, *supra* note 21.

<sup>34</sup> Declaration, *supra* note 1, art. 3.

categories of rights, for example, to land, culture, and institutional development, which are necessary for indigenous peoples to survive and thrive within their traditional, land-based cultures.<sup>35</sup>

What is the ultimate importance of international human rights law to indigenous peoples? Professor Robert Williams Jr. was one of the first federal Indian law scholars to advocate for indigenous human rights as an alternate structure, observing in 1990 that the “global movement for human rights is redefining the world as we know it.”<sup>36</sup> Primarily, he claimed, this involved a transformation in the perception of “Western settler state governments that human rights only amount to a foreign policy concern,” and the ensuing recognition that they are relevant to domestic law and policy.<sup>37</sup> Those words proved to be prophetic. It is abundantly clear that indigenous rights are now a domestic policy concern, and the Declaration suggests that nation-states must adopt processes, procedures, and institutions that will allow for a negotiation (or renegotiation) of rights that are central to the continuing survival of indigenous peoples as separate political and cultural entities. Paramount among these rights, of course, is the right of self-determination, which is the focus of the next Part of this Article.

### III. AUTONOMY RIGHTS: SELF-DETERMINATION AND THE U.S. MODEL OF TRIBAL SOVEREIGNTY

The norm of self-determination is the cornerstone of the Declaration on the Rights of Indigenous Peoples.<sup>38</sup> The right to self-determination expresses the collective right of a people to govern themselves autonomously and to freely consent to political arrangements with other governments. As discussed below, there are various models within which the political right of self-determination might be expressed for indigenous peoples. U.S. domestic law has maintained a formal commitment to tribal self-determination since the 1975 Indian Self-Determination and Education Assistance Act was adopted, thus raising the question of whether U.S. law already comports with the call of the Declaration.<sup>39</sup> This Part will explore the concept of indigenous self-determination and its status under U.S. domestic law.

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<sup>35</sup> *Id.* arts. 10–20.

<sup>36</sup> Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 660 (1990).

<sup>37</sup> *Id.* at 671.

<sup>38</sup> Declaration, *supra* note 1, art. 3.

<sup>39</sup> Indian Self-Determination and Education Assistance Act § 3, 25 U.S.C. § 450a (2006). President Nixon initiated the policy change to self-determination in a 1970 statement to Congress affirming his intention to adopt policies strengthening tribal sovereignty; transferring control of Indian programs from the federal to the tribal governments; restoring the tribal land base; and forever ending the termination policy, which abolished the federal trust relationship with particular tribes that were

*A. The Concept of Indigenous Self-Determination*

Article 3 of the Declaration states that “[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>40</sup> This language tracks that of Article 1 of the 1966 International Covenant on Civil and Political Rights, which identifies the right of self-determination as belonging to all peoples.<sup>41</sup> In hotly contested debates, representatives from many nation-states, including the United States, had rejected the notion that indigenous groups were peoples entitled to the right of self-determination, fearing that this would lead to attempts by such groups to secede from the nations.<sup>42</sup> However, indigenous representatives countered that it was unjust to define their rights as peoples as a subordinate class of rights, charging that this was fundamentally discriminatory.<sup>43</sup> The Declaration asserts the basic right to self-determination in Article 3, but also incorporates additional articles that describe this as a right to *domestic* self-determination.<sup>44</sup>

Article 4 of the Declaration clarifies that “[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”<sup>45</sup> The upshot of this language is to present indigenous self-government as a model of domestic self-governance, rather than a model of independent nationhood. Similarly, Article 5 of the Declaration speaks to the right of indigenous peoples to “maintain and strengthen their distinct political, legal, economic, social and cultural institutions,” while also retaining the “right to participate fully . . . in the political economic, social and cultural life of the State,” “if they so choose.”<sup>46</sup> The language in Article 5 clearly posits a model of indigenous self-governance that is compatible with the simultaneous status of indigenous individuals as equal citizens of the national government. Finally, Article 46 of the Declaration confirms that

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deemed ready to assimilate as equal citizens into the states. See Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 91-363 (1970).

<sup>40</sup> Declaration, *supra* note 1, art 3.

<sup>41</sup> G.A. Res. 2200 (XXI) A, *supra* note 21.

<sup>42</sup> Christopher J. Fromherz, *Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples*, 156 U. PA. L. REV. 1341, 1346 (2008).

<sup>43</sup> See SHARON HELEN VENNE, OUR ELDERS UNDERSTOOD OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS RIGHTS 69–106, 94 (1998) (discussing the many debates at the United Nations dealing with whether indigenous peoples were “peoples” or “minorities,” and asking why “peoples” are recognized as having rights, but those rights are negated by the qualifying adjective, “indigenous”).

<sup>44</sup> Declaration, *supra* note 1, art. 3.

<sup>45</sup> *Id.* art. 4.

<sup>46</sup> *Id.* art. 5.

nothing in the Declaration should be construed to authorize “any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”<sup>47</sup> This effectively removes any suggestion that secession is a justifiable remedy for indigenous governments.

### B. Models of Indigenous Self-Determination

Professor Shin Imai asserts that the notion of indigenous self-determination expresses “the right of a people to decide how it wants to relate to a majoritarian population.”<sup>48</sup> He offers four possibilities for this relationship: sovereignty, self-management, co-management, and participatory governance.<sup>49</sup> The Declaration counsels that self-determination ought to be achieved through a political process of negotiation, in which indigenous peoples consent to the basic conditions of governance within the nation-state and in which the nation-state endorses and supports their governance.<sup>50</sup> This process might result in selection of one model, but it is much more likely to involve the simultaneous operation of two or more models. This, in fact, seems to be already present in the United States, as the following discussion will indicate.

First, however, it is helpful to understand the differences among the models. The first model of indigenous sovereignty supports the right of an indigenous community “to control its own social, economic and political development.”<sup>51</sup> Under this model, the indigenous government is recognized as having the inherent authority as a separate government to make its own laws and apply them within a defined territory.<sup>52</sup> The institutions of indigenous self-governance are expressed through legislative, judicial, and executive action, though the indigenous government is free to constitute these functions as it desires.

The United States considers federally recognized Indian tribes to be “domestic, dependent nations,” which exemplifies the first model of indigenous self-determination.<sup>53</sup> As discussed in the next Part of this Article, tribal governments are considered to retain their inherent sovereignty as separate nations to control their territory and their members, and also to exclude non-members from their lands or condition their entry upon tribal lands. The federal government controls the process of political recognition, as well as the question of which lands

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<sup>47</sup> *Id.* art. 46.

<sup>48</sup> Shin Imai, *Indigenous Self-Determination and the State*, in INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES 285, 292 (Benjamin J. Richardson et al. eds., 2009).

<sup>49</sup> *Id.* at 292–93.

<sup>50</sup> See Declaration, *supra* note 1, arts. 19–20.

<sup>51</sup> Imai, *supra* note 48, at 292.

<sup>52</sup> *Id.* at 293.

<sup>53</sup> See *infra* note 90 and accompanying text.

are to be considered tribal territory, or “Indian Country.”<sup>54</sup> The federal government may also support tribal sovereignty through limited delegations of federal power, thus enabling tribes to exercise authority beyond the limits of their own jurisdiction.<sup>55</sup> The tribes’ inherent sovereignty, which predates the formation of the United States, is the basis for such delegations because the U.S. Constitution precludes delegation of federal power to a non-governmental entity.<sup>56</sup>

The second model of “self-management” is different because it calls for the national government to authorize an indigenous community to operate a program developed and funded by the national government.<sup>57</sup> Under this model, the national government sets the policy objective and provides funding to the indigenous community to carry out the program.<sup>58</sup> In its inception, the U.S. policy of tribal self-determination reflected this model. The 1975 Indian Self-Determination and Education Assistance Act was premised on the notion that tribal self-governance would be enhanced by assuming managerial control over federal programs.<sup>59</sup> The so-called “638 contracts” that emerged from this legislation and similar statutes (for example, in the area of tribal healthcare), involve agreements between the tribe and federal agencies, such as the Bureau of Indian Affairs and the Indian Health Service, about the terms of the tribe’s administration and control of federally funded programs.<sup>60</sup> Although this model supports the notion of self-government, it is also limited by the nature of the contractual arrangement. The Tribal Self-Governance Act of 1994 created a more sophisticated compact model, enabling eligible Indian nations to secure block grants from the federal government, on a level similar to state governments, to enable flexibility in the design and implementation of programs designed to secure the needs of the tribe and its members.<sup>61</sup> Tribes that assume this

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<sup>54</sup> See CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM (6th ed. 2010) at 126–27 (describing the federal statutory definitions of “Indian tribe”) and 127–32 (explaining how the federal acknowledgement process operates to formally “recognize” Indian tribes for purposes of federal law). See also 18 U.S.C. § 1151 (2006) (defining the various categories of “Indian Country” under federal law).

<sup>55</sup> For example, tribes may petition for treatment as states under the Clean Air Act and set air quality standards that limit the ability of off-reservation industries to generate pollutants. Clean Air Act § 301, 42 U.S.C. § 7601(d) (2006). This extra-territorial application of tribal law is justified as a delegation of federal power.

<sup>56</sup> See *United States v. Mazurie*, 419 U.S. 544, 557–58 (1975) (holding that Congress could delegate its power to regulate liquor within Indian Country to tribal governments because they possess a historical political identity as separate peoples and they regulate their lands and members).

<sup>57</sup> Imai, *supra* note 48, at 297.

<sup>58</sup> *Id.*

<sup>59</sup> 25 U.S.C. § 450a (2006).

<sup>60</sup> See, e.g., *id.* § 450f.

<sup>61</sup> Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 450aa–450cc (2006).

relationship enjoy more autonomy in program design and more discretion in the expenditure of federal funds.

The structure of indigenous governance in Alaska, which involves regional and village corporations that have authority to manage tribal resources, is also primarily a self-management model. These corporate entities were formed pursuant to federal law, the Alaska Native Claims Settlement Act, which also revoked most reservations in Alaska, and they are generally chartered under state law.<sup>62</sup> These native corporations manage tribal resources under a business model; however, according to the U.S. Supreme Court, they lack the jurisdictional capacity of Indian nations in other parts of the country, which exert inherent sovereignty over their own territory.<sup>63</sup>

The third model of “co-management” is primarily directed toward facilitating native access and control of lands that are currently outside their jurisdiction.<sup>64</sup> Indigenous peoples throughout the world have been displaced from their ancestral lands pursuant to government policies enabling the settlement and development of indigenous lands by non-native citizens and corporations. This is occurring in many countries today, as national governments facilitate oil and gas exploration, hydroelectric power projects, and timber harvesting.<sup>65</sup> The United States is still dealing with the legacy of its own exploitation of tribal lands and resources, including the massive appropriation of tribal lands in the 19th century that was associated with westward expansion and the manifest destiny policy. Today, many native nations have ancestral connections to lands that are now designated as state or federal public lands, and they have a strong interest in protecting cultural or natural resources on those lands. In the United States, indigenous peoples may be treated as stakeholders in the management of federal public lands, or they may be treated as governments with the authority to negotiate co-management agreements with federal agencies to ensure that the administration of public lands is consistent with tribal interests in protecting cultural and

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<sup>62</sup> Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1606–07, 1618(a) (2006).

<sup>63</sup> See *Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 523, 532–33 (1998).

<sup>64</sup> Imai, *supra* note 48, at 301.

<sup>65</sup> In his most recent book, Professor Anaya documents several of the petitions filed by indigenous groups in Latin America protesting human rights violations by corporations that entered indigenous territories in order to gain access to profitable resources. The *Awas Tingni* case involved a logging plan that threatened indigenous communities in Nicaragua, and *Maya Indigenous Communities v. Belize* involved logging and oil development concessions that were granted by the government of Belize over traditional Maya lands without the consent of the Maya people. Anaya documents how, in each case, the attorneys representing the indigenous groups successfully employed international human rights law to recognize the pre-existing property rights of the indigenous peoples. ANAYA, *supra* note 30, at 265–67.

natural resources.<sup>66</sup> This is particularly compelling when the federal public lands are adjacent to reservation lands.<sup>67</sup>

Another example of the co-management model exists in state-tribal cooperative agreements on issues of mutual concern, such as education, law enforcement, or environmental issues.<sup>68</sup> Such agreements allow the two governments, as sovereigns, to exercise joint authority within a region to alleviate or minimize common problems.<sup>69</sup> To some extent, the co-management model has been institutionalized into federal law. For example, the Indian Gaming Regulatory Act requires tribes to negotiate compacts with states to engage in high-stakes (Class III) gaming.<sup>70</sup>

The final model of participatory governance advocates the full participation of indigenous peoples within the dominant society's political system, which in the United States, entails both federal and state legislative, regulatory, and adjudicatory bodies.<sup>71</sup> This is an integrationist model that conjoins the indigenous communities with the larger communities that encompass them. While it may now seem unexceptional that individual Native Americans in the United States should be entitled to vote in state or federal elections, or have equal access to state educational or social services, this is largely the result of the 1924 Indian Citizenship Act, which provided federal citizenship to American Indians, as well as many lawsuits seeking to vindicate the rights of American Indians to equal citizenship within the states.<sup>72</sup> The battles are far from over, as illustrated by many emerging cases regarding the need for appointment of Native American representatives to state bodies that have a significant impact on tribes and their members, such as school boards or transportation commissions, as well as redistricting plans designed to ensure equal voting rights.<sup>73</sup>

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<sup>66</sup> See Rebecca Tsosie, *The Conflict between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 309–10 (2003) (discussing the management plan for the Santa Rosa National Monument, in which the Agua-Caliente Band of Cahuilla Indians is identified both as a stakeholder and a government entitled to consultation, and the co-management agreement between the Bureau of Land Management, U.S. Forest Service, and the Agua-Caliente Band which covers an expanse of wilderness involving all three jurisdictions).

<sup>67</sup> See *id.* at 309.

<sup>68</sup> See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.05, at 589–94 (Nell Jessup Newton et al. eds., 2005).

<sup>69</sup> See *id.* at 589.

<sup>70</sup> Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d) (2006).

<sup>71</sup> Imai, *supra* note 48, at 304.

<sup>72</sup> Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924).

<sup>73</sup> A prime example of this movement is currently underway in many states in redistricting cases designed to equalize the participation of Native Americans in state and federal elections by redrawing the relevant districts to afford meaningful participation. See generally DANIEL MCCOOL ET AL., NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 45–68 (2007) (detailing relevant cases filed under Voting Rights Act in 15 states from 1965–2006). Tribal governments have been recognized as distinct communities of interest who continue to suffer the

The call for participatory governance as a human right suggests that, as minority communities, the interests of indigenous communities are likely to be overlooked unless they have some meaningful representation within the dominant society's governmental institutions. Of course, rights to political representation may be general, meaning that individual Native Americans are free to run for public office or to vote in state or federal elections for representatives of their choosing, or they may be specific, meaning that a seat is reserved for indigenous participation within a specific body or commission.

In the United States, rights to political representation for indigenous people are largely general, rather than specific. Individual Native Americans are free to run for public office at the tribal, state, or federal levels, and they are eligible to vote in elections at all levels if they otherwise meet the stated criteria to exercise that franchise. Not surprisingly, very few Native Americans have ever served as federal or state legislators or judges.<sup>74</sup> Where they are elected or appointed to public office, Native Americans serve as representatives of the federal or state governments, and they are held to the same norm of impartiality that is intended to bind all public officials in the fulfillment of their duties. It is interesting to compare the systems of other countries. For example, New Zealand sets aside four seats for Maori representatives in the Parliament and allows Maori voters to elect these representatives.<sup>75</sup> In the United States, tribal governments may limit their own elections to tribal members, and federal agencies, such as the Bureau of Indian Affairs, may limit their services to qualified tribes and their members.<sup>76</sup>

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effects of historic discrimination in areas such as education, employment, and health, which hinders their ability to effectively participate in the political process. *See* Navajo Intervenors' Pre-Trial Brief for the New Mexico State House of Representatives Redistricting Trial at 5, Egolf v. Duran (D-101-CV-2011-02942) (1st Dist. N.M., Dec. 5, 2011). As demonstrated by the redistricting litigation in New Mexico, Native Americans have yet to reach proportional representation in the state House of Representatives and voting in New Mexico tends to be racially polarized. *See id.* at 5–6.

<sup>74</sup> The National Congress of American Indians is on the forefront of documenting the (lack of) presence on federal benches of Native American judges and tracking court cases affecting Native Americans. NCAI has a dedicated "Project on the Judiciary" which can be accessed at <http://www.ncai.org/ncai/dcdatal/>.

<sup>75</sup> For a brief history of how New Zealand has set aside four seats in its Parliament since 1868, see *Maori in the House*, <http://www.nzhistory.net.nz/politics/parliaments-people/maorimps>. However, Professor Andrew Sharp discusses the politics of Maori representation, noting that the Maori people are still organized into "Iwi" and "Hapu" groups, and that their representation in Parliament does not necessarily correspond to the many Maori political groups and organizations operative in New Zealand. *See generally* ANDREW SHARP, JUSTICE AND THE MAORI: THE PHILOSOPHY AND PRACTICE OF MAORI CLAIMS IN NEW ZEALAND SINCE THE 1970S (2nd ed. 1997).

<sup>76</sup> *See* Rice v. Cayetano, 528 U.S. 495, 520 (2000) (observing that tribal elections may be limited to tribal members because they are "the internal affair of a quasi-sovereign," and that Congress may fulfill its treaty obligations and unique responsibilities to the Indian tribes by enacting legislation directed toward their circumstances).

However, general state and federal elections must be open to all qualified citizens under the Fifteenth Amendment, and those governments may generally not limit public services or opportunities to any particular racial or ethnic group.<sup>77</sup> This was the basis of the U.S. Supreme Court's holding in *Rice v. Cayetano*—the state of Hawaii could not limit elections for the Office of Hawaiian Affairs trustees only to Native Hawaiians.<sup>78</sup>

As the discussion above demonstrates, all four models of indigenous self-determination are operative in the United States, with varying degrees of success. It should be noted that there are several indigenous groups that currently lack federal recognition.<sup>79</sup> Their rights to self-determination are sharply curtailed because they lack the right to negotiate the terms of their governance, as well as the right to regulate their lands and resources, or to protect the rights of their members.<sup>80</sup> The United States maintains that the civil liberties available to all Americans by virtue of the U.S. Constitution and the civil rights laws that have been enacted in the exercise of Congressional authority adequately protect the basic human rights of all Americans, while the unique rights that federally recognized Indian tribes enjoy are additional protections that stem from the historical relationship between the United States and the Indian nations.<sup>81</sup>

The next Part of this Article engages how, or if, U.S. federal Indian Law should be reshaped by application of the various norms within the Declaration that describe the inherent human rights of indigenous peoples. If indigenous human rights are universal, why can the United States—or any nation-state—limit those rights to specific groups and deny them to others? Does the United States have a good argument that the rights of federally recognized tribes are political rights accorded only to specific groups, whereas the civil rights of all peoples (indigenous or

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<sup>77</sup> *Id.* at 524 (holding that state elections for trustees for the Office of Hawaiian Affairs may not be restricted to Native Hawaiians, but must be opened to all qualified voters under the Fifteenth Amendment).

<sup>78</sup> *Id.* at 498–99.

<sup>79</sup> See generally *Fixing the Federal Acknowledgment Process: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. (2009).

<sup>80</sup> See, e.g., *Muwekma Ohlone Tribe v. Salazar*, No. 08-1231, slip op. at 2–3 (D.D.C., Sept. 28, 2011). In that case, the court denied plaintiff tribe's challenge to Department of the Interior's denial of acknowledgement. The court then observed that federal recognition of a Native American group as a tribe “is a prerequisite to the protection, services, and benefits” provided by the Federal government to Indian tribes, as well as the ‘immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States.” *Id.* (quoting 25 C.F.R. § 83.2 (2011)).

<sup>81</sup> See, e.g., *Announcement of U.S. Support*, *supra* note 8, at 2–3 (noting that the United States is committed to “promoting and protecting the collective rights of indigenous peoples as well as the human rights of all individuals,” and identifying the Constitution as the basic structure for such rights, and the additional rights accorded to federally recognized tribes as rooted in the “special legal and political relationship” that exists between those groups and the United States).

not) are fully protected by the U.S. Constitution? Are civil rights coextensive with human rights? Does the federal government truly enjoy a virtually unrestrained power to limit, modify, or eliminate tribal political sovereignty, as the Supreme Court has indicated in several opinions? Or does this constitute a human rights violation?<sup>82</sup> These and other questions are addressed in the next Part to probe the inconsistencies between domestic law and international human rights law.

#### IV. RECONCILING INTERNATIONAL HUMAN RIGHTS LAW AND U.S. FEDERAL INDIAN LAW: OPPORTUNITIES AND LIMITATIONS

The State Department's endorsement of the Declaration is premised on its finding that the Declaration is consistent with the norms of U.S. federal Indian law, recognizing the right of federally recognized Indian Nations to govern their lands and their members, subject to legal constraints imposed through federal statutory law and Supreme Court decisions.<sup>83</sup> Under this model of "domestic self-governance," tribal governments enjoy a form of limited sovereignty, subject to the overriding supremacy of the United States. The State Department does not view this right as coextensive with the right of self-determination under international law, instead proclaiming that it supports "the Declaration's call to promote the development of a *new and distinct international concept of self-determination specific to indigenous peoples*," which would not "change or define the existing right of self-determination under international law."<sup>84</sup> The State Department observed that this concept of self-determination "is consistent with the United States' existing recognition of, and relationship with, federally recognized tribes," and is the basis for the unique political relationship that exists between the United States and federally recognized tribes.<sup>85</sup> The focus of the State Department's memorandum is on the relationship between the United States and federally recognized tribal governments, although the memorandum also mentions a willingness to work, "as appropriate, with all indigenous individuals and communities in the United States."<sup>86</sup> It is unclear whether this willingness stems from charity or from a sense of duty. The concluding Part of this Article examines some of the problem areas for federal Indian law, focusing on the nature of federal power with

<sup>82</sup> See, e.g., *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

<sup>83</sup> *Announcement of U.S. Support*, *supra* note 8, at 3. See generally GOLDBERG ET AL., *supra* note 55.

<sup>84</sup> *Announcement of U.S. Support*, *supra* note 8, at 3 (emphasis added).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 2.

respect to native peoples, including their land and cultural rights, to see whether U.S. federal Indian law measures up to the Declaration's standards, and if not, what remedies might be pursued.

#### A. *Federal Indian Law and Indigenous Political Rights*

For purposes of U.S. law, federally recognized tribal governments are considered to be separate political sovereigns with their own territorial boundaries.<sup>87</sup> Non-recognized tribes do not enjoy the same recognition for their rights of self-governance, and their ancestral lands lack the federally protected trust status that is available to recognized tribes.<sup>88</sup> The legal history for these principles traces back to Chief Justice John Marshall's early trilogy of foundational Indian law cases, which identified a unique political status for tribal governments as "domestic dependent nations."<sup>89</sup> Marshall found that the Indian nations maintained a separate political identity as nations because they had entered treaties with Great Britain and the United States in that capacity and because they governed themselves within their own territories under their own laws.<sup>90</sup> Marshall declined to find that the Indian nations were "foreign nations," however, because they resided within the political boundaries of the United States and because their "right of occupancy" to their lands was subject to extinguishment by the United States, which, as the successor in interest to Great Britain, held the sovereign title to the land through "discovery."<sup>91</sup> In addition, Marshall declared that, because Indian peoples lacked the civilized status of Europeans, they were rightfully placed under the tutelage of the United States as a superior sovereign. This relationship "resemble[d] that of a ward to his guardian" and gave the United States a duty to protect the Indian nations from mistreatment by non-Indians, meaning that the power of the United States would broker any relationship between non-Indians (whether citizens, state governments, or foreign nations) and the Indian nations.<sup>92</sup>

This foundational trilogy of cases now manifests in two central doctrines which are pertinent to the project of this Article: the plenary power doctrine and the federal trust responsibility. Although much has been written about the nature and extent of each doctrine, the basic idea

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<sup>87</sup> See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 192 (2001).

<sup>88</sup> See *supra* note 81 and accompanying text.

<sup>89</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The other two cases in the trilogy are *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

<sup>90</sup> *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.

<sup>91</sup> *Id.* at 17. See also *Johnson*, 21 U.S. (8 Wheat.) at 584–87 (describing the title-by-discovery held by European nations and the right of occupancy held by native peoples).

<sup>92</sup> *Cherokee Nation*, 30 U.S. (5 Pet.) at 17–18.

is that the federal government directs the nature of the political relationship, if any, that exists between the United States and the Indian nations.<sup>93</sup> This authority has a protective aspect (the trust responsibility), and also a potentially destructive aspect because the federal government has the power to regulate tribal lands and tribal rights (including treaty rights and aboriginal rights), even if the Indian nations object to a particular exercise of power.<sup>94</sup>

The exclusive federal–tribal political relationship, as conceptualized by Chief Justice Marshall, negates the authority of state governments to interfere with tribal rights. As Marshall stated in *Worcester v. Georgia*, “[t]he whole intercourse between the United States and [the Cherokee Nation], is, by our constitution and laws, vested in the government of the United States.”<sup>95</sup> The state of Georgia had no right to extend its laws to the Cherokee Nation, nor could non-Indian citizens enter the Cherokee Nation, “but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”<sup>96</sup>

The plenary power doctrine has engendered the widespread assumption that the federal government has the exclusive authority to extend political recognition to tribal governments, and the sole and exclusive power to regulate interactions with the Indian nations.<sup>97</sup> To the extent that states acted to acquire tribal lands without federal consent, they violated the federal Trade and Intercourse Acts, and the transactions were voidable, even years after they were made.<sup>98</sup> Moreover, the documented abuses of states and their citizens toward Indian tribes resulted in the notion of “Indian Country” as a domain protected from state laws and state authority.<sup>99</sup>

There are several 19th century cases that build out the contours of the plenary power doctrine. For example, in *United States v. Kagama*, the Supreme Court upheld the constitutionality of the federal Major Crimes Act on the theory that the federal government has the duty to protect Indian nations, and thus enjoys the power to enact legislation in service of this goal, even if it is not directly tied to explicit constitutional authority (e.g., the commerce power).<sup>100</sup> Today, this means that federal

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<sup>93</sup> See Coffey & Tsosie, *supra* note 87, at 192–94.

<sup>94</sup> *Id.* at 194.

<sup>95</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

<sup>96</sup> *Id.*

<sup>97</sup> See *id.* Marshall described the sole and exclusive power of the federal government to regulate transactions with the Indian nations, though he did not use the “plenary power” terminology.

<sup>98</sup> E.g., *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 229–30 (1985).

<sup>99</sup> Today, the definition of Indian Country is codified at 18 U.S.C. § 1151 (2006).

<sup>100</sup> *United States v. Kagama*, 118 U.S. 375, 376–85 (1886).

law and tribal law govern criminal jurisdiction in Indian country, except when the case is purely between non-Indians.<sup>101</sup>

In *Lone Wolf v. Hitchcock*, the Supreme Court upheld federal power to unilaterally abrogate an Indian treaty that required the effective consent of tribal members prior to any further alienation of tribal lands on the theory that the government was merely managing tribal property interests in its capacity as trustee.<sup>102</sup> The Court found that the “action . . . complained of” (allotment of the reservation and sale of “surplus” lands to non-Indian settlers) was “a mere change in the form of investment of Indian tribal property, the property of those who . . . were in substantial effect the wards of the government.”<sup>103</sup> To add insult to injury, the Court found that the tribal governments involved (the Kiowa, Comanche, and Apache Nations) had no direct right to petition the Court for the injury sustained because this was a “political question,” and their recourse, if any, would consist of a petition to the very Congress that had just dispossessed them of their land rights.<sup>104</sup> Although this doctrine has been modified slightly in the modern era to hold Congress accountable under the Fifth Amendment for uncompensated takings of treaty-guaranteed land, the federal government still enjoys a significant amount of administrative power over tribal trust lands, and the United States still has the authority to abrogate Indian treaties, in whole or in part, through enactment of later statutes.<sup>105</sup>

Finally, in *United States v. Sandoval*, the Court held that Congress enjoys the right to establish a political relationship with Indian tribes, and once it does, the “guardianship” persists until Congress chooses to “release” the Indians from “such condition of tutelage.”<sup>106</sup> The Court noted, however, that Congress could not “arbitrarily” exercise such authority, and that the political identity would be reserved to those who comprised “distinctly Indian communities,” a calculus which, at that time, placed the Pueblo Indians in this category based on their perceived “Indian lineage, isolated and communal life, primitive customs and limited civilization.”<sup>107</sup> Today, the question of which tribes are entitled to “federal acknowledgement” is governed by a byzantine federal

<sup>101</sup> See General Crimes Act, 18 U.S.C. § 1152 (2006); Indian Major Crimes Act, 18 U.S.C. § 1153 (2006); *United States v. McBratney*, 104 U.S. 621, 624 (1882) (holding that state has jurisdiction over crime between non-Indians).

<sup>102</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

<sup>103</sup> *Id.* at 568.

<sup>104</sup> *Id.*

<sup>105</sup> See, e.g., *United States v. Sioux Nation*, 448 U.S. 371, 386, 416–17 (1980) (identifying the central question as whether Congress has acted in its capacity as “trustee,” converting land into money, which is an acceptable exercise of power, or whether it has exercised its sovereign power of eminent domain, in which case it may “take” tribal property for a public purpose if it pays “just compensation”).

<sup>106</sup> *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (quoting *Marchie Tiger v. W. Inv. Co.*, 221 U.S. 286, 315 (1911)).

<sup>107</sup> *Id.* at 46–47.

administrative process which carefully sorts through the notion of “Indian identity” under a series of factors, including whether the group is recognized as an “American Indian entity” (by state or other tribal governments, by academics, or in publications), and whether the tribe has existed as a “distinct community” from historical times to the present.<sup>108</sup> The federal acknowledgment process has been heavily criticized for its bureaucratic inefficiency and potential unfairness to tribes whose histories are not well documented by anthropologists and historians.<sup>109</sup>

Thus, while the overtly racist language and assumptions of the *Sandoval* Court are no longer employed, it is still the case that federal officials decide the question of which groups are entitled to the political status of a “domestic dependent nation.” Not all indigenous groups have the right to employ this administrative process. The Native Hawaiian people, for example, are specifically excluded from the capacity to petition the federal government for recognition through the administrative process available to other indigenous groups.<sup>110</sup> For over ten years, Senator Akaka has regularly introduced bills into Congress to authorize commencement of a process leading to some form of political recognition for Native Hawaiians, but this legislation has been very controversial among many constituencies, and to date, none of the bills has been enacted into legislation.<sup>111</sup> This is true even though Congress issued a joint resolution apologizing to the Native Hawaiian people for the unlawful overthrow of their internationally recognized kingdom, which operated as a constitutional monarchy, and calling for a process of reconciliation.<sup>112</sup> Interestingly, the net effect of the current legislative efforts (euphemistically entitled the Native Hawaiian Government Reorganization Act) will be to transform the Kingdom of Hawaii into a “domestic dependent nation,” eligible to exercise “self-government” under a domestic model that is similar—but not identical—to the

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<sup>108</sup> 25 C.F.R. § 83.7 (2011) (detailing “mandatory criteria” for administrative recognition).

<sup>109</sup> See generally *Fixing the Federal Acknowledgement Process*, *supra* note 79.

<sup>110</sup> See *Kahawaiola v. Norton*, 386 F.3d 1271, 1274, 1282–83 (9th Cir. 2004) (upholding provision in federal regulations limiting recognition process to Indian tribes “indigenous to the continental United States” against an equal protection challenge filed by Native Hawaiian group); see also Cohen’s Handbook of Federal Indian Law, *supra* note 68, § 4.07(4)(c), at 370–71 (summarizing recent litigation regarding the status of Native Hawaiians).

<sup>111</sup> E.g., Native Hawaiian Government Reorganization Act of 2009, S. 1011, 111th Cong. (2009); S. 2899, 106th Cong. (2000). For a snapshot of the political machinations of gaining this recognition, see, for example, Herbert A. Sample, *Djou Calls for Nonbinding Plebiscite on the Akaka Bill*, HONOLULU STAR-ADVERTISER, Oct. 28, 2010, available at <http://www.staradvertiser.com/news/breaking/106284028.html>.

<sup>112</sup> S.J. Res. 103rd Cong., Pub. L. No. 103-150, § 1, 107 Stat. 1510, 1513 (1993).

political status of federally recognized Indian tribes.<sup>113</sup> Most recently, Governor Neil Abercrombie of Hawaii signed a law recognizing “Native Hawaiians as the only indigenous, aboriginal, maoli population of Hawaii” and extending the state’s support for the “continuing development of a reorganized Native Hawaiian governing entity” that would ultimately lead to “federal recognition of Native Hawaiians.”<sup>114</sup>

So what is the upshot of this federal Indian law doctrine for purposes of a comparative analysis with the tenets of the U.N. Declaration on the Rights of Indigenous Peoples? First of all, the class of “indigenous peoples” for purposes of international human rights law is clearly broader than the class of “federally recognized Indian tribes” under U.S. domestic law, indicating that the United States may be violating indigenous human rights by failing to accord political recognition to certain groups. The obvious example would be the Native Hawaiian people, who are an “indigenous people” with a right to “self-determination.”<sup>115</sup> Their human right to self-determination is arguably being suppressed under U.S. domestic law because Congress has not explicitly extended political recognition, though it has implicitly done so through federal legislation authorizing specific programs and benefits for Native Hawaiian people.<sup>116</sup> The Declaration would counsel recognition on a basis of equality of status as “peoples,” although it is unclear what remedies would be available under domestic law given the broad authority of Congress over “political questions.”

Second, the federal plenary power doctrine may operate in violation of indigenous human rights in some cases. The Supreme Court has declared that Congress may “limit, modify or eliminate the powers of local self-government which the tribes otherwise possess,”<sup>117</sup> meaning that the unilateral action of the federal government may divest a tribal government of its sovereign powers without its consent, which is a fundamental violation of international human rights law. Of course, the Supreme Court also held in *United States v. Lara* that Congress may “restore” the powers that were taken at a later time, which was the effect of Congress’s amendment to the Indian Civil Rights Act (the Duro fix), affirming that tribes have the inherent sovereign power to adjudicate

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<sup>113</sup> See, e.g., Native Hawaiian Government Reorganization Act of 2009, S. 1011, 111th Cong. (2009); Native Hawaiian Government Reorganization Act of 2005, S. 147, 109th Cong. (2005).

<sup>114</sup> See S.B. 1520, 26th Leg. (Haw. 2011).

<sup>115</sup> *Id.* (noting that the United States’ endorsement of the U.N. Declaration on the Rights of Indigenous Peoples combined with the many federal laws that selectively protect Native Hawaiian rights constitute recognition of the right of self-determination that belongs to Native Hawaiian people).

<sup>116</sup> E.g., Hawaiian Homelands Homeownership Act of 2000, 25 U.S.C. § 4221 (2006); Native American Graves Protection and Repatriation Act, 18 U.S.C. § 1170, 25 U.S.C. §§ 3001–13 (2006); Higher Education Opportunity Act § 801, 20 U.S.C. § 1161j (Supp. II 2009).

<sup>117</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

crimes committed by “Indians,” whether or not they are members of the tribe seeking to exercise jurisdiction.<sup>118</sup> Justice Thomas, who concurred in the judgment in *Lara*, pointed out the inconsistency in the Supreme Court’s Indian law jurisprudence, which holds both that Indian nations retain their inherent sovereignty as distinctive sovereign governments and also that the United States has the power to limit or eliminate that sovereignty at its will.<sup>119</sup> This paradox is likely to become a prominent feature of the dialogue on indigenous self-determination.

In fact, the Declaration posits that one aspect of the right to self-determination is the requirement that the people “consent” to the terms of their governance.<sup>120</sup> This norm expresses through an array of provisions, but is featured in Article 19 of the Declaration, which specifies that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”<sup>121</sup> Although there are federal executive orders and agency policies that call for tribal “consultation,” there is a continuing question about whether the process is merely procedural or whether federal policymakers should be held to substantive requirements to ensure that they do secure the “free, prior and informed consent” of indigenous peoples affected by federal policies.<sup>122</sup> There are many federal policies, for example, those governing extraction of oil, gas, and uranium by companies holding mineral leases on federal public lands, which directly impact tribal governments with reservations that are adjacent to those lands, or with ancestral cultural sites on those lands.<sup>123</sup>

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<sup>118</sup> *United States v. Lara*, 541 U.S. 193, 197–98, 210 (2004).

<sup>119</sup> *Id.* at 214–15 (Thomas, J., concurring in the judgment).

<sup>120</sup> Declaration, *supra* note 1, art. 19.

<sup>121</sup> *Id.*

<sup>122</sup> See *Announcement of U.S. Support*, *supra* note 8, at 5 (citing Executive Order 13175 on “Consultation and Coordination with Indian Tribal Governments” and stating that “the United States recognizes the significance of the Declaration’s provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken”).

<sup>123</sup> Under the National Environmental Policy Act (NEPA), the federal government must engage in a scoping process whenever a proposed undertaking on federal lands would cause a significant impact on the environment. 42 U.S.C. §§ 4321–4370 (2006). This scoping process triggers statutes such as the National Historic Preservation Act and the American Indian Religious Freedom Act, which have provisions counseling the federal government to be aware of impacts to Native American cultural resources on federal lands. NEPA requires the federal agency to consider alternative courses of action in an effort to mitigate the harms, where feasible. These requirements, of course, are purely procedural and do not impose any meaningful substantive constraint on federal decision-making. See *Rebecca Tsosie, Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 237 (1996).

Finally, Article 37 of the Declaration states that “[i]ndigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.”<sup>124</sup> Many indigenous peoples within the United States, including many federally recognized tribes, Native Hawaiians, and even some non-recognized Indian tribes, descend from indigenous nations, tribes, and bands that entered treaty relationships (some never ratified) with the United States and its agents.<sup>125</sup> Does justice require the United States to honor those agreements because they were negotiated by indigenous peoples in good faith, even if Congress later failed to ratify the treaties or chose to abrogate them in whole or in part? The legendary and on-going battle of the Lakota and Dakota people for the Black Hills, which were guaranteed to the Sioux Nation by the 1868 Treaty of Fort Laramie and then appropriated by the United States over the fervent objection of the Sioux Nation, is an example of a human rights violation that has never been adequately resolved under domestic federal Indian law.<sup>126</sup> The takings claim was resolved by an award of monetary damages, which the Lakota and Dakota people have refused to accept.<sup>127</sup> The treaty abrogation claim was also denied, in line with *Lone Wolf*'s holding that Congress has the unilateral right to abrogate an Indian treaty.<sup>128</sup> However, the constitutional authority of Congress to abrogate an Indian treaty or fail to ratify it appears to be at odds with the Declaration's emphasis upon the need to negotiate a contemporary political relationship between indigenous peoples and the nation-state that is founded upon respect, trust, and political equality. Most treaties with Indian nations, in fact, dealt with indigenous lands, identifying the lands that were “ceded” to the United States, as well as those that were “reserved” to the Indian nations (purportedly, in most cases, in perpetuity), thereby raising another category of claims for evaluation.<sup>129</sup>

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<sup>124</sup> Declaration, *supra* note 1, art. 37.

<sup>125</sup> Many tribes in California, for example, signed treaties with the United States that were never ratified. Carole Goldberg and Gelya Frank discuss the historical background on the failed treaty process in California, including the fact that the federal treaty commissioners negotiated 18 treaties with the California tribes, but in a “closed session on July 8, 1852 . . . the United States Senate decided not to ratify any of them” and instead “voted to stash the treaties away from public view for fifty years.” GELYA FRANK & CAROLE GOLDBERG, DEFYING THE ODDS: THE TULE RIVER TRIBE'S STRUGGLE FOR SOVEREIGNTY IN THREE CENTURIES 29–37, 32 (2010).

<sup>126</sup> See generally MARIO GONZALEZ & ELIZABETH COOK-LYNN, THE POLITICS OF HALLOWED GROUND: WOUNDED KNEE AND THE STRUGGLE FOR INDIAN SOVEREIGNTY (1999).

<sup>127</sup> *Id.* at 349.

<sup>128</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903).

<sup>129</sup> See, e.g., *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 113 (1938) (discussing the Shoshone Treaty of 1863, which reserved to the tribe over 44 million acres of land, and the subsequent Shoshone Treaty of 1868, which required the tribe

*B. Federal Indian Law and Indigenous Land and Cultural Rights*

As the Black Hills case illustrates, the essence of indigenous identity is the group's longstanding connection to a particular land base and territory. The relationship of indigenous peoples and their traditional lands is a core feature of cultural survival, and a group's ancestral connections to land often manifest in cultural or religious practices tied to the land.<sup>130</sup> The ability of a native nation to effectively protect its land and cultural resources is directly tied to its identity as a federally recognized tribal government and also the recognition that the government has retained its territory. The latter requirement is problematic for many tribal governments, for example those in Alaska, which occupy lands that are not held in trust. As the United States Supreme Court held in the *Venetie* case, the native government could not permissibly exercise authority over non-Indian activity within the Village because the lands were not held in trust and thus lacked the legal status of "Indian Country."<sup>131</sup>

Of course, the United States has the ability to enact legislation specifically protecting tribal land as a trust resource, thereby protecting it from state taxation or regulation. The Supreme Court has often circumscribed tribal jurisdiction through judicial opinions designed to limit or remove tribal authority that might conflict with the perceived interests of non-Indians. For example, the Court has declared that Indian nations have been implicitly divested of their authority to prosecute non-Indians who commit crimes on tribal lands and against the tribe or tribal members, and it has selectively found that Indian nations have lost their authority to exert civil regulatory authority over non-Indians who own fee land within the reservation.<sup>132</sup> The Supreme Court has also limited the ability of the Department of the Interior to take land into trust for tribal governments who gained federal recognition after the effective date of the 1934 Indian Reorganization Act.<sup>133</sup> Thus, as a matter of federal common law, the rights of federally recognized Indian tribal governments to protect their land, resources, and members have been limited in ways that preclude their full enjoyment of their right of self-governance.

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to cede most of this territory, reserving approximately 3 million acres for its "absolute and undisturbed use and occupation" in perpetuity).

<sup>130</sup> See *Tsosie*, *supra* note 123, at 282–85.

<sup>131</sup> *Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 523, 529–32 (1998).

<sup>132</sup> See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194, 208 (1978) (holding that the Suquamish Tribe lacked jurisdiction to prosecute non-Indians who assaulted a tribal officer and damaged tribal property on the reservation); *Montana v. United States*, 450 U.S. 544, 557 (1981) (holding that the Crow Tribe lacked authority to regulate non-Indians hunting and fishing within the reservation on fee lands).

<sup>133</sup> *Carcieri v. Salazar*, 129 S. Ct. 1058, 1065 (2009).

Non-recognized tribes, of course, have an even more difficult time protecting their rights to access their ancestral lands or protecting their cultural resources. For example, in *State v. Elliott*, the Vermont Supreme Court found that a band of Abenaki Indians, a non-recognized Indian tribe in Vermont, did not maintain the aboriginal right to fish in waters adjacent to their aboriginal lands, even though they alleged that they had done so since “time immemorial” and that no federal law or action had ever extinguished their aboriginal rights.<sup>134</sup> The Court found that the Tribe’s aboriginal rights had been extinguished by the practical effect of a series of historical events prior to Vermont’s admission into the Union in 1791.<sup>135</sup> Similarly, the Department of the Interior has, by regulation, interpreted the Native American Graves Protection and Repatriation Act (NAGPRA) to accord repatriation rights only to federally recognized tribes.<sup>136</sup> Non-recognized tribes are not legally entitled to repatriation of ancestral human remains or cultural objects that are directly culturally affiliated to them, although they may petition a recognized tribe to repatriate such remains on their behalf, or ask a museum or agency to repatriate the remains voluntarily through agreements based on moral considerations.<sup>137</sup> Members of non-recognized tribes often feel vulnerable to criminal prosecution for possessing sacred objects, such as eagle feathers, or for the ceremonial use of peyote within Native American Church ceremonies, because the exemptions granted under federal law for native religious use of these regulated items are generally limited to enrolled members of federally recognized tribes.<sup>138</sup> It is abundantly clear

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<sup>134</sup> *State v. Elliott*, 616 A.2d 210, 211–12 (1992).

<sup>135</sup> *Id.* at 221.

<sup>136</sup> See Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L.J. 583, 601 & n.95 (1999) (noting that the statute covers “any tribe, band, nation, or other organized group or community of Indians . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians,” which has been interpreted to include only those groups listed by the Secretary of the Interior as “federally recognized tribes” (quoting 25 U.S.C. § 3001(7))).

<sup>137</sup> The Peabody Museum at Harvard University has voluntarily repatriated items to non-recognized tribes, such as the Abenaki. See NAGPRA Review Committee Minutes: May 3–5, 1999, available at <http://www.nps.gov/nagpra/REVIEW/meetings/RMS017.PDF>.

<sup>138</sup> See, e.g., *United States v. Wilgus*, 638 F.3d 1274, 1288, 1295–96 (10th Cir. 2011) (asserting that the government has two compelling interests at stake: “protecting bald and golden eagles, and fostering the culture and religion of federally-recognized Indian tribes,” and holding that the government’s compelling interests were balanced and advanced in the least restrictive manner by criminalization of possession of eagle feathers without a permit available only to members of recognized tribes); *United States v. Antoine*, 318 F.3d 919, 924 (9th Cir. 2003) (“The government has a compelling interest in eagle protection that justifies limiting supply to eagles that pass through the repository, even though religious demands exceed supply as a result.”); and *Gibson v. Babbitt*, 223 F.3d 1256, 1258–59 (11th Cir. 2000) (ruling that restricting permits to possess or transport eagles or eagle parts for religious purposes to members of federally recognized tribes was the least

that the civil rights of individual Americans to “free exercise” of religion do not equally protect the rights of indigenous peoples, and federal law carefully limits the rights of federally recognized tribes to engage in practices such as the peyote sacrament.<sup>139</sup> Moreover, the duty of federal agencies to “consult” with indigenous peoples that might be affected by federal actions is, in most cases, limited to federally recognized tribes, meaning that non-recognized groups with ancestral cultural sites or practices on public lands will likely not be consulted about agency actions that directly jeopardize their interests.<sup>140</sup>

Finally, it is clear that the basic principles of federal Indian law with respect to indigenous lands may be deeply flawed under the existing principles of human rights law that protect *all* individuals. For example, two separate international tribunals, the Inter-American Commission on Human Rights and the U.N. Committee on the Elimination of Racial Discrimination, held that the Indian Claims Commission process which divested the Dann sisters and their band of Western Shoshone Indians from their aboriginal land rights in Nevada constituted a violation of the Danns’ rights to equal protection under the laws protecting property interests, as well as their rights to due process and fundamental fairness.<sup>141</sup> In that case, a lawyer appointed by the Bureau of Indian Affairs and a lawyer representing the U.S. Department of the Interior stipulated to an arbitrary date upon which the aboriginal title of the Western Shoshone Nation was extinguished, which enabled the Claims Commission to calculate a measure of “damages” that would ultimately be paid out, per capita, to descendants of the historic Shoshone Nation.<sup>142</sup> The Dann sisters and their family did not participate in the Claims proceeding, did not consent to be represented, and maintained that they had been in exclusive use and occupancy of the lands since time

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restrictive means of pursuing a compelling interest in restoring Indian treaty rights, including giving tribe members alternative access to eagles). *See also* *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991) (discussing restrictions on the use of peyote).

<sup>139</sup> *See, e.g., Peyote Way Church of God*, 922 F.2d 1210, 1220 (upholding Texas state law exempting the ceremonial use of peyote by Native American Church members against an equal protection challenge by an individual asserting that others who wished to use peyote as a religious sacrament should be entitled to do so). *See also* 42 U.S.C. § 1996 (2006) (amending the American Indian Religious Freedom Act to accord specific protection for the right of tribal members to use peyote for religious purposes, after the Supreme Court held that such a right was not a feature of the First Amendment Free Exercise Clause in *Employment Division v. Smith*, 494 U.S. 872 (1990)).

<sup>140</sup> *See, e.g.*, Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000) (pertaining to groups on the Secretary of the Interior’s list of federally recognized Indian tribes).

<sup>141</sup> Rebecca Tsosie, *Property, Power, and American “Justice”: The Story of United States v. Dann*, in INDIAN LAW STORIES 325, 342–46 (Carole Goldberg et al. eds., 2011).

<sup>142</sup> *Id.* at 332–34.

immemorial.<sup>143</sup> Nevertheless, the domestic federal courts adjudicated the Danns to be “trespassers” on their ancestral land; their cattle and livestock were seized by government officials; and the federal agencies have since granted leases to non-Indian ranchers and mining companies to harvest the significant economic value of the land, including unextracted gold.<sup>144</sup>

The lawyers who represented the Dann sisters in front of the international tribunals used the existing international human rights conventions and structures within the Organization of American States and the United Nations, which are largely directed toward protecting individual human rights from abuse by State governments.<sup>145</sup> The international tribunals were persuaded that the fundamental human rights of the Dann sisters and their family had been violated.<sup>146</sup> The provisions within the Declaration are even more protective of indigenous land rights because they acknowledge the collective nature of those rights and the unique cultural relationship that exists between indigenous peoples and their ancestral lands, as well as those lands that they currently occupy. For example, Article 26 maintains that “[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”<sup>147</sup> The right encompasses “the right to own, use, develop and control” these lands and territories, as well as the right to require states to give legal recognition and protection for these rights in a way that is consistent with the customary land tenure systems and customs of the indigenous community.<sup>148</sup> Article 27 directs the States to establish and implement, in cooperation with indigenous peoples, “a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems,” and also to give indigenous peoples the right to participate in this process.<sup>149</sup> These provisions have already been used by courts in Latin America to vindicate the possessory rights of indigenous groups and to protect their lands from appropriation and development, pending formal recognition of indigenous land rights by the national governments.<sup>150</sup>

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<sup>143</sup> *Id.* at 333.

<sup>144</sup> *Id.* at 346, 350–53 (discussing the current controversy over the BLM’s decision to approve the expansion plan of Barrick Gold Corporation, the company that holds the lease—a decision that endangers significant Western Shoshone).

<sup>145</sup> *Id.* at 342–46.

<sup>146</sup> *Id.*

<sup>147</sup> Declaration, *supra* note 1, art. 26, para. 1.

<sup>148</sup> *Id.* art. 26, paras. 2–3.

<sup>149</sup> *Id.* art. 27.

<sup>150</sup> See, e.g., *Supreme Court Claims Nos. 171 and 172 of 2007 (Consolidated) re Maya land rights* 64–66, S. Ct. of BELIZE (Oct. 18, 2007), [http://belizelaw.org/supreme\\_court/judgements/2007/Claims%20Nos.%20171%20and%20172%20of%202007%20\(Consolidated\)%20re%20Maya%20land%20rights.pdf](http://belizelaw.org/supreme_court/judgements/2007/Claims%20Nos.%20171%20and%20172%20of%202007%20(Consolidated)%20re%20Maya%20land%20rights.pdf).

There are, of course, many more provisions within the Declaration that illuminate the relationship between indigenous peoples and their environments and articulate standards for contemporary governments to abide by as they interact with indigenous communities. In particular, the Declaration encourages nations to act in ways that preserve the identity of indigenous peoples and their connections to their lands and resources, as well as protect those lands from development or other activities that would result in the removal of indigenous peoples from their lands without their consent, or harm the quality of their traditional lifeways upon those lands.<sup>151</sup>

The multiplicity of provisions (there are 46 Articles) in the Declaration, and the elaborate nature of the rights that they describe, may cause the United States to consider them to be mere “suggestions” for a better relationship, rather than a set of norms that ought to be vindicated by domestic law. In fact, the State Department qualified the United States’ “support” for the Declaration by saying that it is “not legally binding or a statement of current international law,” but nonetheless has “both moral and political force” because it “expresses both the aspirations of indigenous peoples” as well as those of States who seek to “improve their relations with indigenous peoples.”<sup>152</sup> What future does this portend for indigenous peoples within the United States? The answer to that question is far from clear; however, the concluding Part of this Article offers some thoughts.

## V. CONCLUSION

In charting the future of indigenous self-determination, we have a choice. We can focus on the many obstacles within United States constitutional and statutory law that would preclude the alignment of domestic federal Indian law with the standards set forth in the Declaration. In that case, domestic law becomes the outer boundary for indigenous human rights. Or we can focus precisely upon the “moral and political” force of the Declaration in moving the boundaries of federal Indian law toward a structure that is much more aligned with the “aspirations” of indigenous peoples for self-determination.

Indigenous peoples have, for many centuries, lived with the fiction of the prevailing law, while simultaneously pursuing the road to self-determination. The reality is that indigenous peoples have always transcended the limited views of the federal bureaucrats and politicians who attempt to craft the terms of their survival. For example, many native peoples in California, such as the Tule River Tribe, survived the genocidal fray of the California Gold Rush and fought for their survival as a distinctive government, ultimately prevailing, even though the current tribal government may be comprised of several different historic

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<sup>151</sup> Declaration, *supra* note 1, arts. 28–29, 32.

<sup>152</sup> *Announcement of U.S. Support*, *supra* note 8, at 1.

bands and may not have enjoyed continuous recognition by the federal government.<sup>153</sup> The success of these tribal governments in their fight for sovereignty is a testament to the enduring value of self-determination within tribal cultures. Similarly, Kunani Nihipali, a Native Hawaiian leader, observes that the Kanaka Maoli people have survived the overthrow of their internationally recognized kingdom, as well as the illegal annexation of Hawaiian lands into the United States, only to find themselves living “an illusion of reality, called the fiftieth state, the Aloha State of the Union, the United States of America.”<sup>154</sup> However, as Nihipali acknowledges, the cultural sovereignty of the Hawaiian Nation is alive and well, despite the failure of the U.S. Congress to extend them political “recognition” as an indigenous nation.<sup>155</sup>

The legendary Native attorney, Walter Echo-Hawk, sees the United Nations’ approval of the Declaration as a “watershed event” because it “sets forth standards of behavior that have immediate moral force within all countries in regard to their relations with indigenous peoples.”<sup>156</sup> Echo-Hawk asserts that law reformers can employ the U.N. standards to provide a benchmark for evaluating the adequacy of domestic indigenous law and for setting goals for reform.<sup>157</sup> This process has the capacity to “reform the dark side of federal Indian law,” which continues to dispossess native peoples of their full rights to self-determination.<sup>158</sup>

Of particular importance is the way in which the Declaration sustains the collective nature of indigenous rights, as well as the unique aspects of their cultural relationship to their lands, which cannot adequately be captured under the rubric of “religious freedom,” which is the only available category under the United States Constitution. The Declaration calls for acknowledgment of the spiritual relationship that binds indigenous peoples to their land, their ancestors, and to their future generations.<sup>159</sup> This is an unbroken cord of light, transcendent and enduring, which ties together the constituent forces that enable the survival of native peoples throughout these lands. Article 25 of the Declaration acknowledges the right of indigenous peoples to “maintain and strengthen their distinctive spiritual relationship” with their lands, territories and waters, and “to uphold their responsibilities to future generations in this regard.”<sup>160</sup> Article 31 protects the right of indigenous peoples to control their “cultural heritage,” including their genetic

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<sup>153</sup> See generally FRANK & GOLDBERG, *supra* note 125.

<sup>154</sup> Kunani Nihipali, *Stone by Stone, Bone by Bone: Rebuilding the Hawaiian Nation in the Illusion of Reality*, 34 ARIZ. ST. L.J. 27, 38–44 (2002) (emphasis omitted).

<sup>155</sup> *Id.* at 42–43.

<sup>156</sup> WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE TEN WORST INDIAN LAW CASES EVER DECIDED 427 (2010).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Declaration, *supra* note 1, arts. 25, 31, 34, 36.

<sup>160</sup> *Id.* art. 25.

resources, traditional knowledge, and the concrete manifestations of their cultural heritage.<sup>161</sup>

As the Declaration moves toward implementation at the level of law or policy, there will be countless debates about whether indigenous cultural heritage is synonymous with intellectual property, whether it would violate the Establishment Clause to recognize a spiritual right, and whether it is even permissible, as a matter of law, to accord duties to current peoples on behalf of future generations. Indigenous peoples, however, know the truth of the matter. They were placed on these lands for a purpose, with a set of cultural reference points that secure them to their ancestral past and guide them toward their collective future. Sometimes these reference points are visible only to those who participate in the cultural life of the people, but they persist. Rather than accepting the current status of domestic law, indigenous peoples must invoke the legacy of their ancestors, channeling the life force that persists, endures, and ultimately flourishes in service of indigenous self-determination.<sup>162</sup>

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<sup>161</sup> *Id.* art. 31.

<sup>162</sup> See Nihipali, *supra* note 156, at 44, and accompanying text. I am indebted to Kunani Nihipali, Dennis (“Bumpy”) Kanahele, and Ho’oipo Pa for living the legacy of their ancestors and for expressing the self-determination of the Hawaiian Nation. Their comments from the ASU Symposium on Indigenous Cultural Sovereignty are published in Volume 34 of the ARIZONA STATE UNIVERSITY LAW JOURNAL, Spring 2002.