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BOOK REVIEW

SWORD OR SHIELD: THE PAST AND FUTURE IMPACT OF WESTERN LEGAL THOUGHT ON AMERICAN INDIAN SOVEREIGNTY

THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT. By Robert A. Williams, Jr.¹ Oxford University Press. 1990. Pp. 352. \$39.95.

Reviewed by Kevin J Worthen²

[American Indian tribes'] rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.³

Chief Justice Marshall's explanation of the "Discovery Doctrine" generally serves as the starting point for the study of federal Indian law. It is, by contrast, the culmination of Robert Williams's book, *The American Indian in Western Legal Thought*. Tracing the lineage of the Discovery Doctrine from medieval crusades, through imperial Spain and England, and ultimately to the United States, Williams attempts to lay bare the moral (or perhaps immoral) underpinnings of contemporary federal Indian law.⁴

Williams relies heavily on secondary sources, not aiming to please intellectual historians interested in the ambiguities of particular historical events (p. 7).⁵ He instead pursues broader themes, fomenting

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³ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

⁴ Much of the material in the book has been published by Williams in law review articles. See Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; Williams, *Jefferson, the Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165 (1987); Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983) [hereinafter Williams, *Origins of Indian Status*]. The impact of Williams's arguments are, however, much more powerfully presented as a single unit than when read seriatim.

⁵ This Book Review makes no effort to verify or validate the historical accuracy of Williams's views, though his book could profitably be examined from that standpoint. The book also prompts one to question the extent, if any, to which the experience of indigenous peoples forced to accept Western law has been different from that of peoples subjugated by non-Western cultures. This Book Review, however, limits itself to the question whether Western legal thought

passionate disgust rather than detached analysis as he exposes the inhumane origins of the Discovery Doctrine and the grotesque uses to which its predecessor theories were put. Reading Williams's book is like stumbling upon a mass grave, the remnant of a brutal massacre committed by one's own ancestors and excused by one's contemporaries. Williams ably demonstrates how Western legal dogma has been used to cleave Native Americans from their rights to life, liberty, and property. He postulates, though with less elaboration, that current federal Indian law merely perpetuates that legacy.

Williams's book compels one to ask whether Western legal concepts are inevitably inimical to the survival of American Indian tribalism. The future of federal Indian law will ultimately depend on the answer to this critical question.⁶ Williams's conclusions, though somewhat equivocal, seem unnecessarily pessimistic. Western legal concepts, if used creatively, can protect instead of destroy tribal sovereignty.

I. THE DISCOVERY DOCTRINE: WESTERN LEGAL THOUGHT AS A SWORD

According to Williams, Western legal concepts concerning Native Americans derive from notions developed by the medieval Church concerning the status of non-Christians. Two themes dominated Cath-

can accommodate American Indian tribes' legitimate desire to create and preserve their own views and norms.

⁶ Diametrically opposed views concerning the proper future course of federal Indian law are set forth in a lively exchange of views prompted by some of Williams's earlier work. Compare Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413, 421-30 (1988) [hereinafter Laurence, *Plenary Power*] (arguing in favor of the status quo and concluding that congressional self-restraint, coupled with judicial recognition of inherent tribal sovereignty when Congress has not acted, adequately ensure the future of American tribes) with Williams, *Learning to Live With Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live With the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ. L. REV. 439, 451-52, 457 (1988) [hereinafter Williams, *Eurocentric Myopia*] (expressing pessimism about Western law, Congress, the courts, and the Constitution, and postulating that tribes will be truly secure only when "the lie of words sustained by Federal Indian legal law and its blind obeisance to the Discovery Doctrine and the closely related congressional plenary power doctrines can no longer be lived with"). Professor Laurence rebuts Williams's criticisms of *Plenary Power* in Laurence, *On Eurocentric Myopia, The Designated Hitter Rule and "The Actual State of Things,"* 30 ARIZ. L. REV. 459 (1988) [hereinafter Laurence, *Actual State of Things*].

This Book Review stakes out a middle ground between the views of Professors Williams and Laurence. Reliance on congressional good will seems far too risky for tribes, given past performances. Contrary to Professor Laurence's argument, some constitutional limitation on Congress's authority to regulate tribes is desirable and probably necessary if the disparate viewpoints of Indians are to be given a meaningful place in modern America. See *infra* p. 1384. At the same time, the complete restructuring of the American legal system advocated by Professor Williams seems both undesirable and unachievable. See *infra* p. 1383.

olic thought at the time: hierarchy and unity.⁷ The unifying force was Christ's redemption of all mankind upon conditions of repentance; the apex of the hierarchy was the Pope who, through Peter, had been given a divine mandate to shepherd the universal flock.

Williams notes that this "vision of a unitary Christian society directed by God's vicar" (p. 18) did not go unchallenged even in medieval times. Civil monarchs relied on early Roman legal and political thought to resist papal hierocratic claims (pp. 41-43). In response to such challenges, the Church changed its doctrines in subtle ways to embrace some elements of secular humanism (such as the concept of natural law), but retained the underlying themes of unity and hierarchy (pp. 43-50).

For example, at the time of the Crusades, Pope Innocent IV exploited natural law themes to legitimize the Crusaders' violent efforts to dispossess non-Christians of *dominium*⁸ over their lands. Acknowledging that infidels had natural law rights to property and self-governance, the Pope nevertheless justified the violation of those rights. Non-Christians exhibited their need for instruction and protection by engaging in conduct deemed unacceptable by the ultimate interpreter of natural law, the Pope (pp. 46-47).

Innocent IV thus recognized the need to call on reason to justify the aggression of the Crusaders (a need created by secular humanism's challenge to Church authority), but retained for himself and his successors the prerogative to determine the *content* of that reason. He also effectively set the pattern for future legal justifications for the deprivation by Europeans of the human rights of what Williams terms "normatively divergent" societies: "as rational beings, infidels, like Christians, were responsible for their conduct under natural law, and excessive breaches of the universalized dictates and norms of this Eurocentric legal discourse indicated a lack of reason requiring remediation" (p. 49). The very fact that infidels failed to conform their conduct and beliefs to Western European norms indicated a lack of ability to exercise properly their natural rights. It was therefore necessary for more enlightened guardians to assume authority over them until they could be "civilized."⁹

⁷ Williams traces medieval Church dogma back to the writings of Paul concerning the *corpus mysticum Christi* (the Church as the mystical body of Christ), in which everyone belongs to the community of Christ's body (the theme of unity), and every limb of the body is assigned an ordered place (the theme of hierarchy) (p. 15). See, e.g., 1 *Corinthians* 12:12-29.

⁸ The power of *dominium* included the authority both to possess and govern land (pp. 13, 40).

⁹ The similarity between this reasoning and that used to create the federal government's trust relationship for modern American Indian tribes is apparent. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), the Supreme Court stated that "the character and religion of [the native] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy." *Id.* at 573. The Indians' normative divergence

As the Spanish and Portuguese spread Western European influence outside the Mediterranean region, they carried with them the Catholic conceptualization of the rights of non-Christian peoples. For example, upon first contact with Indians, and prior to commencing violence, the Spanish conquistadors were to read aloud the *Requerimiento*¹⁰ to apprise the natives of their natural law obligation to acknowledge the superiority of Christian norms (pp. 91-92). If this formalistic entreaty proved unpersuasive, and the Indians failed to comply with the wishes of their conqueror-discoverers, the Pope's agents were then free to kill or enslave them (pp. 91-92). The actual manner in which the announcement of the *Requerimiento* was executed, however, indicates "a frightening gap between law on the books in the Old World and law in action in the New World" (p. 92). As described by one historian:

"[T]he Requirement was read to trees and empty huts when no Indians were to be found. Captains muttered its theological phrases into their beards on the edge of sleeping Indian settlements, or even a league away before starting the formal attack, and at times some leather-lunged Spanish notary hurled its sonorous phrases after the Indians as they fled into the mountains. Once it was read in camp before the soldiers to the beat of the drum. Ship captains would sometimes have the document read from the deck as they approached an island, and at night would send out enslaving expeditions . . ." (p. 92).¹¹

According to Williams, the sixteenth century philosopher Francisco de Victoria was responsible for Spain's major contribution to the development of Western legal concepts affecting non-European infidels.¹² Victoria desacralized the discourse of conquest. The measure of a person's compliance with natural law was shifted from pronouncements of "a divinely installed papal intermediary" to "humanized,

quickly led to the assertion that the tribes were "in a state of pupillage" and that "[t]heir relation to the United States resembled that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). Fifty-four years later, the Court observed that the need for trusteeship had only been heightened by past policies. "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell." *United States v. Kagama*, 118 U.S. 375, 384 (1885).

¹⁰ The *Requerimiento* was drafted at the request of King Ferdinand to justify formally Spanish dominion in the New World (p. 91).

¹¹ Williams quotes L. HANKE, *THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA* 34 (1949).

¹² The connection between the work of Victoria and modern federal Indian law was first recognized nearly 50 years ago by Felix Cohen, the godfather of modern American Indian law. See Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 11-21 (1942). Cohen's opinion as to the ultimate result of Victoria's contributions, however, was much different from Williams's. See, e.g., *id.* at 11 ("[T]he legal ideals which Spanish teachers proclaimed . . . provided a humane and rational basis for an American law of Indian affairs.").

rationally conceived norms of conduct contained within the eclectic but wholly privileged Western corpus of legal, political, and theological ideas that constituted the Christian natural-law tradition" (p. 103). Moral norms of the Western European national community — the Law of Nations — rather than papal decrees, became the measuring rod of acceptable conduct. The result of a people's failure to conform, however, remained the same: they were deemed "unfit to found or administer a lawful State up to the standard required by human and civil claims," and the conquering Europeans were justified, indeed obligated, to assume a benign guardianship over the land and laws of the uncivilized until they matured sufficiently to comply with natural law on their own (p. 104).¹³

While Spain was refining Western legal concepts to justify its conquest of Native Americans, England began using similar legal arguments to aid its own colonization efforts. English attempts to conquer the "wild Irish," who were readily likened to savages of the Indies (p. 141), eventually led to two novel variations on doctrines borrowed from Spain.¹⁴ First, the English added underutilization of land to the list of natural law violations deserving of forceful correction.¹⁵ Second, the English relied on private, rather than public, funding of conquest. Thus, under the English plan, "investors would finance the planting of colonies in exchange for royal recognition of feudal rights in any Irish territory they conquered" (p. 139). These innovations created a situation in which "the motive for conquest (abundant land [available to private interests]) was subsumed into its justification (the abundant land was underutilized)" (p. 140).

In justifying North American conquest, the English further refined the legal basis for exploitation of natives by including rights of free trade and travel as norms of the Law of Nations. According to noted English theorist George Peckham and others, trade and traffic with "infidels" or "savages" had been practiced for so long that Native

¹³ Williams quotes F. VICTORIA, *DE INDIS DE IVRE BELLI REFLECTIONS* 160-61 (E. Nys ed. J. Bate trans. 1917).

¹⁴ Williams struggles to make a direct connection between Victoria and English legal theorists. He concludes, ultimately, that Victoria's views were adopted surreptitiously by English lawyers who, as members of the educated gentry, certainly would have been exposed to Victoria's work, but who would have hesitated to cite a Spanish Dominican priest to the English Protestant ruling class of the time (pp. 168-69).

¹⁵ The view that colonization was justified by the natives' failure to develop properly their lands was not "elevated to a principle of natural law in English colonial discourse" until after the attempted Irish conquest (pp. 140-41). By the time England had shifted its colonizing efforts to the New World, however, an English theorist could assert that "God did create land, to the end that it should by Culture and husbandry, yield things necessary for man's life" (p. 171) (spelling modernized) (quoting D. QUINN, *THE VOYAGES AND COLONIZING ENTERPRISES OF SIR HUMPHREY GILBERT* 468 (1940)). The implication was that Native Americans, who failed to conform with divine obligation by refusing to employ their lands in this manner, would benefit from colonizing efforts.

Americans' interference with trade and trade-related travel in the New World violated "universally binding laws" (p. 167). Thus, economic liberalism was added to the orthodoxy to which the Indians were expected to comply.

The English economic justifications did not secure North America against competing Spanish claims, however, because they failed to justify England's claim to *exclusive* rights to Indian territory. As the main focus of the discourse became the comparative rights of European conquerors, the Doctrine of Discovery began to assume its final form. Spain based its claim to exclusive rights on the papal bulls of 1492 and 1493, in which Pope Alexander drew a line of demarcation between the Spanish and Portuguese (pp. 79-80) and, exercising his guardianship responsibility, placed the inhabitants of most of North and South America under the tutelage and direction of the Spanish Crown. Protestant England, of course, refused to recognize this papal action and looked to its own legal concepts to support its claim against the Spanish.

George Peckham claimed that English discovery of the New World prior to Columbus vested undoubted title in the English Crown (p. 170).¹⁶ Subsequent English colonization efforts were, therefore, based not on an assertion of new rights, but on the restoration of prior ones created by discovery (pp. 170-71). The Doctrine of Discovery became increasingly useful to the English as other European countries began seeking New World wealth. While recognizing an inherent right to trade with Indians, the English emphasized that this was their *exclusive* right, justified by first discovery.¹⁷

The final challenge to England's right of exclusive control over Indian affairs came from American colonists. In an effort to avoid costly wars, England sought in the eighteenth century to prohibit the colonists from expanding into territories not already wrested from Indian control. The Crown defended its authority to impose such restrictions by declaring that Christian Europeans had superior rights to lands held by non-Christians and that, by virtue of discovery, the Crown was heir to those rights, including the inchoate rights of conquest and ultimate title to infidel territories. While the Indians enjoyed a possessory interest in lands until the right of conquest was

¹⁶ Peckham recalled a legend of a twelfth century Welsh Prince, Madoc, who had sailed to the New World in 1170 and left some of his crew there. As evidence of the validity of the legend, Peckham contended that Madoc gave Welsh names (for example, "Gwynethes") to islands, animals, and fruits which "yet to this day beareth the same" (p. 170). He also relied on reports that English seamen had seen bearded men in the New World and argued that because Native Americans were not normally bearded, "bearded Welshmen had intermarried with the smooth-faced Indians and spread their hairy-faced progeny throughout the New World as signs of English title" (p. 170).

¹⁷ Conveniently, the Indians lacked the right to free trade because they had demonstrated their inability to exercise that right.

fully exercised, they could not sell their rights to the colonists without permission of the Crown.

Many colonists, including such luminaries as George Washington, Thomas Jefferson, and Benjamin Franklin, recoiled at the idea that an English king could deny their right to purchase lands from frontier Indians. The colonists could not agree among themselves, however, as to the exact defect in the Crown's claim. White land speculators from "landless"¹⁸ states directly repudiated the Discovery Doctrine, and relied on the Indians' natural law right to sell lands they occupied to whomever they pleased (pp. 279-80). Those from "landed" states could not decide whether to reject or embrace the Discovery Doctrine because their own property rights depended upon it. Prior to the American Revolution, when the main issue was whether the Crown or the colonies would control westward expansion onto Indian land, Jefferson and others from the landed states attacked the Discovery Doctrine as the offshoot of illegitimately Norman-imposed feudalism (pp. 268-71). Because the landed states' charters also derived from that system (p. 272), their abhorrence of the Discovery Doctrine apparently abated once the successful revolution eliminated the Crown's authority.

The Revolutionary War did not, however, end the debate over the nature of the right to purchase Indian lands. It merely eliminated the English Crown as a participant. The attack on the Discovery Doctrine reached its peak during the Articles of Confederation period. Some critics, such as Samuel Wharton, even asserted that natural law rights of Native Americans were equal to those of their European counterparts. Indians held rights to their territory "according to the laws of nature and of nations' as 'the original and first occupants and possessors of the country'" (p. 303).¹⁹ According to such critics, European claims to the contrary were based on the Norman-derived feudal concepts rejected by the American Revolution. Not surprisingly, these arguments were generally advanced by land speculators who would personally benefit most from a doctrine allowing free alienation of Indian lands (pp. 272-73).

Ultimately, however, the land speculators' arguments failed, and the Discovery Doctrine prevailed when the landed states ceded their rights inherited from the Crown to the United States as part of a political compromise.²⁰ By discovery, the English had obtained the

¹⁸ Some states, such as Virginia, had charter claims to lands extending beyond the Appalachian Mountains. The charters of others, such as Maryland and New Jersey, limited their boundaries to eastern lands. Those without charter claims to Western lands were "landless" states. See M. JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781*, at 150 (1940).

¹⁹ Williams quotes S. WHARTON, *PLAIN FACTS* 10-11 (1781).

²⁰ Congress agreed to accept Virginia's cession of its claims north of the Ohio and, in exchange, to refrain from investigating conflicting claims in the region (p. 305).

right and obligation to reform the Indians, as well as title to tribal lands. The United States inherited those rights (by grant from the colonies or otherwise), and when the Constitution was adopted, control over Indian affairs vested exclusively in the United States.²¹

Judicial ratification of the Discovery Doctrine came in 1823. In *Johnson v. M'Intosh*,²² successors in interest to a speculator's claims to Indian land argued that their claims were superior to those of persons who purchased the same lands from the federal government after a treaty between the United States and native tribes. In rejecting that argument, the Supreme Court formally adopted the Doctrine of Discovery, holding that the Indians could not have passed title to property because they had lost that right when the English discovered the territory. Like earlier European theorists, Chief Justice Marshall described the practices of Western European governments as universal norms, applicable to all the world, including Indians.²³ Further, as partial explanation for ignoring the adverse impact this "universal" rule would have upon the Indians, Marshall relied on the justification originally advanced by conquerors in the Middle Ages — the normative divergence of the people: "Although we do not mean to engage in the defense of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them."²⁴ Thus, as Williams explains, "the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples" and "[w]hite society's exercise of power over Indian tribes received the sanction of the Rule of Law" (p. 317). The stage was set for the destruction of Indian tribes.

Williams makes little effort to chronicle the post-*Johnson* treatment of Indians under the Discovery Doctrine and its corollaries.²⁵ An independent review of Indian law cases and statutes, however, reveals that these legal doctrines have repeatedly been used to undermine tribal authority and existence.²⁶ For example, only eight years after

²¹ See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes . . .").

²² 21 U.S. (8 Wheat.) 543 (1823).

²³ Marshall went to considerable length to establish that the Discovery Doctrine was "the common principle adopted by all Europe," *id.* at 575, thereby enjoying "universal recognition," *id.* at 574.

²⁴ *Id.* at 589.

²⁵ In a single scathing sentence, Williams sets forth his view of that history:

Violent suppression of Indian religious practices and traditional forms of government, separation of Indian children from their homes, wholesale spoliation of treaty-guaranteed resources, forced assimilative programs, and involuntary sterilization of Indian women represent but a few of the practical extensions of a racist discourse of conquest that at its core regards tribal peoples as normatively deficient and culturally, politically, and morally inferior.

(pp. 325–26). But see Laurence, *Plenary Power*, *supra* note 6, at 425–26 (questioning the accuracy of these claims).

²⁶ The Supreme Court has explained the basis of the federal common law limits on tribal

Johnson, Chief Justice Marshall concluded that Indian tribes were not independent foreign states entitled to invoke the original jurisdiction of the Supreme Court.²⁷ Using concepts derived from the Discovery Doctrine, Marshall concluded that they could be considered no more than "domestic dependent nations."²⁸ The Supreme Court has ruled that as a necessary result of their status as "domestic dependent nations," Indian tribes have been deprived of power to alienate their land freely without approval of the federal government,²⁹ enter into direct diplomatic or commercial relations with foreign nations,³⁰ and exercise criminal jurisdiction over non-Indians or non-tribal member Indians who commit crimes on reservation lands.³¹ The Court also has held that the tribes lack power to regulate hunting and fishing activities of non-Indians on non-Indian-owned land within a reservation,³² zone some kinds of fee-owned reservation land,³³ interfere with state regulation of liquor sales on a reservation,³⁴ and, to some lesser extent, exercise jurisdiction over civil cases involving non-Indians on a reservation.³⁵ Such limitations severely curtail tribes' abilities to develop their own norms and shape their own communities.³⁶

authority by noting that tribes' "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Although the quoted language leaves the impression that these limitations were voluntarily accepted by tribes in exchange for other benefits, history clearly demonstrates the contrary.

²⁷ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831).

²⁸ *Id.* at 17-18. Williams briefly discusses *Cherokee Nation* (p. 314).

²⁹ See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 586-88 (1823).

³⁰ See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17-18. This assertion was dictum, but it has never been questioned.

³¹ See *Duro v. Reina*, 110 S. Ct. 2053, 2059 (1990); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978).

³² See *Montana v. United States*, 450 U.S. 544, 564-65 (1981). Under the Doctrine of Discovery, most reservation lands were originally held in trust for the tribes by the United States. As a result of the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.), however, many reservations were eventually sold in fee to individual Indians and non-Indians. The Court in *Montana* upheld the Crow tribe's right to regulate fishing and hunting by non-Indians on tribal and trust land, see 450 U.S. at 557, but invalidated the application of similar regulations to land owned in fee by non-Indians.

³³ See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 109 S. Ct. 2994 (1989). The *Brendale* Court upheld the tribe's right to zone fee-owned land in a largely undeveloped portion of the reservation to which the public had been granted only limited access, but rejected the tribe's efforts to zone a more developed area to which the general public had unrestricted access. See *id.* at 3009, 3015.

³⁴ See *Rice v. Rehner*, 463 U.S. 713, 726 (1983).

³⁵ See *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). The *National Farmers* Court held that a challenge to the assertion of tribal court jurisdiction in a civil action raised a federal issue sufficient to invoke federal question jurisdiction, see *id.* at 852. It did not, however, specify the parameters of the federal law.

³⁶ For instance, inability to zone all lands in a reservation prevents the tribe from using one of the most powerful governmental tools for defining a community's "essential character." *Bren-*

Tribes' abilities to implement their distinctive norms have been further limited by congressional action. Since *Johnson*, Congress has enacted statutes opening reservations to non-Indian settlement,³⁷ subjecting some tribes to certain state regulation,³⁸ requiring tribes to adhere to standards similar to those imposed on federal and state governments by the Bill of Rights and the fourteenth amendment,³⁹ and in some cases, completely terminating tribes.⁴⁰ Such actions obviously restrict, if not eliminate, a tribe's power to implement and perpetuate its own norms. While such legislation is not necessarily the direct product of the Discovery Doctrine, both ultimately derive from the same Western legal concepts which recognize supreme and plenary legislative authority in the discovering conqueror.⁴¹

dale, 109 S. Ct. at 3009. In non-Indian contexts, the Supreme Court has repeatedly recognized the connection between zoning authority and the perpetuation of values. *See, e.g.*, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (declaring that local governments have the power to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people").

³⁷ Under the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.), 160-acre parcels of reservation land were allotted to individual tribal members with the intent of making surplus lands available to non-Indians. As a result of the Act and subsequent implementing legislation, total Indian landholdings fell from 138 million acres in 1887 to 52 million acres in 1934. *See* C. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 20 (1987); *infra* p. 1388.

³⁸ *See* 18 U.S.C. § 1162 (1988) (transferring criminal jurisdiction over Indian lands from the federal to the state governments in California, Minnesota (except for the Red Lake Reservation), Nebraska, Oregon (except for the Warm Springs Reservation), and Wisconsin (except for the Menominee Reservation, from which federal jurisdiction was removed and later reinstated, *see* 25 U.S.C. §§ 891-903f (1988))); 28 U.S.C. § 1360 (1988) (transferring civil jurisdiction from federal to the state governments in the above-mentioned jurisdictions); *see also* 25 U.S.C. §§ 1321-1322 (1988) (providing mechanism whereby other states may assume jurisdiction over Indian tribes subject to tribal consent).

³⁹ The Indian Civil Rights Act statutorily imposes many, but not all, of the provisions of the Bill of Rights on Indian tribes. *See* 25 U.S.C. § 1302 (1988).

⁴⁰ "Termination" of a tribe involves "termination of federal trusteeship over the tribe, mandatory distribution of tribal assets to individual tribal members, and in some cases, disbandment of the tribe." Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1025 (1981); *accord* Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139, 152-53 (1977). During the "Termination Era" of the 1950s, 109 tribes and bands were terminated. *See id.* at 151. Tribal status was eventually restored to some of the terminated tribes. *See, e.g.*, *Menominee Restoration Act*, 25 U.S.C. §§ 903-903f (1988).

⁴¹ The Supreme Court has repeatedly recognized the plenary nature of congressional power to legislate with respect to Indian tribes. *See, e.g.*, *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 788 n.30 (1984) (noting that "all aspects of Indian sovereignty are subject to defeasance by Congress"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (observing that "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess"). The exact source of that power has not been definitively established. *See, e.g.*, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) (holding that "the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making"); Newton, *Federal*

Accordingly, although Williams himself does not draw the line from *Johnson* to the present, it is not difficult to construct an argument that the pre-revolutionary tendency to use Western legal thought to excuse the conquest and elimination of normatively divergent peoples continues today.⁴² Perhaps Western legal thought cannot be used in any other manner or trusted to defend traditional tribal ways. Without discussing post-*Johnson* law, Williams apparently leaps to this radical conclusion. He insists that tribes be given the power to "seek protection and preservation through means other than those provided by a conqueror's rule of law and its discourse of conquest" (p. 327). By advocating both the complete rejection of the Doctrine of Discovery (p. 326) and the granting of an equal voice to the tribes in the international arena, Williams seems to repudiate traditional Western legal concepts that recognize any federal authority over Indian tribes.⁴³

If complete independence offers the only hope for tribal preservation, as Williams implies, prospects for Native Americans are dim indeed. This absolutist position ignores the compelling role that settled expectations play in any non-anarchic society and the importance of ensuring some degree of certainty in whatever system a society adopts. That, in fact, was one of the main points of Chief Justice Marshall's opinion in *Johnson*. Marshall did not base his decision

Power over Indians: Its Sources, Scope, and Limitations, 132 U. PA. L. REV. 195, 199 (1984) (arguing that "[t]he Plenary Power Doctrine . . . can be traced not only to [the constitutional] commerce power but also to the treaty, war, and other foreign affairs powers, as well as the property power"). Because the tribes never consented to the Constitution, however, even these sources must ultimately rest on the concept that as a result of European discovery, tribal "rights to complete sovereignty, as independent nations, [are] necessarily diminished." *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); see also Laurence, *Plenary Power*, *supra* note 6, at 421 (arguing that "the Discovery Rule . . . influenced the later creature of the plenary power"); Williams, *Eurocentric Myopia*, *supra* note 6, at 452 (contending that "the Discovery Doctrine as . . . articulated in *Johnson* is, after all, the conceptual foundation of the plenary power of Congress in Indian affairs"). Conquest, not consent, is the ultimate foundation of the relationship.

⁴² See cases cited *supra* notes 31-35.

⁴³ As an example of the kind of equal voice that should be given to American Indians, Williams cites the Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere that was adopted by the United Nations Non-Governmental Organizations at the Conference on Discrimination Against Indigenous Populations in the Americas (p. 331 n.14). Williams describes the document as calling for the "recognition of indigenous nations as nations and proper subjects of international law, provided that the people concerned desire such recognition and meet fundamental requirements of nationhood, including a permanent population, a defined territory, and a government with the ability to enter into relations with other states" (p. 331 n.14).

Williams has earlier observed that the Doctrine of Discovery had been used to eliminate the tribes' ability to "engage in multilateral relations with other sovereign powers, an important aspect of tribal political sovereignty." Williams, *Origins of Indian Status*, *supra* note 4, at 3 n.5. Restoration of that right seems to require independent nation status.

solely on the moral or logical persuasiveness of the Doctrine of Discovery,⁴⁴ for such arguments, by themselves, were insufficient even for the Western conquerors. Instead, Marshall noted the practical realities of the situation:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.⁴⁵

The force of that argument has increased considerably since 1823, as American society has made even further adjustments in reliance on the existing system. Indian tribes no longer live in isolated expanses of the realm.⁴⁶ The creation of hundreds of national enclaves interspersed throughout the United States (some within the confines of major cities) would immeasurably alter existing notions of sovereignty. Suggestions of such magnitude are so politically untenable that they may be dismissed without serious consideration.⁴⁷ Accordingly, although Williams's book advances a compelling argument for alteration of the status quo, advocacy of more incremental, attainable changes is much more likely to benefit the tribes.

Pragmatic examination of the uses to which the legal reasoning in *Johnson* and its progeny have been put suggests that Western legal thought need not be completely jettisoned. Its concepts can be employed in ways that advance, rather than hinder, tribal interests. For example, in *Williams v. Lee*,⁴⁸ the Supreme Court relied on the federal supremacy over Indian affairs recognized in *Johnson* to reaffirm the tribes' right to "make their own laws and be ruled by them" free from state interference.⁴⁹ The same reasoning has been used to prevent a state from taxing some transactions and activities involving tribes and their lands.⁵⁰ Similarly, the tribal prohibition against alienation of

⁴⁴ See *supra* p. 1379.

⁴⁵ *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 591 (1823).

⁴⁶ "All Indian reservations are within state boundaries and some reservations are close to, or even within, population centers. Indian reservations are located, for example, near Santa Fe, Tucson, Pendleton, Oregon, Seattle, and Miami. They are located within Reno, Palm Springs, and Tacoma." C. WILKINSON, *supra* note 37, at 25.

⁴⁷ Williams's failure to acknowledge the "actual state of things" has elsewhere been criticized. See Laurence, *Actual State of Things*, *supra* note 6, at 459-63; Laurence, *Plenary Power*, *supra* note 6, at 435-37. For Williams's response, see Williams, *Eurocentric Myopia*, *supra* note 6.

⁴⁸ 358 U.S. 217 (1959).

⁴⁹ *Id.* at 220. Although the Court did not cite *Johnson*, it relied extensively on *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which in turn was based on principles articulated in *Johnson*. See *Worcester*, 31 U.S. (6 Pet.) at 543-44.

⁵⁰ See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 344 (1983) (prohibiting the state from enforcing hunting license fees and regulations on reservation lands); *Central Mach.*

land without federal government approval, a direct result of *Johnson*, has been successfully invoked to create a federal common law right in the tribes to enforce their aboriginal and occupational property rights nearly two centuries after they were deprived of particular lands.⁵¹ Even the demeaning legal theory that views Indians as wards of the federal government needing guardianship protection has been used to benefit Native Americans.⁵²

Consequently, the rationale of *Johnson* and its progeny has not been purely inimical to tribal interests. Given the less than honorable history of the federal government's relationship with Indian tribes, however, it would be disingenuous to argue that tribal interests have been well served by Western legal concepts. The examples cited above are relatively isolated pieces of the modern federal Indian law mosaic. Moreover, each of these Indian "victories" was subject to congressional veto because of the plenary power theory.⁵³ Indeed, so long as Congress retains unlimited authority over tribes, their ability to create and implement their own value systems will remain subject to the often hostile will of the conquering majority.

If, however, constitutional arguments could be forged in defense of tribal autonomy, the sword of Western jurisprudence could be recast into a shield to safeguard Indian diversity from congressional and judicial assaults. Principles announced in an early Indian law case unfavorable to the tribes provide the basic materials for such a transformation, while doctrines announced in a recent non-Indian law Supreme Court decision provide the necessary reshaping tools.

II. ASSOCIATIONAL RIGHTS: WESTERN LEGAL THOUGHT AS A SHIELD

While some measure of constitutional protection has been extended to Native Americans in the past, such efforts have generally focused solely on the rights of individual Indians,⁵⁴ not the tribal

Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 166 (1980) (holding that sales of farm equipment to a tribe are exempt from a state's gross proceeds tax).

⁵¹ See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234-36 (1985).

⁵² See *Ewert v. Bluejacket*, 259 U.S. 129, 137-38 (1922).

⁵³ For example, in *Williams*, the Court noted that if tribal authority to resolve contract disputes "is to be taken away from [the tribe], it is for Congress to do it." 358 U.S. 217, 223 (1959). Similarly, the *Oneida* Court observed that the tribes' common law right to enforce their property rights existed "absent federal statutory guidance . . ." 470 U.S. at 236 (quoting *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 674 (1974)). The Court also invited Congress to act. See *id.* at 253 ("We agree that this litigation makes abundantly clear the necessity for congressional action.").

⁵⁴ See, e.g., *Native Am. Council of Tribes v. Solem*, 691 F.2d 382, 385 (8th Cir. 1982) (upholding free exercise and equal protection claims when prison officials allegedly prohibited family members from attending religious ceremonies with Indian inmates when the same priv-

group.⁵⁵ This omission has been particularly ironic because Indians historically have been treated as distinct, divergent *groups* — as “domestic dependent nations.”⁵⁶ Until now, this divergent group status of Indians has been invoked as a reason for limiting tribal authority.⁵⁷ That same concept, however, when coupled with recent non-Indian law cases concerning the constitutional right of association, could be used for the benefit of the tribe.

In *Roberts v. United States Jaycees*,⁵⁸ a case involving Minnesota’s efforts to force local chapters of the Jaycees to accept women as members, the Court outlined the framework of the constitutional right of association.⁵⁹ According to *Roberts* and its progeny,⁶⁰ the Constitution limits the government’s authority to regulate two distinct classes

ilege was granted to inmates of other faiths); *Teterud v. Burns*, 522 F.2d 357, 362–63 (8th Cir. 1975) (striking down on free exercise grounds prison rule that required an Indian inmate to cut his hair); *Reinert v. Haas*, 585 F. Supp. 477, 481 (S.D. Iowa 1984) (granting preliminary injunction to prevent prison officials from violating Indian inmates’ free exercise right to wear religious headbands). This protection has been far from absolute, however. See, e.g., *Employment Div. v. Smith*, 110 S. Ct. 1595, 1606 (1990) (rejecting a free exercise challenge to state’s denial of unemployment benefits to an Indian fired because of ceremonial ingestion of peyote); *Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir. 1990) (questioning the continuing validity of *Teterud*).

⁵⁵ As Williams has explained, concepts such as “due process . . . equal protection . . . the freedom of religion’ are usually individual-contextualized rights in United States constitutional adjudicative theory” Williams, *Eurocentric Myopia*, *supra* note 6, at 447 (quoting Laurence, *Plenary Power*, *supra* note 6, at 419). “When Indian tribal people talk about important ‘rights’ Their focus is on protection and perpetuation of their people’s tribally-oriented existence. This critical ‘right’ . . . to a tribal existence, has never been protected by the white man’s law or courts.” *Id.* The same observation has been made with respect to the Western legal system’s treatment of non-Indian groups. See Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1012, 1015, 1049 (1983).

⁵⁶ In *Cherokee Nation*, the case in which the term “domestic dependent nation” first appeared, Chief Justice Marshall demonstrated how Indians were treated as a “group” rather than as individuals:

[The Cherokees] have been uniformly treated as a State from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people . . . responsible in their political character . . . for any aggression committed on the citizens of the United States by any individual in their community.

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) (emphasis added).

⁵⁷ See *supra* pp. 1379–80 (discussing limitations imposed on tribes as a result of their status as domestic dependent nations).

⁵⁸ 468 U.S. 609 (1984).

⁵⁹ See *id.* at 622–23. The Court ultimately upheld the Minnesota law, which prevented the Jaycees from discriminating on the basis of gender, against the organization’s claim of associational freedom. See *id.* at 628–29. In reaching this conclusion, the Court did not hold that the members of the organization had no right to protection from outside interference. Rather, it held that abridgement of the right was subject to strict scrutiny, a test that was satisfied by the statute in question. See *id.*

⁶⁰ Three years after *Roberts*, the Court again addressed the associational right, upholding a California statute requiring California Rotary Clubs to admit women. See *Board of Directors of Rotary Int’l v. Rotary Club*, 481 U.S. 537 (1987).

of association: "intimate" and "expressive."⁶¹ Under the criteria set forth by the Court, many tribes might not merit protection as intimate associations,⁶² but the protection afforded expressive associations would seem to be more readily applicable.

Expressive associations facilitate the exercise of other constitutionally protected activities, such as "speech, assembly, petition for the redress of grievances, and the exercise of religion."⁶³ The right of expressive association seems particularly well suited for use by tribes, as its primary purposes are to preserve "political and cultural diversity" and to protect "dissident expression from suppression by the majority."⁶⁴ In short, it is designed to ensure that divergent voices, such as those of Native Americans, are not silenced.

Expressive associational rights have been extended to a "wide variety of political, social, economic, educational, religious and cultural ends."⁶⁵ The expressions in which groups must engage, therefore, need not be limited to communications with those outside the group — the Constitution also defends the inculcation of traditional values *within* a group.⁶⁶ An association, therefore, is entitled to constitutional protection if a "not insubstantial part" of its activities facilitate either internal or external expression.⁶⁷

⁶¹ See *Rotary Int'l*, 481 U.S. at 544; *Roberts* 468 U.S. at 617-18.

⁶² Although the Court has "not held that constitutional protection [for intimate association] is restricted to relationships among family members," it has limited it to those relationships that "presuppose 'deep attachments and commitment to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'" *Rotary Int'l*, 481 U.S. at 545 (quoting *Roberts*, 468 U.S. at 619-20) (emphasis added).

Thus, among the key factors in determining whether a relationship falls within the intimate associational protection is the size of the group. See *Roberts*, 468 U.S. at 620. Many tribes have several thousand enrolled members. See U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, AMERICAN INDIAN AREAS AND ALASKA NATIVE VILLAGES: SUPPLEMENTAL REPORT 35 (1980) (listing sixty reservations containing more than 1000 Indian residents).

That size is a critical factor may itself reflect a Western bias against non-Western cultures. An Indian's relationship to his or her tribe may be intimate from a cultural viewpoint, notwithstanding the large size of the tribe. See R. BARSH & J. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY*, at vii-viii (1980).

⁶³ *Roberts*, 468 U.S. at 618; accord *Rotary Int'l*, 481 U.S. at 544.

⁶⁴ *Roberts*, 468 U.S. at 622.

⁶⁵ *Id.*; see also *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 289 (D. Md. 1988) (finding that the KKK is entitled to expressive association protection).

⁶⁶ See *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring) ("[P]rotected expression may also take the form of . . . inculcation of traditional values [and] instruction of the young . . ."). A group's ability to communicate internally affects its power to convey its distinct messages to those outside the group. See Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 111.

⁶⁷ *Roberts*, 468 U.S. at 626 (quoting *United States Jaycees v. McClure*, 709 F.2d 1560, 1570 (8th Cir. 1983)). The *Roberts* Court held that the Jaycees were "plainly" covered by the associational protection, *id.* at 622, because the organization had taken public positions on a number

This protection could easily be extended to Indian tribes, which often engage in expressive conduct. A major function of modern tribes is to advance their members' unique political, economic, cultural and social interests, either by communicating with those outside the group through activities such as lobbying,⁶⁸ or by inculcating tribal values in members through ceremonies and enforcement of tribal law.⁶⁹

Tribal use of this right of expressive association would shield tribes from the kinds of congressional abuses which Native Americans have suffered in the past and which may occur in the future. Government action unconstitutionally interferes with the freedom of expressive association in a number of ways. Most relevant to tribes are acts that affect the "philosophical cast" of the group and thereby "change the message communicated by the group's speech,"⁷⁰ and those that "interfere with the internal organization or affairs of the group."⁷¹ A review of Congress's legislative record with respect to Indian tribes reveals a number of instances of both kinds of impermissible governmental interference.

The most egregious example of an unconstitutional intrusion affecting the philosophical cast of the tribe occurred in the 1950s when Congress "terminated" a number of tribes.⁷² Termination effectively eliminated the revenues, territorial base, and governmental authority crucial to any tribe's legal existence.⁷³ Such actions dramatically altered the philosophical cast of the "terminated" tribes, thereby preventing them from fully expressing their distinct cultural messages to both their members and outsiders. For a tribe to communicate its distinct message adequately, a formal tribal organization must exist — one possessing a land base and some governmental authority.

of issues and had "engage[d] in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment," *id.* at 626-27.

⁶⁸ Because their continued existence depends so much on Congress's goodwill, "[h]ighly effective legislative campaigns have been pursued by individual tribes and by national organizations." C. WILKINSON, *supra* note 37, at 82. For specific examples of successful lobbying efforts by Indian tribes, see *id.* at 192 n.151; F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 196-200 (1982).

⁶⁹ See V. DELORIA & C. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN SOVEREIGNTY* 248 (1984); D. McNICKLE, *NATIVE AMERICAN TRIBALISM: INDIAN SURVIVALS AND RENEWALS* 85 (1973).

⁷⁰ *Roberts*, 468 U.S. at 627.

⁷¹ *Id.* at 623.

⁷² See *supra* note 40.

⁷³ Although termination legislation did not expressly eliminate tribal governmental authority, deprivation of a territorial base and federal funding, together with the express authorization for the exercise of state regulatory authority, "effectively stripped" the tribes "of their broad powers to act as governments." Wilkinson & Biggs, *supra* note 40, at 154; see also O. REYNOLDS, *HANDBOOK OF LOCAL GOVERNMENT LAW* § 66, at 197 (1982) (stating that "territory over which the government has some control" and "money with which to pay the costs of activities" are two essential elements of effective governmental action); Clinton, *supra* note 40, at 1042 (arguing that "ownership of a land base and the exercise of government power are integrally intertwined").

The importance of a tribal land base to the continued existence of tribal culture has been evidenced in many ways over the past two centuries. When, as a result of the General Allotment Act of 1887,⁷⁴ Congress opened Indian reservations to non-Indian settlement and thereby reduced the size of the tribal land base by nearly sixty-five percent, the impact was "less economic than psychological and even spiritual. A way of life had been smashed; a value system destroyed."⁷⁵ The world views of many Indians were altered,⁷⁶ and the character of both the individual Indians and their tribes was radically changed.⁷⁷ Indeed, for some, the destruction of Indian tribal culture was the purpose of the Allotment Act.⁷⁸

Tribes, of course, recognized the link between a land base over which they had primary control and the preservation of their culture even before the 1887 Allotment Act. Indeed, many tribes agreed to leave their ancestral lands only when assured that they would be given primary control over some land base. As one Quapaw chief explained in 1833, "We want to continue . . . any where, even in the swamps where the whites will never settle. If our Great Father [the United States President] will grant our request, he may keep our money, we will give it all to him."⁷⁹

Modern courts also have recognized the importance of a tribal land base in perpetuating tribal culture. In upholding the Salish and Kootenai tribes' residency requirement for tribal council candidates, the Ninth Circuit acknowledged that "the cultural identity of the . . . Tribes is primarily a product of continued physical presence on the reservation" and that "the elected leaders of the Tribe must be current and long-term actual residents . . . in order to insure that they are sufficiently familiar with and part of that culture in order to be

⁷⁴ Ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).

⁷⁵ W. WASHBURN, *RED MAN'S LAND/WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN* 75 (1971).

⁷⁶ As Washburn explains:

No longer did many tribal Indians feel pride in the tribal possession of hundreds of square miles of territory which they could use as a member of the tribe. Now they were forced to limit their life and their vision to an incomprehensible individual plot of 160 or so acres in a checkerboard of neighbors, hostile and friendly, rich and poor, white and red.

Id.

⁷⁷ "The admired order and the sense of community often observed in early Indian communities were replaced by the easily caricatured features of rootless, shiftless, drunken outcasts, so familiar to the reader of early twentieth-century newspapers." *Id.* at 76.

⁷⁸ As Theodore Roosevelt said, "The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual." S. TYLER, *A HISTORY OF INDIAN POLICY* 104 (1973) (quoting 15 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 1789-1914, at 6672 (J. Richardson ed. 1896-1917) [hereinafter *MESSAGES AND PAPERS*]).

⁷⁹ C. WILKINSON, *supra* note 37, at 18 (quoting the Speech of Head Chief of Quapaw Tribe in Council Meeting Connected with the Negotiation of a Treaty (May 10, 1833)).

entrusted to carry it forward."⁸⁰ Deprivation of a land base in which a full Indian community develops clearly alters the tribe's philosophical cast and modifies the message it can and will communicate.

Limiting tribal governmental authority over the community in which tribal members reside also adversely affects tribal culture. Many types of governmental activities facilitate or obstruct the perpetuation of a particular way of life. The Navajo tribe's zoning authority to prohibit the construction of any structures other than traditional hogans in a specific part of the reservation, for example, can advance significantly the tribe's ability to teach traditional Navajo values and customs to its members.⁸¹ If the zoning decision were made by non-Indian state and county officials, who might view the hogans merely as unsightly mud huts, the atmosphere on the reservation could change drastically in a way that, over time, would substantially alter the values of tribal members and the resultant messages conveyed by the tribe both internally and externally. Likewise, non-Indian control of other governmental decisions affecting tribal members, such as the development of educational policy⁸² or criminal law,⁸³ alters not only the content of those decisions, but also the entire character of the regulated tribal group.

⁸⁰ *Howlett v. Salish & Kootenai Tribes*, 529 F.2d 233, 243 (9th Cir. 1976).

⁸¹ The central place and meaning of the hogan in the life of the traditional Navajo is likely to elude most non-Indians:

To [Navahos], their hogans are not just places to eat and sleep, mere parts of the workaday world, as homes have tended to become in the minds of white people, particularly in cities. The hogan occupies a central place in the sacred world also. The first hogans were built by the Holy People Navaho myths prescribe the position of persons and objects within; they say why the door must always face the rising sun and why the dreaded bodies of the dead must be removed through a hole broken in the hogan wall to the north (always the direction of evil). A new hogan is often consecrated with a Blessing Way Rite or songs from it

C. KLUCKHOHN & D. LEIGHTON, *THE NAVAHO* 89-90 (rev. ed. 1974).

⁸² The impact of educational policy on the outlook of American Indians has been recognized for centuries, especially by those who desired to reshape the Indian view to conform to traditional Western norms. Daniel Rosenfelt has noted that in the effort to "civilize" Indians, "[e]ducation was perhaps the most important instrument . . . as evidenced by the inclusion of education provisions in Indian treaties beginning in 1794 and continuing through the end of the treaty-making in 1889." Rosenfelt, *Indian Schools and Community Control*, 25 STAN. L. REV. 489, 492 (1973). The most "successful" of these devices was the boarding school. As described by anthropologist Peter Farb:

The children usually were kept at boarding school for eight years, during which time they were not permitted to see their parents, relatives, or friends. Anything Indian — dress, language, religious practices, even outlook on life . . . was uncompromisingly prohibited. Ostensibly educated, articulate in the English language, wearing store-bought clothes, and with their hair short and their emotionalism toned down, the boarding-school graduates were sent out either to make their way in a White world that did not want them, or to return to a reservation to which they were now foreign.

P. FARB, *MAN'S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE* 257-59 (1968).

⁸³ A tribe's power to criminalize certain conduct may perpetuate and communicate unique

In short, federal termination of a tribe's legal existence profoundly impacts the philosophical cast of the tribe and alters the message likely to be communicated by the tribe in several critical ways. Such congressional action therefore infringes on the tribe's constitutional right of expressive association. Even less severe intrusions, which impact only limited areas of tribal life, may likewise be constitutionally suspect.

Of course, not every statute that changes the philosophical cast or alters the message of a group violates the Constitution. A court must consider the governmental purpose behind the statute. Nevertheless, infringements on this associational right are permissible only if the legislation advances a "compelling state interest[], *unrelated to the suppression of ideas*, that cannot be achieved through means significantly less restrictive of associational freedoms."⁸⁴ Under this test, termination legislation, which was designed solely to make the members of the affected tribe more "white" by suppressing the proliferation of Indian ideals,⁸⁵ is clearly unconstitutional. Other assimilationist legislation, such as the Allotment Act, which sought to force Indians to "change their mode of life" to conform to the white world's "idea of home, of family, and of property,"⁸⁶ likewise would be invalid.

tribal values and culture. Allowing non-Indians, who do not share those values, to define crimes will likely alter not only the substance of the criminal law, but also the values communicated to those governed by the law. For example, in *Dodge v. Nakai*, 298 F. Supp. 26 (D. Ariz. 1969), a non-Indian attorney was excluded from the reservation for laughing derisively during a tribal council meeting. A federal judge revoked the tribal order, finding that "[i]nvocation of the drastic power of exclusion for this reason is wholly unreasonable," *id.* at 32, without considering that "[f]or a white man who had previously placed himself in defiance of tribal government to enter into the seat of government . . . and to laugh scornfully in the face of tribal government, may, within the culture of the Navajo tribe, constitute a grave transgression." Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D.L. REV. 1, 50-51 (1975).

⁸⁴ *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (emphasis added); see also *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987) (applying this standard).

⁸⁵ The Termination legislation was spurred in large part by a 1948 study commission headed by Herbert Hoover, which announced that Indian "assimilation must be the dominant goal of public policy," S. TYLER, *supra* note 78, at 166, with the hope that when termination was completed "[t]he Indians will have been integrated, economically and politically, as well as culturally." A. GIBSON, *THE AMERICAN INDIAN* 549 (1980) (quoting *THE HOOVER COMMISSION REPORT* 473 (1949)). As one Montana Supreme Court justice observed: "The policy was to have declared an Indian no longer an Indian." Speech by R.V. Bottomly to National Congress of American Indians (1956), reprinted in S. TYLER, *INDIAN AFFAIRS: A STUDY OF CHANGES IN POLICY OF THE UNITED STATES TOWARD INDIANS* 138-39 (1964).

⁸⁶ 11 CONG. REC. 905-06 (1881) (remarks of Sen. Pendleton). As one commentator has noted, "it would never have occurred to any of the debaters to inquire of the Indians what ideas they had of home, of family, and of property. It would have been assumed, in any case, that the ideas, whatever they were[,] were without merit since they were Indian." S. TYLER, *supra* note 78, at 104 (quoting McNickle, *Indians and Europeans: Indian-White Relations from*

While some federal limitations on tribal governmental authority would withstand constitutional scrutiny notwithstanding their impact on the philosophical cast of the tribe,⁸⁷ those that have as their primary goal the elimination of tribal customs merely because they differ from majority customs likely would not withstand strict scrutiny. Much federal legislation would fail this constitutional test, because federal Indian policy has often destroyed tribal existence solely to encourage Indians to assimilate into the larger society.⁸⁸

Congress also has wielded its plenary power over Indians to enact legislation interfering with the internal organization and composition of the tribal group. The Indian Civil Rights Act⁸⁹ has been interpreted to require tribes to alter the method of choosing tribal leaders,⁹⁰ to change the qualifications for election to tribal office,⁹¹ and in one instance to admit members contrary to tribal wishes.⁹²

Requiring tribes to make these kinds of changes might, in certain situations, be justified by some independent governmental interest.⁹³ Extending the constitutional associational protection to tribes, however, would shift the burden to Congress to show that there is a compelling governmental interest that could not be achieved through

Discovery to 1887, in *AMERICAN INDIANS AND AMERICAN LIFE* (G. Simpson & J. Yinger eds. 1957)).

⁸⁷ For example, the Indian Civil Rights Act prohibits a tribe from imposing the death sentence for violations of tribal law. See 25 U.S.C. § 1302(7) (1988) (limiting maximum tribally imposed penalty to one year imprisonment and \$5000 fine). That restriction furthers the government's compelling interest in preserving the life of its citizens and likely could be imposed on the tribes even if it interfered with the manner in which tribes traditionally dealt with certain kinds of conduct.

⁸⁸ For example, the General Allotment Act of 1887 offered U.S. citizenship — which was not generally granted to all Indians until 1924, see F. COHEN, *supra* note 68, at 153 — to any Indian willing to live away from the tribal group and adopt the habits of a "civilized life." Ch. 119, § 6, 24 Stat. 388, 390 (codified as amended at 25 U.S.C. § 349 (1988)). This provision clearly represents a constitutionally suspect effort "to impose penalties or withhold benefits from individuals because of their membership in a disfavored group." *Roberts*, 468 U.S. at 622.

⁸⁹ 25 U.S.C. §§ 1301-1303, 1311-1312, 1321-1326, 1331, 1341 (1988).

⁹⁰ See *White Eagle v. One Feather*, 478 F.2d 1311, 1314 (8th Cir. 1973) (requiring tribe to adhere to one person-one vote standard); *Daly v. United States*, 483 F.2d 700, 704-05 (8th Cir. 1973) (same).

⁹¹ See *Daly*, 483 F.2d at 705-06 (affirming the lower court's elimination of a blood quantum requirement for candidates for one tribal election).

⁹² See *Martinez v. Santa Clara Pueblo*, 540 F.2d 1039, 1047-48 (10th Cir. 1976), *rev'd on other grounds*, 436 U.S. 49 (1978). The *Roberts* Court observed that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." 468 U.S. at 623.

⁹³ For example, the ordinance at issue in *Martinez* excluded from tribal membership the children of female members who were married to non-members, but not those of male members married to non-members. See *Martinez*, 540 F.2d at 1040. In light of *Roberts* and *Rotary International*, the government's need to eliminate gender-based discrimination might outweigh the tribe's associational interest, particularly when, as in *Martinez*, the tribal requirement was not clearly tied to tribal tradition. See *id.*

means significantly less restrictive of associational freedoms.⁹⁴ Such a showing is unnecessary under the plenary power theory. Moreover, a more expansively understood associational right would prevent Congress from interfering with tribal organizations solely to eliminate ideological, cultural, and attitudinal differences between the tribes and the rest of American society.⁹⁵ Thus, the American legal system's decision to treat Indians as divergent groups — a decision which in the past has deprived them of rights due to their dependent nation status — could now benefit Indians.

In light of the Western legal system's past performance, one might doubt, as Williams does,⁹⁶ whether reliance on these types of arguments will effectively stem the assimilationist tide of Western government. The white man's jurisprudence was, after all, advanced on behalf of Indians during revolutionary times without any success.⁹⁷ Centuries of use of Western jurisprudence as a sword against tolerance and diversity may have rendered it too inflexible to be reshaped into a shield. For the sake of the tribes, however, as well as the sake of all other Americans,⁹⁸ we must hope that the metal is still malleable.

⁹⁴ See *Roberts*, 468 U.S. at 623; *supra* p. 1390; see also *United States v. Frame*, 885 F.2d 1118, 1135 (3d Cir. 1989) (holding an act requiring cattle producers and importers to finance a national beef promotion campaign sustainable "only if the government can demonstrate that the Act was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of . . . associational freedoms") (emphasis added).

⁹⁵ Other Western legal concepts designed to protect group rights and diversity might then also be reshaped to inhibit further destruction of tribal viewpoints and customs. For example, some aspects of tribal sovereignty could be protected through creative use of the due process clause and its equal protection component. See Newton, *supra* note 41, at 261-71, 281-88. Also, if the aim or primary effect of the governmental action is the destruction of the Indian family (rather than the larger tribe), this clearly runs afoul of the constitutionally protected right of intimate association. See *Roberts*, 468 U.S. at 618-19. Thus, legislation such as the Allotment Act which, according to its supporters, "acts directly upon the family," S. TYLER, *supra* note 78, at 104 (quoting MESSAGES AND PAPERS, *supra* note 78, at 6672 (speech of Theodore Roosevelt)), is unconstitutional to the degree it is successful.

⁹⁶ See *supra* p. 1382.

⁹⁷ See *supra* pp. 1376, 1378. Current proponents of Indian rights differ, however, from those of the late eighteenth century. While current proponents are driven by moral considerations, see F. COHEN, *supra* note 68, at v, their predecessors were land speculators motivated by greed.

⁹⁸ "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith" F. COHEN, *supra* note 68, at v.