Tribal Sovereignty:

Legal and Theoretical Perspectives

By:

Isabella Beham

Submitted to:

Central European University

Department of Nationalism Studies

In partial fulfillment of the degree Masters of Arts

Supervisor: Andras Pap

Acknowledgements
This thesis is dedicated to my friend Tom. I have forty-five and a half reasons (and counting) to be thankful to you.

Abstract

Historically, the relationship between the Native American Nations and the US federal government can be characterized as one of an oppressor using the legal, child welfare, and educational systems to impose its standards of living, gender roles, and economic model on Native American communities. This history of forced assimilation still thrives today, largely through the US education system. This thesis examines concepts of autonomy, self-determination, and sovereignty to ascertain whether or not "tribal sovereignty" is a meaningful concept with a strong theoretical and legal foundation. Ultimately, this thesis argues that this is not the case. Turning to policy analysis, to analyze the legal framework of tribal sovereignty, this thesis examines three early Supreme Court cases that are foundational to understandings of tribal sovereignty, as well as one piece of legislation, The Indian Child Welfare Act, which was intended on addressing the assimilationist policies of the federal government. This thesis ends by questioning whether tribal sovereignty can be expressed in a meaningful way through the US legal system while exploring alternative ways in which self-determination can be expressed.

Contents

I. Introduction

This thesis examines the issue of tribal sovereignty in the United State for the Native American Nations. It begins with a discussion of the various meanings of sovereignty, while problematizing understandings of tribal sovereignty in the United States. Different theories of sovereignty will be explored in order to determine whether or not tribal sovereignty is a "myth" as some scholars assert. The theories utilized in this thesis all discuss what it means to be a state, a nation, or a people and what rights of sovereignty should be granted to each category. The theoretical approaches of these authors are important to a discussion of the status of the Native American nations within the United States, what rights should be granted to them, and how much autonomy they are able to observe.

Next, I will turn to a discussion of the history of the concept of tribal sovereignty in the US, beginning with an examination of the Indian Commerce Clause of the Constitution and the "Marshall Trilogy" of Supreme Court cases that determined the status of the Native American nations as "domestic dependent nations." This will, of course, be followed by an application of the previously discussed theories on sovereignty and self-determination in order to conceptualize and problematize the idea of domestic dependent nations.

In order to apply these theories and the concept of tribal sovereignty to a concrete case study, I will examine the Indian Child Welfare Act and the history of Indian child welfare that surrounds it. The ICWA was written in response to the forced assimilations practices that the US government was enacting through the education and child welfares systems. This controversial legislation was passed in 1978 with the intent of enforcing tribal sovereignty through placing control of child welfare practices within the jurisdiction of the Indian tribal courts. Opponents of the adoption of Native American children by white families argue that it robs the children of

their Indian identity while depriving the Native American nations their right to ensure the survival of their unique culture through the upbringing of their children. From this perspective, this thesis will explore the importance of the preservation of culture as an aspect of self-determination and sovereignty. While acknowledging this aspect of the legislation that does indeed help to uphold self-determination, this study will seek to prove that this piece of legislation fails at promoting tribal sovereignty by fundamentally violating Kranser's theory of Westphalian sovereignty, among others. This thesis ends by asking the question, "Can tribal sovereignty be expressed through the US legal system?"

The methodology used in this study begins with a discourse analysis looking at concepts of sovereignty, autonomy, self-determination, and nationhood or peoplehood as interpreted by notably scholars. Following the theoretical approach of the previous chapters, I begin with an analysis of the Indian Commerce Clause of the Constitution and three US Supreme Court cases drawing from primary and secondary sources. Following this chapter, I combine the theoretical with the legal approaches to examine how the concept of tribal sovereignty is or is not a relevant concept with a strong legal backbone. Turning to the policy section of this thesis, I first examine the history that led to the implementation of the ICWA, before I analyze the legislation itself. While analyzing tribal sovereignty from a legal perspective, I first conducted an independent analysis before applying the literature on the specific court cases and legislation. Because this thesis focuses on American law, I have chosen not to analyze the international legal perspective. Additionally, the two main fixtures of indigenous rights in international law, the ILO Convention Concerning Indigenous and Tribal People in Independent Countries and the UN Declaration on Indigenous Rights, are non-binding agreements.

II. **Concepts**

It is difficult to differentiate between the concepts of autonomy, self determination, and sovereignty. While there is significant overlap between the three terms, there are differences, although scholars tend to disagree on what these are. This section will briefly address some of these debates, to be elaborated on in the following chapter, while clarifying what this thesis understands these terms to mean. Additionally, it is important to delineate between minority protections and indigenous rights. While scholars such as Kymlicka who focus on minority protections and multiculturalism are utilized in this thesis, indigenous rights are legally different than minority protections, especially in the case of US law where the unique status of the Native American nations has been negotiated through treaties and enshrined in the Constitution.

The most relevant definition of autonomy is presented by Brunner and Küpper who believe that autonomy is the most evolved form of self-determination. Brunner and Küpper see two forms of autonomy, personal and territorial autonomy. Territorial autonomy asserts that a minority must have complete autonomy over the territory in which it constitutes a majority. This conception of autonomy is most relevant to this thesis because the Native American nations have clearly demarcated territory on which they constitute the majority. This grants the minority autonomy at the local level. According to Brunner and Küpper's definition of territorial autonomy, the minority culture must be responsible for maintaining public areas, schooling, etc... Additionally, as a condition of both personal and territorial autonomy, minorities must have representatives at the legislative level.[1]

Tamir explores theories of national self-determination that assert that a people living as a minority within a certain territory have the right to remain a separate state and "participate in the

[1] Georg Brunner & Herbert Küpper, "European Options of Autonomy: a typology of autonomy models of minority self-governance. (na, 2002) 14-20.

governing of their own lives."[2] While acknowledging the relevance of this definition she instead understands the right to self-determination as being a cultural rather than primarily political right. While the preservation of American Indian culture is of paramount importance, especially when applied to a discussion of transracial adoptions, it is not the sole factor in conceptualizing self-determination for the Indian Nations, however this thesis will understand nation as a cultural entity rather than understanding nation as relying upon the precondition of statehood.

Cline writes that self-determination "advocates the idea that a homogeneous people has the 'right' to determine its own destiny as a distinct sovereign nation or the 'right' to maintain its own national traditions within a larger political entity."[3] Cassese contributes that the right to self-determination is politically "both boldly radical and deeply subversive."[4] The United Nations understands self-determination to be "a right with correlative duties,"stating in the 1970 Declarations on Principles of International Law concerning Friendly Relations and Cooperation, "All people have the right to freely determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."[5] Paust asserts that the UN Charter has been interpreted as saying that self-determination is not the right of a state, but rather the right of a people.[6]

It is clear from these definitions that self-determination involves the ability of a people, regardless of whether or not they constitute a majority, to have an equal voice in the political activities of their polity as well as free control over their economic, social, and cultural

[2] Yael Tamir, *Liberal Nationalism*, (Princeton: Princeton University Press, 1993) 69.
[3] Ray S. Cline, "Forward" in *Self Determination: National, Regional, and Global Dimensions,* ed. Yonah Alexander and Robert A. Friedlander, (Boulder: Westview Press, 1980) xi.
[4] Antonia Cassese, *Self-Determination of Peoples: a legal reappraisal*, (New York: Cambridge University Press, 1995) 1.
[5] Jordan J. Paust, "Self-Determination: A Definitional Focus," in Self:Determination: National, Regional, and Global Dimensions, ed. Yonah Alexander and Robert A. Friedlander, (Boulder:Westview Press, 1980) 3.
[6] Paust, "Self-Determination," 10.

development. In some instances self-determination means the right to secession, while in other cases, particularly those of indigenous peoples, the right to self-determination involves the right to the control of their own land within a larger territory. This is where issues of sovereignty occur. According to the UN General Assembly, the right to self-determination can result in the creation of a new sovereign state, integration within an existing state, or "the emergence into any other political status freely determined by a people."[7] International governmental organizations tend to refer to indigenous peoples as "populations" so as not apply the term people, which would imply that Native peoples have the right to self determinations, as all peoples do.[8] Sovereignty is a linked, but separate issue from self-determination because self-determination deals with the political rights of groups and individuals, while sovereignty is defined at the level of political authority.

Another differentiation that needs to be made is between the terms people and nation. Dinstein argues that within one state there is one nation. This perception is problematic to an understanding of the status of the Native Americans. If one understands Dinstein's definition, then the nations cannot constitute their own nations, and therefore "Native American nation" would not be the appropriate term. Dinstein does believe that within one state there can exist multiple peoples.[9] Moore likewise supports this theory, while taking the argument further and granting political and territorial rights to peoples. Tamir makes a strong delineation between a people and a nation, claiming that peoplehood is a social category akin to that of family or tribe. The general understanding of what constitutes a people for Moore is similar to Tamir's understanding of a nation. While Moore places an emphasis on political rights and the right to

[7] Ibid., "Self-Determination," 5.
[8] Catherine Iorns, "Indigenous Peoples and Self Determination: Challenging State Sovereignty," Case Western Reserve Journal of International Law, 24 (1992): 210.
[9] Yoram Dinstein, "Collective Human Rights of Peoples and Minorities," *The International and Comparative Law Quarterly,* 25 (1976): 104.

territory, Tamir, drawing from Anderson's framework, focuses on shared culture as a determining factor of nationhood. Anderson defines the nation as an "imagined political community" that is both "inherently limited and sovereign."[10] If we understand the Native American nations as "imagined political communities" it is easy to conceptualize them as nations. However, once we apply the additional criterion of sovereignty, this definition raises problems that this study hopes to address; in exploring the concept of sovereignty, this thesis asks whether the term can truly be applied to the Native American nations while considering multiple conceptions of nationhood. Utilizing Tamir's concept of cultural nationhood this thesis uses the term "nation" instead of tribe; nation tends to be the preferred term of use by Native individuals and groups. Whether the United States actually allows the Native nations to exercise sovereignty or self-determination as a nation will be the main question addressed in this study.

[10] Benedict Anderson, *Imagined Communities*, (London: Verso, 1983) 6.

III. Theoretical Framework

Sovereignty

This section centers around a discussion of the meaning of sovereignty in its multiple manifestations. The theories in this section discuss state sovereignty, extrapolating into a discussion of self-determination and self-determination for minority cultures. These theories are then applied to a discussion of the case study of the Native Americans in the United States to explore what levels of sovereignty and self-determinationt hey are able to be freely exercised.

Beginning with the classics, **Bodin** believed in an absolute sovereign, in which absolute and indivisible sovereign power was rested in a monarchy, "Majest of Sovereignty is the most high, absolute, and perpetual power over the citizens and subjects."[11] This sovereignty is absolute because because it is granted by God; by this merit it over rides law. Further, Bodin believes dividing sovereignty is antithetical to peace; he imagines that without an absolute ruler, people will not have incentive to follow the law.[12]

Rousseau agrees with Bodin that sovereignty is indivisible, however, where Bodin understands the sovereign as a monarch, for Rousseau, only the people as a collective body, expressing the general will, are sovereign. Rousseau agrees with Bodin that the power of the sovereign must be indivisible in order to establish what Bodin calls peace, and what Rousseau refers to as the "common good."[13] He differentiates between a government and a sovereign. Paying mind to the

[11] Jean Bodin, *The Six Books of the Commonweal*, trans. Richard Knolles, ed. Kenneth Douglas McRae, (Cambridge: Harvard University Press, 1962) 84.
[12] Ibid., *The Six Books of the Commonweal*, 91.
[13] Jean-Jacques Rousseau, *The Social Contract*, trans. G.D.H. Cole, (Mineola: Dover Publications, 2003) 15-16.

daily necessities of life, Rousseau realizes that the people, while they retain the right to form or abolish a government, there must be a governmental structure.[14]

Krasner proposes four different approaches to understanding state sovereignty: international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty.[15] Krasner's international legal sovereignty involves the mutual recognition between territorial entities. Westphalian sovereignty "refers to the exclusion of external actors from authority structures within a given territory."[16] Krasner argues that international legal sovereignty and Westphalian sovereignty both "involve issues of authority and legitimacy, but not control."[17] Domestic sovereignty "refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity."[18] Interdependence sovereignty "refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state."[19] While independence sovereignty is concerned only with control, namely the control of "movement across its borders," domestic sovereignty is concerned with both.[20] Krasner notes that some states can exercise multiple forms of sovereignty.[21]

Hoffman claims that sovereignty is a contentious term, subject to any number of definitions, interpretations, and conflations. Problematizing the discussion surrounding the notion of sovereignty is the fact that sovereignty has become inextricably linked with ideas of statehood,

[14] Ibid., *The Social Contract*, 67.
[15] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy*, (Princeton: Princeton University Press, 1999) 3-4.
[16] Ibid., *Sovereignty,* 4.
[17] Ibid., *Sovereignty*, 4.
[18] Ibid., *Sovereignty*, 4.
[19] Ibid., *Sovereignty*, 4.
[20] Krasner, *Sovereignty*, 4.
[21] Ibid., *Sovereignty*, 4.

with scholars arguing that one exists as a necessary precondition for the other. Hoffman argues that the "contentious nature of sovereignty arises from its association with the state."[22] Hoffman believes that the most productive way of engaging with the idea of sovereignty is by detaching the concept of sovereignty from that of the state. In regards to the state, Hoffman further argues, "The state is a contradictory institution which uses force to secure community."[23] According to Hoffman, once the concept of sovereignty is detached from that of the state it becomes "a concept which embraces democracy, autonomy, and self-government."[24]

Fowler and Bunck present two theoretical sets of requirements of sovereignty: de facto autonomy and de jure independence. De facto autonomy is divided into two subsets: de facto internal supremacy and de facto external independence. De facto internal supremacy refers to the situation in which no other political entity besides the state exercises authority over the people within the given territory.[25] The de facto external independence theory argues that in order to establish sovereignty status, a state must be able to maintain its independence from other states, not just in theory, but in practice. Fowler and Bunck note that sovereignty means independence from other states, not supremacy to other states.[26] The other approach presented, de jure independence, asserts that a state holds sovereignty when it is "legally separate from other states."[27] Fowler and Bunck note that in many instances de facto and de jure independence often accompany one another, however this is not a necessarily always the case. Additionally, Fowler and Bunck put forth two different theories through which one can approach the question

[22] Hoffman, *Sovereignty*, 13.
[23] Ibid., *Sovereignty*, 19.
[24] Ibid., *Sovereignty*, 20.
[25] Michael Ross Fowler & Julie Marie Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty*, (University Park:The Pennsylvania University Press: 1995) 37.
[26] Ibid., *Law, Power, and the Sovereign State*, 47.
[27] Ibid., *Law, Power, and the Sovereign State*, 51.

of sovereignty: the chunk approach and the basket approach. The chunk approach holds that by virtue of existence as a state, a state is sovereign. If it is not in the possession of sovereignty, then it is not a state, but another kind of political entity.[28] While the chunk approach asserts that sovereignty is a monolithic entity, the basket approach allows for more variability, imagining sovereignty "as a basket of attributes and corresponding rights and duties."[29] Because the basket approach imagines each state as possessing different rights and duties, it allows for a more nuanced understanding of sovereignty in which some states are in possession of greater amounts of sovereignty than others. Scholars understanding sovereignty through the basket approach do not perceive sovereignty as resting in a place of static equilibrium, rather sovereignty is a status that is constantly being negotiated and cultivated.[30]

Unlike Hoffman, **Hannum** asserts that only states can possess sovereignty. In his study he describes different kinds of governmental entities, some of which can be defined as states. The first is *guaranteed* or *neutralized states*. These states are fully sovereign, aside from the limitations set by treaties, and were created by international treaty. The next is the *protected independent state*, which is the situation in which a state retains full domestic authority, but concedes some of its powers to a guardian state, as seen in the case of Monaco. *Associated statehood* refers to states that are not self-governing, but are still able to practice self-determination. Similar to a guaranteed state is an *internationalized territory*. The similarity reflected with the guaranteed state lies within the fact that internationalized territories are created by international treaty in response to a particular political situation. Internationalized territories are not always considered states. A *vassal state* is akin to a protected state, however the vassal

[28] Ibid., *Law, Power, and the Sovereign State*, 65.
[29] Ibid., *Law, Power, and the Sovereign State*, 70.
[30] Fowler and Bunk, *Law, Power, and the Sovereign State*, 71-72.

state is subject to greater suzerainty. A *condominium* falls under the sovereignty of two or more powers and generally does not have an "independent international personality."[31] The final form of statehood recognized by Hannum is the *protected dependent state,* which is dependent upon the protection from a larger state and has a limited international presence. Additionally, the UN recognizes non-self-governing territories, which are not recognized as states. The UN Charter recognizes these territories as those "whose peoples have not yet attained a full measure of self-government."[32]

Nationhood and Peoplehood

While theorists like Tamir believe there can be many nations within one state, **Dinstein** disagrees saying that the entire citizen body forms the nation, "In each State there is one nation."[33] However, within one nation there can exist many peoples. Dinstein believes that what is really meant by the term multinational state is one nation with more than one peoples. Dinstein claims that peoplehood is based on an objective and subjective criterion, defining the objective criteria as meaning, "an ethnic group linked by a common history."[34] While the subjective criteria requires that the people identify themselves as members of a people and hold criterion for group membership.

Moore likewise holds a definition of peoplehood. To Moore, a people is not simply a collection of individuals; a people have a distinct, shared political purpose to assert territorial rights and self government. Moore defines a people as, "The appropriate collective agent for holding and

[31] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, (Philadelphia: University of Pennsylvania Press, 1996), 16-18.
[32] Hannum, *Autonomy, Sovereignty, and Self-Determination,* 18.
[33] Dinstein, "Collective Human Rights of Peoples and Minorities," 104.
[34] Ibid., "Collective Human Rights of Peoples and Minorities," 104.

exercising jurisdictional rights."[35] Additionally, Moore presents three criteria for classification as a people. These conditions include: individuals must view themselves as a part of the group and engage in a "common political project," they must have the ability to exercise self-determination through their ability to "establish and maintain political institutions," and finally the people must have "a history of political cooperation together."[36] Moore goes on to problematize the idea of "capacity" as a requirement of statehood. She discusses a few ways in which a group may lack capacity. One situation is in which a people is either too small or in some other way lacks the ability to exercise control over the land that they occupy. However, they may still be able to "support forms of collective self-determination within a larger state."[37] If a group is unable to meet all of the requirements of peoplehood because of "burdens" like poverty, Moore does not believe that they should lose their status as a people if they are able to qualify in the other requirements, rather she argues that they must be assisted in overcoming these burdens, however she does not indicate who is responsible in assisting these groups. In some cases assistance may not be enough, and the group will not be able to exercise full territorial rights, but will be able to exercise self-determination within their limited polity[38]

Like Tamir, **Liebich** understands nations as primarily cultural entities. He sees two moral arguments for the sovereignty of nations. The first argument he points to is the understanding that self-rule constitutes "an irreducible value" upon which the dignity of the individual rests. According to this argument every nation has the right to seek self-determination and in doing so

[35] Margaret Moore, *A Political Theory of Territory*, (New York: Oxford University Press, 2015) 50.
[36] Moore, *A Political Theory of Territory,* 50.
[37] Ibid., *A Political Theory of Territory*, 51.
[38] Ibid., *A Political Theory of Territory*, 52.

has the right to secession.[39] The second argument, which Liebich believes to be less convincing, is an indentitarian argument, which asserts that "citizens require their cultural characteristics to be incorporated in their polity and incarnated in their political leaders" because their cultural compatriots will be able to govern and advocate for group interests most effectively.[40] Liebich problematizes the morality and effectiveness of this argument pointing to the fact that it compartmentalizes the identity of individuals, forcing them to choose one aspect of their identity as being the most politically salient. Additionally, he claims this argument contradicts the very concept of liberal democracy because it violates the tenets of free association.[41]

The Right to Culture

Tamir argues that one of the core tenants of liberalism is a respect for personal autonomy and individual rights.[42] Tamir asks the question of why the right of individuals, "to preserve their national identity and adhere to their national culture" should be respected.[43] Tamir believes there are five ways of approaching this question. All of these five approaches claim that individuals have the right to preserve their culture and that individuals believe that the protection of national identity is important to the well-being of an individual. Only a few of these approaches are relevant to this thesis. The first approach claims that "national membership is an important and constitutive element of personal identity."[44] The second approach states that cultural membership possesses, "instrumental value, as means for individuals to exercise their capacity for choice and self-reflection."[45] In the fourth approach the argument is made that not allowing

[39] Andre Liebich, "Must Nations Become States?" Nationalities Papers, 31 (2003): 457.
[40] Liebich, "Must Nations Become States?" 459.
[41] Ibid., "Must Nations Becomes States?" 459.
[42] Tamir, *Liberal Nationalism,* 35.
[43] Ibid., *Liberal Nationalism*, 35.
[44] Ibid., *Liberal Nationalism,* 35.
[45] Ibid., *Liberal Nationalism*, 36.

individuals to identify with their chosen culture is paternalistic. Respect should be given to cultural choices because they represent the autonomy of the individual. However, the right to culture may be overridden by other rights.[46]

Kymlicka believes that cultural membership is more important to liberal thought then generally acknowledged. He claims that cultural structures are important, "because it's only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the option available to them, and intelligently examine their value."[47] Additionally, Kymlicka asserts that without a cultural structure children lack role-models which leads to, "despondency and escapism."[48] He makes it clear that he is not arguing that the community is more important than the individual or that the state should impose its "conception of the good life," in order to preserve culture.[49] Rather, he argues that culture is an important facet of living a good life and highlights the importance of considering the cultural membership of all members of the community. However, he does believe that it is acceptable to place temporary restrictions on individual rights if these rights legitimately threaten the existence of the community.[50] Kymlicka points to the case of the First Nations in Canada, where leaders argue that Indian communities "have been too weakened (and denigrated) by the white majority to currently allow every individual Indian to enjoy all the liberties she will enjoy once the cultural structure has recovered its normal healthy strength and flexibility."[51]

[46] Tamir, *Liberal Nationalism*, 37.
[47] Will Kymlicka, *Liberalism, Community, and Culture,* (New York: Oxford University Press, 1989)
[48] Ibid., *Liberalism, Community, and Culture*, 165-166.
[49] Ibid., *Liberalism, Community, and Culture*, 167-168.
[50] Ibid., *Liberalism, Community, and Culture*, 170.
[51] Kymlicka, *Liberalism, Community, and Culture*, 171.

IV. The Backbone of Federal Indian Policy

Before examining how the theoretical conceptions of sovereignty can be applied to the Native American nations, we must first look at the basic framework of federal Indian policy, beginning with the United States Constitution. Many scholars tend to agree that the Constitution recognizes the Indian nations as autonomous institutions.[52] Article I of the Constitution gives Congress the right, "To regulate commerce with foreign nations, and among the several states, and with Indian nations." While the Constitution is constantly subject to interpretation, Article I seems to place the Native American nations on equal footing with the states and foreign nations in regards to Congress' interactions with them. Although some scholars interpret Article I as asserting the sovereignty of the Indian nations, this argument seems strained. However, it is at least possible to say that the Constitution recognizes these nations as entities separate from that of the United States.[53] Despite the fact that a strict constitutional interpretation of the Indian Commerce Clause would limit the interaction between Congress and the Indian nations to the realm of trade, this clause has been used as justification for the intervention of Congress into tribal affairs, certainly stretching the limits of constitutional interpretation. On the other hand, the Indian Commerce Clause has also been the primary tool of asserting the sovereignty of the Nations nations.[54]

Johnson v. M'Intosh

Early Supreme Court cases conveyed a schizophrenia in regards to the treatment of tribal sovereignty by the US government. Barnes characterizes the relationship between the Supreme

[52] Algeria R. Ford, "The Myth of Tribal Sovereignty: An Analysis of Native American Tribal Status in the United States," International Community Law Review 12 (2010): 397.
[53] Ibid., "The Myth of Tribal Sovereignty," 397-398.
[54] Philip J. Prygoski, "From Marshall to Marshall: The Supreme Court's changing stance on tribal sovereignty," American Bar Association, Accessed April 21, 2017.

Court and the Native nations as being "a continuous adjustment to an unjust system."[55] Three cases in particular, known as the Marshall Trilogy, "established the doctrinal basis for interpreting federal Indian law and defining tribal sovereignty."[56] *Johnson v. M'Intosh* (1823) was a blow to tribal sovereignty. Johnson had purchased land from the Piankeshaw nation. While the land was in the possession of Johnson, M'Intosh acquired the same land through the US government. The district court held that M'Intosh was the rightful owner of the land, claiming that one could not purchase land from any of the Indian nations because Native Americans were not able to own land in the United States. This concept became known as the Discovery Doctrine, which Chief Justice Marshall explained simply in the Court's opinion, "This principle was, that discovery gave title to the government."[57] Ford argues that in losing their right to legally own land "Native peoples had lost the very thing that makes a nation sovereign."[58]

It is impossible to ignore the contradictions found in this court case. While seeming to destroy the sovereignty of the Native nations with a single pen stroke, Marshall also asserts that the nations are the rightful and legal owners of their lands:

> The rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.[59]

Marshall follows by acknowledging that the Indian nations were at one point sovereign nations, but that the Discovery Doctrine seems to render the concept of tribal sovereignty irrelevant in US law:

[55] Richard L. Barnes, "From John Marshall to Thurgood Marshall: A Tale of Innovation and Evolution in Federal Indian Law Jurisdiction," Loyola Law Review 57 (2011): 437.
[56] Prygoski, "From Marshall to Marshall."
[57] *Johnson v. M'Intosh,* 21 U.S. at 573 (Marshall C.J.).
[58] Ford, "The Myth of Tribal Sovereignty," 402-403.
[59] *Johnson,* 21 U.S. at 573.

> But their 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.[60]

This introduces another element that is fundamental to navigating the hypocrisy that in federal Indian policy. In discussing the "diminishing" of sovereignty, Marshall implies that sovereignty is a fluid concept, not an absolute. In doing so Marshall set the landscape for nearly 200 years of federal Indian policy in which tribal sovereignty fluctuated based on the justification of "necessity," as laid out in *Johnson v. M'Intosh*. Marshall furthers his argument by claiming that the termination of the territorial rights of the Indian nations is "vested in the government which might constitutionally exercise it."[61] In this portion of the opinion Marshall seems to assert that the extermination of tribal territorial rights is a power bestowed by the Constitution. However, this thesis asserts that the Indian Commerce Clause should be limited to only a discussion of commerce. A reading of the Indian Commerce Clause which grants the US government the right to terminate tribal land ownership requires a broad imagination.

Cherokee Nation v, Georgia

Cherokee Nation v. Georgia (1831), decided whether or not the nations constituted foreign nations that could therefore sue a state under diversity jurisdiction. Prygoski asserts that this landmark case "established the premise that Indian nations do not possess all of the attributes of sovereignty that the word 'nation' normally implies."[62] Initially, the Court's opinion seemed to favor the concept of tribal sovereignty. Justice Marshall wrote:

> So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been

[60] *Johnson,* 21 U.S. at 573.
[61] *Johnson,* 21 U.S. at 573.
[62] Prygoski, "From Marshall to Marshall."

> completely successful. They have been uniformly treated as a state from the settlement of our country... The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.[63]

Chief Justice Marshall follows what seems to be a declaration of nationhood and statehood by completely contradicting the points that he just made:

> They may, more correctly perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relations to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.[64]

Where Chief Justice Marshall recognizes the statehood and nationhood of the Cherokee nation he then makes a turn towards characterizing the Cherokee nation as a ward of the US government, imaging the Cherokee nation as weak and unable to manage its own affairs, despite having written earlier in the opinion that the Cherokee nation is, in fact, capable of governing itself.

In the concurring opinion Justice Johnson rejects the wardship metaphor, instead describing the federal government as "master and conquerer" and the referring to the Cherokee nations's "feudal dependence" on it.[65] In utilizing language of reliance and attempting to construct the president as an icon of "great father" for the Indian nations, Chief Justice Marshall perfectly captures the essence of the paternalistic relationship between the Native nations and the US government that still thrives today.

By understanding the nations as "dependent nations" the Court set the precedent for what is called the "trust" relationship between the federal government and the Native American nations. In this trust relationship "the federal government protects the nations from interference

[63] *Cherokee Nation,* 30 U.S. at 16 (Marshall, C.J.)
[64] *Cherokee Nation*, 30 U.S. at 16.
[65] *Cherokee Nation,* 30 U.S. at 16 (Johnson J., concurring).

and intrusion by state governments and state citizens."[66] Because the trust relationship implies that the nations must rely on the federal government to manage their affairs, it has been used as the primary tool to justify intrusion into tribal sovereignty. To further clarify that the Cherokee nation is not an independent nation, Chief Justice Marshall writes:

> They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United State, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.[67]

Worcester v. Georgia

Contrarily, *Worcester v. Georgia* (1832) is considered to be a landmark case in the protection of tribal sovereignty. In this case the Court held that states were unable to tax or regulate the Indian nations because it would be an encroachment on tribal sovereignty.[68] In Worcester "protection" sheds some of its paternalistic connotation, instead being understood as, "Claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character."[69] Delivering their opinion the Court writes, "The Cherokee nation... is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter."[70] Fletcher believes that, "There had not been a stronger statement of respect for the legal authority of Indian nations --and there has not yet been one like it since."[71] However, it is important to note that this declaration of tribal sovereignty is in reference to the state of Georgia; it gives no mention to the respect that the federal government

[66] Prygoski, "From Marshall to Marshall."
[67] *Cherokee Nation*, 30 U.S. at 16.
[68] Ford, "The Myth of Tribal Sovereignty," 398.
[69] *Worcester v. Georgia,* 31 U.S. at 515 (Marshal, C.J.).
[70] *Worcester,* 31 U.S. at 515.
[71] Mathew L.M. Fletcher "The Iron Cold of the Marshall Trilogy," North Dakota Law Review 82 (2006): 647.

must pay to the Indian nations. If Fletcher is correct that this qualifies as the strongest statement of support for tribal authority, then it is must be noted that the Court's opinion, as it is stated, only protects the sovereignty of the nations from the governments of the states, not from the federal government. Additionally, the Court does not have the ability to enforce its own rulings; this privilege is bestowed on the Executive branch. The President at the time, Andrew Jackson, vehemently disagreed with Chief Justice Marshall's ruling in this case, saying, "Absolute independence of the Indian nations from state authority can never bear intelligent investigation."[72] This court case asserted that the territory in possession of the Cherokee nations was sovereign and the Cherokee could therefore apply their own laws and exercise their sovereign rights over non-Indians living on reservation lands. However, in 1981 this decision was reversed, asserting that the Indian nations do not have jurisdiction over non-tribal members living within their territory.[73]

The Marshall trilogy set three precedents for American Indian jurisprudence. Firstly, that the Indian nations do possess a certain level of sovereignty. Sovereignty could be encroached on by the federal, but not the state government. And finally, the Native American nations' dependence on the US government created a trust responsibility from the US government towards the nations.[74] These legal precedents will be explored in the following chapters when applied to theoretical discussion of sovereignty.

[72] Nathan Goetting, "The Marshall Trilogy and the Constitutional Dehumanization of American Indians," Indigenous Policy Journal XXI (2010): 15.
[73] Joseph P. Kalt & Joseph William Singer, "Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule," Faculty Research Working Paper Series (2004): 6.
[74] Prygoski, "From Marshall to Marshall."

V. Tribal Sovereignty: A theoretical lens

With a better understanding of the precedents set by the Marshall trilogy, we can then return to the theoretical perspective in order to see how the US government approaches tribal sovereignty in comparison to the theoretical framework that surrounds the concept of sovereignty. Although this chapter focuses on theory, it is important to highlight the ways in which these conceptions of sovereignty are actually applied to Native American life.

Scholars across disciplines have struggled since the time of Bodin to define sovereignty, imagining, problematizing, and defining the concept across a wide spectrum. Hannum concedes that while the term sovereignty may hold a heady emotional appeal, it remains difficult to define.[75] Reflecting this point, the usage of the term "tribal sovereignty" without a strong legal, historical, and theoretical framework to justify its usage, results in an amorphous concept that fails to deliver on its inherent promises.

Hannum proposes one commonly held definition of sovereignty as being, "The fundamental authority of a state to exercise its powers without being subservient to any outside authority."[76] This definition reflects Krasner's definition of Westphalian sovereignty, meaning the expression of sovereignty that exists when a state does not allow for the involvement of outside actors in its authority structures. In this instance, the term sovereignty clearly does not apply to the Native American case, because the Indian nations are subject to the American bureaucratic machine and the legislative powers of Congress.

While Hannum acknowledges the varied definitions and criteria of sovereignty, one point he puts forth as concrete is that only states enjoy sovereignty.[77] This turns us towards a discussion of statehood for the Indian nations. In the most prevalent definition of statehood,

[75] Hannum, *Autonomy, Sovereignty, and Self-Determination,* 14.
[76] Ibid., *Autonomy, Sovereignty, and Self-Determination*, 15.
[77] Hannum, *Autonomy. Sovereignty, and Self-Determination,* 15.

Max Weber defined a state as a "human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory." The monopoly of physical force is usually understood as being expressed domestically through a police service. There are three models for policing Indian reservations. The most common arrangement is a result of the Indian Self-Determination and Education Assistance Act of 1975. In this arrangement Native American nations are able to establish their own police forces, but through a contract with and funding from the Bureau of Indian Affairs (BIA). However, officers and staff are considered tribal employees. Police departments on Indian lands administered directly by the BIA, with officers and staff acting as federal, not tribal employees, is the second most common type of arrangement. A similar kind of arrangement places reservation police services under the authority of the state and local governments. Finally, the least common arrangement involves a situation in which the police department is funded and controlled entirely by tribal funds.[78]

Additionally, the Supreme Court case *Nevada v. Hicks* (2001) held that tribal courts "have no jurisdiction over state law enforcement officials who enter tribal land to investigate an off-reservation crime."[79] Because policing is only entirely enforced and funded by tribal governments in few circumstances and that tribal courts have no authority over state police officers, it is clear that the Native American nations do not hold a legitimate monopoly on force within their territories, therefore, according to Hannum's theory, based on the statehood principle, the Native American nations are not able to express sovereignty in this realm.

When we turn to the Constitutive definition of statehood, similar to Krasner's international legal sovereignty, which holds that statehood is imparted "if and only if, it is recognized as sovereign by other states" we must acknowledge that the Native American nations

[78] Wakeling, Jorgensen, Michaelson, & Begay, *Policing on American Indian Reservations*, iv.
[79] Kalt & Singer, "Myths and Realities of Tribal Sovereignty," 17.

are not recognized as independent states on the international legal level. Because of this lack of international recognition, the status of the Native American nations most closely resembles Hannum's notion of a protected dependent nation. The Supreme Court made clear in *Cherokee Nation v. Georgia* that the Indian nations do not constitute foreign states. Conversely, the Declarative conception of statehood lends a more positive outlook for tribal sovereignty, defining statehood along four criteria: "a defined territory, a permanent population, a government, and a capacity to enter into relations with other states."[80] In *Worcester v. Georgia*, Justice Marshall wrote that the Cherokee nation "is a distinct community, occupying its own territory, with boundaries accurately described." The Native American nations also have their own tribal government structures and often their own constitutions, seeming to conform to the Declarative criteria, however the Native American nations are not able to enter into relationships with other states beside the US, and even so the United States no longer signs treaties with the Native American nations. Ionnidis rejects the fourth criterion for statehood claiming that it is circular logic since in order to enter into relationships with other states, a territory must first be recognized as a state.[81]

Returning to Krasner, all four of his forms of sovereignty can problematize the concept of tribal sovereignty. The first, domestic sovereignty involves the "effectiveness of political authorities within their own borders." While the Indian nations do have their own tribal governments, the concept of domestic sovereignty is violated in a number of ways. Krasner names the control of crime and the maintenance of order as attributes of domestic sovereignty. As mentioned before, police activities on reservations are frequently subject to intrusion by the federal and state governments. Although the Indian nations do have the right to levy taxes,

[80] Christoforos Ionnidis, "Are the Conditions of Statehood Sufficient? An Argument in Favour of Popular Sovereignty as an Additional Condition of Statehood," Jurspredencija, 21, (2014): 975.
[81] Ibid., "Are the Conditions of Statehood Sufficient," 976.

another named attribute of domestic sovereignty, Native Americans must also pay federal income taxes.[82] Additionally, Native Americans are subject to the same military obligations of any American citizen, while it seems absurd to imagine an Indian nation independently raising an army and declaring war.

Interdependence sovereignty refers to the ability of a nation to regulate its borders. Krasner writes, "The inability to regulate the flow of goods, persons, pollutants, diseases, and ideas across territorial boundaries has been describes as a loss of sovereignty."[83] To begin with, the Indian nations did not even establish their own borders. Rather, reservation lands were demarcated by the federal government. The borders of reservations are porous at best, allowing for a drug epidemic to erupt across many reservations, a social ill Krasner attributes to a lack of interdependence sovereignty.

One complex issue that involves interdependence sovereignty is the conflict between the Standing Rock Sioux and Energy Transfer Equity, the principle owner of the Dakota Access Pipeline.[84] The pipeline runs beneath Lake Oahe, the tribe's only source of fresh drinking water. While the pipeline does not technically transgress reservation borders, representatives of the Standing Rock Sioux argue that the pipeline could leak and contaminate Lake Oahe.[85] On January 24th, 2017 President Trump issued an executive order that granted a key permit to the Dakota Access Pipeline.[86] The construction of the Dakota Pipeline demonstrates a violation of interdependence sovereignty because it makes it impossible for the Sioux nation to control the flow of pollutants across their borders.

[82] "Answers to Frequently Asked Questions about Native Peoples," Native American Rights Fund, accessed April 30, 2017.
[83] Krasner, *Sovereignty*, 12.
[84] Noah Kirsch, "Dakota Pipeline Billionaire Slams Standing Rock Protests," *Forbes,* March 23, 2017.
[85] Amber Penn-Roco, "Standing Rock and the Erosion of Tribal Rights," National Lawyers Guild Review, 73 (2016): 176.
[86] Kirsch, "Dakota Pipeline Billionaire Slams Standing Rock Protests."

An additional case that exemplifies the lack of interdependence sovereignty enjoyed by the Indian nations comes into play when the traditional lands of an indigenous nation traverse the borders of the United States; this is the case for 40 different nations. In the case of the Akwesasne Mohawk, their territory extends across the Canadian-American border. Despite the fact that the Jay Treaty of 1774, signed by both the United States and Great Britain, grants free travel for Akwesasronon (People of Akwesasne) across the border, in reality this treaty has not be upheld. Akwesasronon are subject to the same requirements to cross the border as any other non-Indian individual.[87]

International legal sovereignty, dealing primarily with the recognition of a state by other states is another form of sovereignty that seems unattainable for Native peoples. An additional feature of international legal sovereignty is the ability to enter into treaties with foreign entities. In early American history many treaties were signed with the Native American nations, an act that inherently recognizes a nation-to-nation relationship, however the United States stopped making treaties with the Native Nations in the late 1800s.[88] As mentioned earlier, the Supreme Court case *Cherokee Nation v. Georgia*, explicitly prohibits foreign nations from developing political relationship with the Indian nations. Chief Justice Marshall writes that doing so would be interpreted as an act of hostility.[89]

Another attribute of international legal sovereignty is the recognition and non-interference of one nation's court system by another. In the US Supreme Court case *Underhill v. Hernandez*, the Court wrote, "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts in one country will not sit in judgement on the acts of

[87] Kalt & Singer, "Myths and Realities of Tribal Sovereignty," 6.
[88] Kalt & Singer, "Myths and Realities of Tribal Sovereignty," 6.
[89] *Cherokee Nation,* 30 U.S. at 16.

another done within its own territory."[90] Although there is in place a tribal court system that is theoretically sovereign, there have been many instances of cases involving Native Americans that have transcended the tribal court system and found their way to the Supreme Court.

The most obvious form of sovereignty that the United States' relationship with the Indian nations violates is Westphalian sovereignty, because, as Krasner writes, "That states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behavior."[91] Native Americans are subject to most of the same federal laws as all Americans. As mentioned above, Native Americans may be drafted, must pay federal income taxes, may be subject to Supreme Court rulings, and their police activities are often run by the federal government. The United States government has an entire bureaucratic agency set up to interact with the Native American nations. Additionally, in overturning *Worcester v. Georgia*, the US government asserted tribal law is not necessarily applicable to non-tribal members who may be living on reservation land. This is a clear violation of Westphalian sovereignty because a larger state asserts the predominance of its own laws over that of the smaller nation.

Fowler and Bunck grant a simple definition of sovereignty. Domestically, sovereignty means "the supremacy over all other potential authorities within that state's boundaries," while on an international level sovereignty means that a state holds enough power to not feel their statehood threatened by other states.[92] Additionally, they list rights that are enjoyed by sovereign states: "expropriation... diplomatic and sovereign immunity, and... jurisdiction over legal matters and home, and increasingly abroad." Other rights include the ability to "recognize new states, negotiate treaties and sign agreements, declare war and conclude peace, protect national citizens

[90] *Underhill v. Hernandez,* 168 U.S. 250 (Fuller, C.J.).
[91] Krasner, *Sovereignty,* 21.
[92] Michael Ross Fowler & Julie Marie Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty*, (University Park:The Pennsylvania University Press: 1995) 7.

traveling abroad, cast votes in international organizations, even register ships to sail on the high seas."[93] Of all of the criteria listed by Fowler and Bunck only one applies to the case of the Native Americans, sovereign immunity, meaning one cannot sue the Native American nations without the permission of the federal government. Despite the fact that this seems to be an attribute of sovereignty, in reality it does not work that way. The very fact that sovereign immunity may be waived demonstrates that while the government may allow for what appears to be expressions of sovereignty, the fact that the federal government regulates when and how sovereignty is expressed represents the backwards logic of the United States' involvement with the Native nations.

Perspectives on Tribal Sovereignty

Following the broader discussion of sovereignty, we can turn more specifically to conception of tribal sovereignty. Ford presents these two theories of tribal sovereignty as inherent tribal sovereignty and delegated tribal sovereignty. The theory of inherent tribal sovereignty holds that because the Native American nations "existed thousands of years before the formation of the United States," the American government does not have a right to encroach on the natural and historical sovereignty of the nations.[94] This is sometimes referred to as pre-contact rights. According to Ford's theory, "tribal sovereignty cannot be separated from tribal existence."[95]

It is interesting, and perhaps ironic, that the concept of inherent tribal sovereignty seems to reflect that liberal idea of "pre-political freedom," a founding principle behind the formation of the United States. Reflecting the debate over inherent and delegated tribal sovereignty, there are two different perspective on laws and rights. The moral perspective argues that rights are

[93] Ibid., *Law. Power, and the Sovereign State*, 12.
[94] Ford, "The Myth of Tribal Sovereignty," 403.
[95] Ibid., "The Myth of Tribal Sovereignty," 403.

inherent, while the other view, as proposed by Paine argues that "the only source of rights is what the sovereign state recognizes."[96] The moral (inherent) perspective argues that Native American nations are inherently sovereign, therefore it is not possible for a state to take away or bestow sovereignty on them. Iorns writes, "The dictates of natural law compel the recognition of the right of indigenous peoples to self-determination in positive law because such recognition is not solely up to the discretion of states."[97]

Navajo leader Raymond Etcitty interprets inherent tribal sovereignty in a slightly different way. Rather than focusing on pre-contact rights Etcitty believes the right to sovereignty comes from their right as a government formed by the people:

> The Navajo Nation is not going away. We have our own courts, 300,000 members, and a government that nearly 200,000 people abide by. The fundamental principle is that the government comes from the people. The government can't be done away with [by the Supreme Court or any other federal branch] because the people have formed it. The Constitution never took away Indian self-governance; the governance flows from the people.[98]

Of course it obvious how these ideas of governance bear striking similarity to the founding principles of the United States; the Native American Caucus of the California Democratic Party claims that the founding fathers greatly admired the democratic systems developed by the Native American nations in contrast to the hierarchal systems of European governance. In fact they assert that the Constitution was inspired by the "Great Law of Peace," the constitution of the Seven Iroquois nations.[99] These founding principles are seen here in the Declaration of Independence, highlighting the hypocrisy of federal Indian policy:

[96] Robert Paine, "Aboriginality, Multiculturalism, and Liberal Rights Philosophy," Ethnos: Journal of Anthropology, 64 (1999): 329.
[97] Iorns, "Indigenous Peoples and Self Determination," 224.
[98] Krakoff, "Illuminating the Domestic Dependent Nation Paradox," 1163.
[99] "Tribal Sovereignty: History and Law," The Native American Caucus of the California Democratic Party, accessed May 30, 2017.

> Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and institute a new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The Declaration of Independence clearly asserts that a government must be derived from the consent of the People; if the People have found that they can no longer give their consent to the government, then they have the right to create a government of their own. Although the racism (and sexism) of the day did not allow for the principles of the Declaration of Independence to apply equally to "All Men," it is still today the bedrock of the US government. If these principles of self-government are not allowed to be practiced by the Native American nations, then we must address the fact that the US government is still functioning at a level that excludes the Indigenous nations from "the People" resulting in the unfortunate implication that "the People" is an amorphous concept bound only by racism.

The theory of delegated sovereignty asserts that while Native American nations had historically been independent and sovereign entities, after the formation of the United States, the nations began to rely on the US government and doing so has diminished their powers. This theory notes that the Native American nations live within the boundaries of the United States; this fact alone places limits upon their sovereignty. Essentially, proponents of this theory hold that the US government is responsible for granting powers to the Native American nations. Ford claims that in the decisions of the Supreme Court in regards to the Native nations, the Court upholds the delegated sovereignty argument.[100] However, in the case *Worcester v. Georgia*, Chief Justice Marshall wrote, "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as undisputed

[100] Ford, "The Myth of Tribal Sovereignty," 404.

possessors of the soil, from time immemorial."[101] Fletcher argues that although Chief Justice Marshall eventually made this concession to the Indian nations, his decision in *Cherokee Nation* has most often been held as the precedent in cases dealing with the question of sovereign nationhood for the Indian nations.[102]

[101] *Worcester,* 31 U.S. 515 (C.J. Marshall).
[102] Fletcher, "The Iron Cold of the Marshall Trilogy," 655.

VI. Culture and Forced Assimilation

Culture and Legal Culture

While it is clear how the policies of the US government has eroded tribal sovereignty, if we apply Tamir's understanding of a nation as a cultural entity, this opens a different realm through which the US government can diminish sovereignty, cultural destruction and oppression. This thesis looks at two of the ways through which the US government has tried to destroy Native American culture, while arguing that cultural autonomy is not just an important aspect of tribal sovereignty, but is of paramount importance to the health and survival of indigenous nations. Almqvist writes that culture is, "something that one can have a right to in the same way as one has a right to housing, clean water, or nutrition."[103] This thesis looks at culture through the "subjective-behavioral" approach, which holds that culture is important not just on an individual level, but wields impressive power in human action on a grander scale.[104] Culture shapes actions, not by providing ultimate ends, but by providing a repertoire or tool-kit of habits, skills and styles from which people construct strategies of action. It consists of symbolic vehicles of meaning, including beliefs, ritual practices, art forms, and ceremonies, as well as informal cultural practices such as language, gossip, stories, and rituals of daily life."[105]

One manifestation of culture is through political convictions, which includes unique understandings of ethics, rights, and justice.[106] Legal culture is an important aspect of a society that is vital to the discussion of tribal sovereignty because it involves culturally variable conceptions of power, ethics, and justice. The suggestion that each "people" or "nation" has the right to their own legal culture is a difficult theory to implement in states that encompass multiple peoples or nations. Since the Native American nations have clearly demarcated

[103] Almqvist, *Human Rights, Culture, and the Rule of Law,* 33.
[104] Dana Irina, "A Culture of Human Rights and the Right to Culture," Communication and Culture 1, (2011): 32.
[105] Ann Swindler, "Culture in Action: Symbols and Strategies," in American Sociological Review 51, (1986):273
[106] Irina, "A Culture of Human Rights and the Right to Culture," 33.

boundaries the idea of a legal system specific for each nation seems to be possible, however the problem begins in legal cases involving both Native Americans and non-Native individuals. Additionally, the supremacy of the Supreme Court seems to undermine the idea of cultural legal sovereignty. Navajo leaders believe that Supreme Court cases effecting tribal sovereignty have been a hindrance to the sovereignty of the Navajo Nation, asserting that their survival as a nation depends on this sovereignty. Chief Justice Robert Yazzie has stated that the recent Court cases effecting tribal sovereignty have created a "threat of cultural, economic, and political genocide."[107] If culture is the driving force behind law, as suggested by Irina, then how can the United States make laws with the expressed intent of regulating some level of Native American life?[108] These laws not only fundamentally violate the concept of Westphalian sovereignty, but are at best culturally ill suited and at worst outwardly paternalistic or destructive.

Federal Indian Boarding Schools

Early interactions with the indigenous communities by European settlers and the United States represents what Surface-Evans calls external colonialism meaning that the colonizers "attempted to control resources, labor, and regional economics."[109] After the implementation of the federal Indian boarding schools the mechanisms of colonization utilized by the US government shifted towards internal colonialism which was characterized by an attempt to impose Western values and ideals onto the Indian population. Lomawaima and McCarthy write that "schools have been the logical choice as the institutions charged with the responsibility for

[107] Krakoff, "Illuminating the Domestic Dependent Nation Paradox," 1153.
[108] Irina, "A Culture of Human Rights and the Right to Culture," 35.
[109] Sarah Surface-Evans, " Landscape of Assimilation and Resistance: The Mount Pleasant Indian Industrial Boarding School," International Journal of Historical Archaeology 20, (2016): 575.

Native American cultural genocide."[110] Prior to the Indian Child Welfare Act, both adoption and federal boarding schools were aimed at assimilation and the imposition of Western values and gender norms.

The Bureau of Indian Affairs (BIA) was established in 1824 as a subdivision of the Department of War, in order to control the Native American nations, which included educating Indian peoples in order to "civilize" them.[111] The Indian Peace Commission was created by Congress in the 1860 with the purpose of identifying the source of warfare between the Native American nations and the United States. Members of the commission were able to pinpoint racism as a cause of conflict, pointing to the shooting of Native Americans by railroad employees in "wonton cruelty." However, it was the "problem" of "the tribal or clannish organization" and inability to speak English that Congress chose to address, "Now, by educating the children of these nations in the English language, these differences would have disappeared, and civilization would have followed at once. Nothing then would have been left but the antipathy of race, and that too is always softened in beams of higher civilization."[112] Missionaries were particularly apt to advocate for the assimilation of Native children, believing that this "civilization" of Native peoples would prevent massacre. Richard Pratt, founder of the Carlisle Indian School, the first federal Indian boarding school built outside of a reservation, advocated to "kill the Indian to save the man," which became a common slogan for the movement.[113] A commencement speaker at the Carlisle Indian School stated, "You cannot

[110] K. Tsianina Lomawaima, Teresa L. McCarty, "When Tribal Sovereignty Challenges Democracy: American Indian Education and the Democratic Ideal," American Educational Research Journal 39 (2002: 282.
[111] Barbara Charbonneau-Dahlen, John Lowe, & Staci Leon Morris, "Giving Voice to Historical Trauma Through Storytelling: The Impact of Boarding School Experience on American Indians," Journal of Aggression, Maltreatment, & Trauma, 6 (2016): 601.
[112] Briggs, *Somebody's Children*, 66.
[113] Briggs, *Somebody's Children*, 66.

become truly American citizens, industrious, intelligent, cultured, civilized until the INDIAN within you is DEAD."[114]

The policies and activities of the boarding schools were generally built around the military model with students even being forced to participate in military drills.[115] Pratt modeled the Carlisle School on the Marion Prison in St. Augustine, Florida where he had "supervised the detention of American Indian prisoners of war."[116] Surface-Evans writes that the purpose of the federal Indian boarding schools was to assimilate the Native American children to American society so that they could be trained for menial jobs.[117]

According to Briggs, "The most basic question of Indian country in the twentieth century was sovereignty, and the most fundamental question about sovereignty was whether Native nations had control over their children."[118] Congress declared school attendance mandatory for Indian children in 1876. Government officials believed that Native American children should be separated from their families because familial ties were holding them back from assimilation.[119] The legislation advocated for the forceful removal of Indian children if their parents would not comply.[120] It also authorized the Bureau of Indian Affairs to deny benefits to parents who refused to send their children to school.[121] Thomas Jefferson Morgan, then Commissioner of Indian Affairs, called for the restriction of rations to the "barbarians and semi-savages" who

[114] Charbonneau-Dahlen et. all, "Giving Voice to Historical Trauma Through Storytelling," 601.
[115] Surface-Evans, "A Landscape of Assimilation and Resistance," 579.
[116] Chabboneau-Dahlen et. all, "Giving Voice to Historical Trauma Through Storytelling," 601.
[117] Surface-Evans, "A Landscape of Assimilation and Resistance," 574.
[118] Briggs, *Somebody's Children,* 66.
[119] Margaret Jacobs, "Breaking and Remaking Families," in On the Border of Love and Power, David Wallace Adams & Crista DeLuzio, ed., (Berkley: University of California Press, 2012), 20.
[120] Chabboneau-Dahlen et. all, "Giving Voice to Historical Trauma Through Storytelling," 601.
[121] Briggs, *Somebody's Children,* 66.

failed to send their children to the boarding schools. Nineteen Hopi men were actually imprisoned in Alcatraz, having been found in violation of the boarding school policy.[122]

In the 1890s sending Native American children to boarding schools and separating them from their parents and communities was the cornerstone of "federal policy to 'civilize' the savage, to teach English, and to extinguish traditional religions and ways of life."[123] In order to due so, upon arriving to the boarding schools children had their traditional dress removed and hair cut as well as being forbidden from speaking their native languages. Boarding schools were actually seen as liberal and progressive measures as conceived of by the Indian Peace Commission and "friends of Indian" groups.[124]

Administrators of the boarding schools believed that job training was one of the vital missions of the schools. Job training for these students strictly adhered to traditional gender roles, with boys trained to be low skilled labor workers and girls trained for domestic servitude.[125] The training for menial labor was implemented because the government policy held that the intelligence of Indians inferior to that of the white population, therefore these were the only jobs they would be able to hold.[126] The labor of the Indian children was exploited by the boarding schools with boys providing food for the school and girls providing domestic services like laundering and cooking. Some schools had systems where nearby families could hire Indian girls to work as domestic servants paying the girls little to no wages. These girls were frequently physically and sexually abused by their employers. Reflecting middle-class gender norms, boys were allowed much more freedom at the boarding school and were even allowed to hunt and fish on school grounds. Furthering the gendered indoctrination, female

[122] Chabboneau-Dahlen et. all, "Giving Voice to Historical Trauma Through Storytelling," 601.
[123] Briggs, *Somebody's Children,* 66.
[124] Ibid., *Somebody's Children,* 66.
[125] Surface Evans, "A Landscape of Assimilation and Resistance," 577.
[126] Chabboneau-Dahlen et. all, "Giving Voice to Historical Trauma Through Storytelling," 602.

students were educated in middle-class female roles and child-rearing practices. Surface-Evans refers to this indoctrination as patriarchal colonization.[127]

Survivors of boarding schools claim that sexual and physical abuse and humiliating treatment were rampant at the schools. Upon arriving at the boarding school siblings would immediately be separated. One survivor describes the humiliating treatment she received as a child when she wet the bed, being forced to walk through the center of campus with her sheets. Another survivor reports that her clothes were taken away as punishment.[128] Of the nine participants in a study conducted by Charbonneau-Dahlen, Lowe, and Morris, two discussed how they were raped by a priest in a Catholic boarding school while another three professed that they have been sexually abused by a nun. One survivor described the thinly veiled threats made by the priest after he assaulted her, "Then he drug [sic] me from the back over where they baptize the children, and he just looked into my eyes, and he said, 'Remember: anything that happens at (Name of boarding school stays at (Name of boarding school).'"[129] A study in Canada in the 1970s found 3,400 instances of sexual abuse within the boarding schools. While no parallel study has been conducted in the US, it is believed that such crimes as "starvation, medical experimentation, involuntary sterilization of girls, and physical punishment that amounted to torture," would be among the crimes that such a study would reveal.[130]

In the 1920s, Native American activist groups such as the American Indian Defense Association (AIDA) launched campaigns in defense of Native peoples' rights to maintain their traditional religion and ways of life, as well as their land. One major success these groups had was in the realm of boarding schools. In 1928 the Meriam Report, commissioned by Secretary

[127] Surface-Evans, "A Landscape of Resistance and Assimilation," 579.
[128] Chaboneau-Dahlen et. all, "Giving Voice to Historical Trauma Through Storytelling," 628.
[129] Chabboneau-Dahlen et. all, "Giving Voice to Historical Trauma Through Storytelling," 629.
[130] Briggs, *Somebody's Children*, 67.

of Interior Hubert Work "harshly criticized U.S. policy for its effects on the state of health and nutrition among Native people, the effects of allotment on indigenous landholdings, and the consequence of the BIA's management resources with respect to their wealth."[131] This report also critiqued the boarding school system. It criticized the practice for removing children from their homes and disrupting normal family life. The report states:

> Children living in overcrowded dormitories, without even adequate toilet facilities at times, subsisting on a vastly inadequate diet and subject to terrible health conditions. Children were engaged in day labor half of the day--probably in violation of child labor laws--to support the school, with the other half of the day spent studying a curriculum of little value to them... They had virtually no leisure time and students were subject to extraordinary harsh discipline.[132]

The Meriam report caused the BIA to reform itself, leading to AIDA's John Colliers becoming commissioner of Indian affairs. Colliers implemented a series of reforms, for one setting up day schools in place of boarding schools. For many reservations, this marked the first children to be raised by their parents in generations. In the day schools and remaining boarding schools he eliminated compulsory attendance to religious services as well as the menial labor aspect of the curriculum. As far as other curriculum changes, Colliers changed the focus from "civilization" to vocational education.[133] While Colliers was successful in obtaining certain reforms, this did not end the policies and practices of forced assimilation.

Adoptions

Another means of forced assimilation utilized by the federal government and missionaries was the practice of placing Indian children in white homes through adoption and fostering. This practice began in the 19th century. Mormon settlers in Utah in the nineteenth century would frequently purchase Native American children from their parents or slave

[131] Ibid., Somebody's Children, 67-68.
[132] Ibid., *Somebody's Children*, 68.
[133] Briggs, *Somebody's Children*, 68.

traders.[134] The Mormons adopted Native children in order to convert them to the Church of Latter-Day Saints because, according to LDS doctrine, the Native peoples were the fallen descendants of the Lost Nations of Israel.[135] The children would then work for their Mormon family for up to twenty years in order to pay off the price of their purchase. When Utah became a state the slave trade was made illegal, however, the state legislature legalized the indenturing of Native children. In a similar practice, California settlers were permitted to "adopt and indenture" Indian children according to the 1850 Act for the Government and Protection of Indians.[136]

In the early nineteenth century military leaders were known to adopt Native children. Andrew Jackson himself adopted a Creek boy as a "trophy of war" after decimating his tribe.[137] These adoptions reflect the commodification, exploitation, and objectification of Native Americans that was rampant at the time. While Andrew Jackson adopted the Creek boy as a conquest of war, other military leaders, after battles with the Indians, did so out of a feeling of responsibility for the children they had orphaned. In one such instance, Brigadier General Leonard Colby adopted an Indian girl who had been found under the dead and frozen body of her mother after the 1890 Wounded Knee massacre.[138]

Margaret Jacobs writes that the practice of non-Native families and individuals blurs the lines between love and power in what Ann Laura Stoler calls the "intimacies of empire."[139] In a perfect example of this point in 1887 Hope Ghiselin was given an Apache girl as a "Thanksgiving Day gift." She wrote, "I named [her]... Lizzie Owing for my mother, and hope if possible to have her always with me; I love her so."[140] Some of these women became deeply

[134] Jacobs, "Breaking and Remaking Families," 21-22.
[135] Briggs, *Somebody's Children*, 83-84.
[136] Jacobs, "Breaking and Remaking Families," 21-22.
[137] Jacobs., "Breaking and Remaking Families," 22.
[138] Ibid., "Breaking and Remaking Families," 22.
[139] Ibid., "Breaking and Remaking Families," 19.
[140] Ibid., "Breaking and Remaking Families," 25.

invested in the Native communities from which they adopted children, in some cases even learning the language and moving onto the reservation. In these cases the adoption of Indian children did not necessarily result in the loss of Native culture, however most adoptive parents took care to ensure the Americanization of their adopted children. It is important to note that most of the people adopting Indian children at this time were single women, many of whom had moved to the West to to form maternalist, male-free communal families based on the writings of Charlotte Perkins Gilman. These women had found that social workers would not allow single women to adopt white babies. This adds an additional layer to the complicated relationship between love, assimilation, gender norms, and racial hierarchies.[141]

The 1940s saw a return of the adoption of Indian children by white families as transracial adoptions were becoming a socially acceptable practice. In the 1940s and 1950s there were about twice as many white potential adoptive parents as there were white children available for placement. The BIA and the Child Welfare League of America (CWLA) worked towards the specific goal of placing Native children with white families. Furthering this aim, in 1957, BIA social workers won the right to petition parents to relinquish their children. Because of this policy, roughly 400 Native children were placed with white families in the years between 1958 and 1967. Additionally, the program was used as an example for other agencies, encouraging them to likewise place Native children with white families.[142]

The Indian Child Welfare Act: Background

While the BIA and CWLA sought to place Native children, "far from the reservation," William Byler, executive director of the Association on American Indian Affairs (AAIA) saw the situation differently. In 1968 he said at a press conference:

[141] Jacobs, "Breaking and Remaking Families," 28-29.
[142] Briggs, *Somebody's Children*, 72.

> As sad and terrible as the conditions are that Indian children must face as they grow up, nothing exceeds the cruelty of being unjustly and unnecessarily removed from their families... Today in this Indian community a welfare worker is looked on as a symbol of fear rather than of hope... The Devil's Lake Sioux people and American Indian nations have been unjustly deprived of their lands and their livelihood... and now they are being dispossessed of their children. Indian leaders and parents charge... that county welfare workers frequently evaluate the suitability of an Indian child's home on the basis of economic or social standards unrelated to child's physical or emotional well-being and that Indian children are removed from the custody of their parents or Indian foster family for placement in non-Indian homes without sufficient cause and without due process of law.[143]

Representatives from the Devil's Lake Sioux also spoke at the press conference and presented stories of children being removed from their Indian homes. 25% of children from the Devil's Lake Sioux nation had been removed by welfare agencies and placed either in boarding schools, foster care, or adoptive homes.[144] One woman, Esie Greywind, had actually been jailed for refusing to allow her grandchildren to be taken and placed in a white foster home. Further, Byler argued that the termination policies were a violation of treaty rights. Byler contextualized this issue as being a part of the larger problem of Native peoples being "deprived of lands and livelihood-- part of a broader struggle for sovereignty and treaty rights, a set of relationships formed through law, in which nations are political entities with the right to self-government."[145]

In 1968, Louis Goodhouse, the Devil's Lake Sioux's tribal chairman, reached out to the AAIA. The tribe had been insisting for years that the issues of adoption and child welfare be processed through the tribal courts, even taking their case to the North Dakota Supreme Court and winning. However, the outcome of the case did not serve to change child welfare practices. Goodman was reaching out in regards to the case of Ivan Brown who was a six-year-old boy living on the reservation with what the tribe recognized as his grandmother. Because Ivan's grandmother was 63, welfare officials had resolved that she wasn't of an appropriate age to care

[143] Briggs, *Somebody's Children*, 74.
[144] Pevar, *The Rights of Indians and Tribes,* 291.
[145] Briggs, Somebody's Children, 75.

for him. This led the state welfare agency to place Ivan with a white foster family. The AAIA sent Bertram Hirsch, who became a noted legal advocate for the nations , to pursue the case which was the AAIA's first pertaining to child welfare. After winning the case and returning Ivan to his grandmother, the AAIA began to litigate more child welfare cases winning every case they appealed.[146]

While Hirsch was successful in having Ivan returned to the care of his grandmother, the case revealed some disturbing statistics. As mentioned before 25% of the nations ' children had been removed. Of Native American children being placed for adoption, 85% were placed with non-Native families.[147] It was also determined that although Native people accounted for 2-3% of the population of the Dakotas, of the children in in foster care, 50 percent were Indian. At the time the state of North Dakota held a law that "chronic dependency" could serve as justification to remove children. On the Fort Totten reservation unemployment exceeded 90%. That meant that under state law 90% of children could be removed. The Tribal Council continued to argue that it was not within the jurisdiction of the state to remove Native American children. The county responded by ending the distribution of welfare benefits to the tribe.[148]

As mentioned above, Goodman and five other activists went to New York to hold a press conference and then to Washington D.C. to petition the BIA. The activists were able to convince the BIA to give the tribe jurisdiction over food stamp benefits rather than the county. They also received funding for a Family Development Center. The Center, which targeted families at risk of losing their children, was run through by a Tribal Council appointed Child Welfare Board.

[146] Briggs, *Somebody's Children*, 80 & 83.
[147] Terry L. Cross, "The Indian Child Welfare Act: We Must Still Fight for Our Children," Reclaiming Children and Youth 23, (2014): 23.
[148] Briggs, *Somebody's Children,* 77-78.

Perhaps most importantly, they were finally successful in establishing the Tribal Court as having precedence over the county welfare department.[149]

Social workers and judges, because they lacked understanding of Indian culture, particularly in regards to customs of child rearing, were often ignorant and prejudice in their intervention into Indian families.[150] In observing the poverty and social problems on the reservations, rather than address these problems, social workers used this as justification for the removal of the children. Additionally, social workers, not understanding the Native American conception of family, mistook the informal placement of children with extended family as abandonment.[151] Congress found in their studies that state officials "have often failed to recognize the... cultural and social standards prevailing in Indian communities and families."[152] Additionally, social workers believed that just because a family is poor it was in the best interest of the children to remove them from their homes, reflecting the nineteenth and early twentieth century belief that the most humane thing to do was to remove children from their Indian homes, either to be raised by white people or to be subject to forced assimilation in boarding schools.[153]

Also in 1968 the AAIA attempted to address the issue of boarding schools. Although not as prevalent as they were in the 1920s and 1930s the boarding school were still enrolling Native American children. The AAIA found that nine thousand children under the age of nine were enrolled in boarding schools. In the case of the Navajo 90% of children were enrolled. The Upstate New York Mohawk newspaper, *Akwesasne Notes* published activist articles about what

[149] Briggs, *Somebody's Children,* 78.
[150] Pevar. *The Rights of Indians and Nations* , 291.
[151] Terry L. Cross & Kathleen Fox, "Customary Adoption as a Resource for American Indian and Alaska Native Children," in *Child Welfare for the Twenty First Century,* Gerald P. Mallon & Peg McCartt, ed. (New York: Columbia University Press, 2014), 423.
[152] Pevar, *The Rights of Indians and Nations* , 291.
[153] Ibid., *The Rights of Indians and Nations* , 291.

they described as "social genocide," meaning the removal of Native American children from their homes on their respective reservations.[154]

In the 1970s the AAIA began to work to bring the issue of Indian child welfare into the public consciousness with the creation of a quarterly newsletter, *Indian Family Defense.* The AAIA distributed the newsletter to somewhere between three to five thousand groups at no cost. This included the nations , urban Indian groups, and public libraries. The advocacy movement for Indian child welfare justice began to pick up momentum. The most important pan-Indian organization, the National Congress of American Indians issued a resolution advocating for change in the welfare system. While an editorial published in the *American Journal of Psychiatry*, claimed Indian boarding schools were, "a hazard to mental health."[155] The *Akwesasne Notes* continued to publish their highly critical articles. The Native American Children's Advocates, formed by a group of Native mothers in New Mexico, organized a conference and issued a number of potential measures regarding child welfare justice, charging that welfare agencies were discriminating against them and not allowing them to become foster or adoptive parents. The Native American Children's Advocates called for an end to this discrimination. They also insisted that children be placed with their grandparents rather than to white families.[156]

In 1974 the AAIA were finally successful in their requests for an inquiry into Indian child welfare practices. James Abourezk, a senator from South Dakota, decided to hold hearings on the subject. The hearings revealed stories of forced sterilization, suicide attempts, alcoholism, and mental health treatment among other social ills that were a repercussion of children being

[154] Briggs, *Somebody's Children,* 79-80.
[155] Ibid., *Somebody's Children*, 88.
[156] Ibid., *Somebody's Children*, 88.

forcibly removed from their homes.[157] Congressional hearings followed in 1976 and 1977. Congress found that most of the removals of Indian children from their homes were "inappropriate, unnecessary and conducted without due process."[158] The data revealed how difficult it was to actually calculate these numbers. Following the hearings in 1976 the AAIA wrote a preliminary version of the Indian Child Welfare Act.[159]

The Indian Child Welfare Act passed in 1978. It held that when a child is domiciled within a reservation, child welfare cases fall under the jurisdiction of the tribal courts. If the child was not domiciled within the reservation, cases could be considered by the state courts, if there was good reason. When it comes to the placement of children the bill stipulates that preference should be given to placing then child within the extended family, then with a member of his or her tribe, then with another Native family of any tribe. Additionally, it is requires that crisis intervention services be offered to a family before terminating parental rights.[160]

Additionally, Congress wrote that nothing "is more vital to the continued existence and integrity of Indian nations than their children."[161] Reflecting this point, Pevar asserts that not only were these policies disastrous for Indian families, but the Native American nations were also losing their future generations. Pevar adds that the ICWA also promotes the importance of tribal sovereignty. In order to reassert their commitment to preserving tribal sovereignty some states, Californian, Colorado, Iowa, Nebraska, and Washington, have passed their own version of the legislation, in which some of the obligations of the state exceed those of the ICWA.[162]

[157] Briggs, *Somebody's Children*, 89.
[158] Cross & Fox, "Customary Adoption as a Resource," 423.
[159] Briggs, *Somebody's Children*, 91.
[160] *The Indian Child Welfare Act,* Public Law 95-608, *U.S. Statutes at Large* 3069 (1978)
[161] Ibid.
[162] Pevar, *The Rights of Indians and Nations ,* 292.

Until 1988 the bill seemed to be working in keeping Native children with their families or nations , however in 1988 rates of children taken from their families increased to higher levels than were seen before the ICWA.[163] A 2015 study found that Indian child welfare continues to be a pressing problem for the Native American nations. Indian children are "2.7 times more likely to be in foster care," while there are disproportionate numbers of Indian children in foster care in twenty-one states.[164]

[163] Briggs, *Somebody's Children,* 93.
[164] Scott Trowbridge, "Understanding the 2016 Indian Child Welfare Act Regulations," Child Law Practice, 36 (2017).

VII. The Indian Child Welfare Act

After understanding the background of forced assimilation in the United States, and the threat to Native American nationhood that it poses, it becomes clear why many believed that the Indian Child Welfare Act was necessary. However, this thesis argues that the nature of the law is inherently problematic in the sense not only that it violates Westphalian sovereignty, but also in the paternalistic relationship that it implies. The defined purpose of the Indian Child Welfare Act is, "To establish standards for the placement of Indian children in foster or adoptive homes, to prevent the breakup of Indian families, and for other purposes."[165] Section 3 states:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian nations and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in fester or adoptive hime which will reflect the unique values of Indian culture, and by providing for assistance to Indian nations in the operation of child and family service programs.[166]

Section 2 begins by acknowledging the "special relationship between the United States and the Indian nations and their members and the Federal responsibility to Indian people."[167] The special relationship concept is left, while the "Federal responsibilities" are left unclear. It is interesting to note that the legislation refers to the Native American nations as tribes, not nations, despite the fact that earlier legislation and Court cases, including the Marshall Trilogy, at least in language, acknowledge the individual nationhoods of the Indian peoples. This seems to assert that this Congress did not recognize the nationhood of the Native Americans, already introducing a power dynamic into the legislation. Furthering this dynamic, the legislatioin refers to the responsibility of the US government to the Indian nations. Having been left undefined these "responsibilities to" could easily be interpreted as "powers over" considering that any insertion into tribal affairs undermines tribal sovereignty to begin with. Article 1 of Section 2 establishes

[165] *The Indian Child Welfare Act,* Public Law 95-608, *U.S. Statutes at Large* 3069 (1978)
[166] Ibid., Sec. 2, Art. 1.
[167] Ibid., Sec. 2, Art. 2.

that "Congress has plenary power over Indian affairs," by virtue of the Indian Commerce Clause as well as "other Constitutional authority" which is left broad and vague, leading one to wonder, if these Constitutional provisions exist, why Congress would fail to point towards them.[168]

Article 2 elaborates briefly on what these responsibilities are, "Congress, through statutes, treaties, and the general course of dealings with the Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources."[169] Here responsibility clearly refers to the paternalistic control the Federal government can assert over the Native American nations. In this instance Congress specifically points to control over resources. One nations control over another's resources seems a clear violation of concepts of sovereignty, particularly Krasner's interdependence sovereignty. Congress acknowledges that they derive these powers, in part, from "the general course of dealings with the Indian tribes." This euphemism trivializes the treatment of the Native American nations by the US government to a point that is almost comical. It is, shocking to observe that Congress has in this way acknowledged that their power over the Native American nations is derived from the violence and oppression that characterizes the relationship between the United States and the Native Americans; yesterday's violence is the justification for today's paternalism.

Interestingly, Section 3 acknowledges the importance of children in the continued existence of a nation and its culture, while Section 5 concedes that the States lack the cultural knowledge to successfully exercise jurisdiction of Indian child welfare. Yet even these concessions are tinged with paternalism, "The United States has a direct interest, as trustee, in protecting Indian children."[170] Section 4, Article 8 defines "Indian tribe" as an organization of Indians "eligible for the services provided to Indians by the Secretary [of Interior]." Through

[168] *The Indian Child Welfare Act,* Sec. 2, Art. 1.
[169] Ibid., Sec. 2, Art 2.
[170] *Indian Child Welfare Act,* Sec 2, Art. 1.

these words Congress appropriates the right to define one's one membership or a nation's entire existence and relegates it to the realm of federal bureaucracy.[171] The bill establishes a series of programs meant to protect the integrity of the Indian family and establishes the US government's responsibility to fund these programs. Some argue that while the Native American nations accept financial support from the US government they cannot be considered sovereign nations. While this theory may initially appear to hold some credibility, a more accurate interpretation would assert that the Native American nations as accepting assistance or welfare from the US government, but rather reparations.

While there are numerous pieces of legislation and court cases, such as *Worcester*, that have explicitly stated or have been interpreted as asserting tribal sovereignty, this analysis of the Indian Child Welfare Act hopes to highlight not just where this particular bill has failed to conform to theoretical conceptions of sovereignty for the Native American nations, but point towards the contradiction of writing legislation to assert the autonomy of another nation. Although pieces of legislation seem to uphold territorial sovereignty as discussed by Moore and Brunner and Küpper, this legislative habit the US government has developed, by its very nature, undermines the sovereignty, self-determination, or autonomy that the piece of legislation itself may seek to assert.

VIII. Looking Forward

After examining concepts of sovereignty, nationhood, and the right to self-determination as applied to the case of the Native Americans, one might be inclined to ask whether or not sovereignty for the Native American nations is even possible within the framework of the United States. Ford agues that although the Native American nations retain some rights and levels of sovereignty, these rights are granted by the US government and are not only inferior to the

[171] Ibid.„ Sec. 4, Art. 8.

powers of the US government, but are subject to change according to "congressional whim."[172] Ford points out that while there are constitutional provisions in place to check the power of the federal government over that of the state governments, no such balances apply in regards to the relationship between the federal government and the Native American nations. For example, the US government is not able to change state boundaries or take possession of state lands. However, as shown through the 1989 Supreme Court case of *Brendale v. Confederated Nations & Bands of the Yakima Indian Nations,* the federal government does exercise this right over the Native American nations. In this case the Court ruled that the Yakima Indians had lost their claim over certain lands because the demographics on these lands had shifted and were now primarily occupied by white people.[173] The fact that Indian peoples may still lose their lands and the accompanying sovereignty simply by white people becoming a majority on the land, makes claims that the federal government upholds tribal sovereignty seem farcical. Additionally, Ford points out that in efforts to reassert tribal sovereignty therein lies a paradox that the nations "must rely on the taker of their power's willingness to relinquish it."[174]

Krakoff reflects Ford's point, writing, "What kind of sovereignty can it be that depends, for its continued existence, on the pleasure of a branch of government of another nation?"[175] Justice Thomas points out this paradox in his concurring opinion for the Supreme Court case *The United States v. Lara:*

> The time has come to reexamine the premies and logic in our tribal sovereignty cases. It seems to me that much of the confusion reflected in our precedent arises from... incompatible and doubtful assumptions... First Congress... can regulate virtually every aspect of the tribes without rendering tribal sovereignty a nullity.[176]

[172] Ford, "The Myth of Tribal Sovereignty," 406.
[173] Ibid., "The Myth of Tribal Sovereignty," 410.
[174] Ibid., "The Myth of Tribal Sovereignty," 411.
[175] Krakoff, "Illuminating the Paradox of the Domestic Dependent Nations," 1119.
[176] *United State v. Lara,* 541 U.S. 193, 215 (Thomas J. concurring).

Justice Thomas seems to assert that tribal sovereignty cannot be expressed with the help of the Supreme Court, "The tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously."[177] With this statement, Thomas makes clear that he does not interpret sovereignty as a fluid concept. While it may be the only means of redress for the Native American nations, seeking greater autonomy though the US court system, from the legislative branch, or from the Bureau of Indian Affairs, redeploys the concepts that sovereignty is fluid, providing justification for interpreting sovereignty in the way that Ford argues majority of Court cases have, that the sovereignty of the Native American nations is delegated by the federal government, making tribal sovereignty a hollow shell dependent on the whims of the US government.

While Audre Lorde was writing about feminism and race, her iconic words seem applicable to this debate, "The masters tools will never dismantle the master's house."[178] Sovereignty cannot be expressed with the permission of the oppressor. The master's tools in this case includes US Indian law. Riley argues, "American jurisprudence may not be fully capable of embracing more nuanced conceptions of equality that acknowledge and reify the idea that fair and equal treatment for Indian nations requires specialized understanding and application"[179] The question that presents itself is how then do the Native American nations step outside of the framework that inherently holds their sovereignty as fluid, as well as delegated by and dependent on the US government. One theoretical perspective could remove the concept of sovereignty from the legal realm and place it within the realm of culture, understanding cultural sovereignty to be the best means for the Native American nations to protect their sovereignty. This concept

[177] Ibid., (Thomas J. concurring).
[178] Audre Lorde, "The Master's Tools Will Never Dismantle the Master's House," in *Sister Outsider: Essays and Speeches,* (Berkley: Crossing Press, 1984) 110.
[179] Angela R. Riley, "Native Nations and the Constitution: An Inquiry into 'Extra-Constitutionality,'" Harvard Law Review Forum 130, (2017): 175.

reflects Tamir's understanding of nation as a cultural entity, "The right to national self-determination... is the right to preserve the existence of a nation as a distinct cultural entity."[180].

This thesis asserts that the sovereignty of the Native American nations is pre-Constitutional and inherent. However, if we address the issue of sovereignty from a cultural lens, the struggle for sovereignty becomes for protecting Native American children as a resource for the preservation of Indian culture. As discussed earlier in this thesis, the removal of Native American children from their homes has been one of the primary means of eroding the sovereignty of the Native American nations. One way in which a greater respect for tribal sovereignty can have tangible benefits for the Native American nations is through educational sovereignty. As the situation stands it is estimated that only 40% of Native American teenagers will graduate from high school.[181] McCarty and Lee argue that tribal sovereignty must include educational sovereignty, and this education must be "culturally based, culturally relevant, and culturally responsive.[182] If we return to Brunner and Küpper's definition of territorial autonomy, we must remember that control of the school system within a minority culture's territorial domain is a condition of recognized autonomy. Although Native American nations may be seeking to assert greater control over the education of its children, all educational activities fall under the purview of Bureau of Indian Education.[183]

The Navajo Nation has attempted to redefine tribal education by turning it away from its assimilationist past. To do so, the Navajo Tribal Council requires that Navajo language and culture be taught in all grades, a project that is overseen by the Diné Department of Education.[184]

[180] Tamir, *Liberal Nationalism*, 57.
[181] Lomawaima & McCarty, 282.
[182] Teresa L. McCarty & Tiffany S. Lee, "Critical Culturally Sustaining/Revitalizing Pedagogy and Indigenous Education Sovereignty," Harvard Educational Review 84 (2014): 102-103.
[183] Ibid., "Critical Culturally Sustaining/Revitalizing Pedagogy and Indigenous Education Sovereignty," 104.
[184] Krakoff, "Illuminating the Paradox of the Domestic Dependent Nation," 1142.

Krakoff asserts, "The survival of the Navajo Nation as a unique group of people growing and developing socially, educationally, economically, and politically within the larger American Nation requires that the Navajo People... retain and/or develop an understanding, knowledge and respect for the Navajo culture, history, civics and social studies."[185] Noting that only 10% of Native American youth speak their native language, the preservation of indigenous languages has been a high priority for Native American activists and scholars.[186] The Navajo Nation National Code asserts this goal, "The Navajo Language is an essential element of the life, culture, and identity of the Navajo people. The Navajo Nation recognizes the importance of preserving and perpetuating that language for the survival of the Navajo Nation."[187]

Krakoff claims, "The provision of adequate local education is a clear prerequisite to encouraging tribal members to stay in the Diné homeland. Yet the history of education of American Indian children pushes strongly against this goal."[188] Despite these goals, the majority of Native American children are exported off of the reservation to attend public schools. The Navajo nation has fought for schools to be built on reservations with equal funding to that of public schools.[189] The fact that the nearly 90% of Indian children attend school off of the reservation still reflects assimilationist policies.[190] In American schools Indian children are exposed to values and economic models that differ from the traditional way of life for their respective nations. Facing contradicting narratives from opposing institutions of authority can cause psychological distress for Indian children, perhaps leading to feelings of confusion and

[185] Ibid. "Illuinating the Paradox of the Domestic Dependent Nation," 1142.
[186] McCarty & Lee, "Critical Culturally Sustaining/Revitalizing Pedagogy and Indigenous Education Sovereignty," 104.
[187] Nation Code tit. 10 sect. 111 (Equity 1984)
[188] Krakoff., "Illuminating the Paradox of the Domestic Dependent Nation," 1145.
[189] Ibid., "Illuminating the Paradox of the Domestic Dependent Nation," 1145-1146.
[190] McCarty & Lee, "Critical Culturally Sustaining/Revitalizing Pedagogy and indigenous Education Sovereignty,"104.

isolation in both spheres as the child grapples with the Sisyphean task of synthesizing and appropriately expressing the values and norms of both cultures.

Not only does the American school system introduce this tension, but it inherently imposes its economic system and expectations on Native American children rather than training them in their traditional conceptions of economics or specifically preparing them for an adult life in their community. Being raised in an environment that differs ideologically from that of one's native culture presents significant threats to said culture. This situation cannot just lead to a cultural clash between generations on the reservation, but can eventually lead to a shift away from traditional values.

Conclusion

This thesis agrees with Ford's analysis that the tribal sovereignty is a mythological concept. Despite this fact, this thesis asserts that tribal sovereigny should be aspired towards. The legal framework that surrounds Native American jurisprudence does not protect the sovereignty of the tribes, rather the Marshall Trilogy, the cornerstone of federal Indian policy, make clear that the Native American naions are not independent nations, but rather "domestic dependent nations." While Native Americans constitute the poorest minority in the United States and the reservations are rampant with social ills, it is clear that the status quo for tribal sovereignty must change. This thesis argues that the best way to combat social ills is by returning power to the local level where each respective Native American nation may write the legislation and create the programs that are best suited to their culture and needs as a community. For example, on reservations facing a drug abuse epidemic, the Native American nations should have the right to decriminalize substances in order to focus on treatment of the illness, rather than punishment.

This thesis raises the question of whether or not tribal sovereignty can be expressed through the US legal system. One way this would be possible would be if the US reestablished the treaty relationship with the Native American nations. A treaty relationship inherently acknowledges the legitimacy and nationhood of both parties. This relationship would allow for the US government and Native American nations to come to agreements that increase tribal sovereignty, without the paternalistic implications of legislation handed down from Congress.

While this thesis asserts that the Native American nations must be recognized as sovereign, because it is unlikely that there should be grand changes in federal Indian policy, it is important to look outside of the US legal system for expressions of sovereignty. From this perspective one may choose to understand the nation as a cultural entity and sovereignty as a

cultural attribute. This interpretation allows for a broader understanding of nationhood. Tribal sovereignty in this case would involve the right to protect one's culture. One way of doing so is through ensuring that the traditional culture and language are imparted on the next generation; children become a valued resource in the struggle for cultural survival. Facing the historical past and present realities of forced assimilation, Native American nations must be able to protect their children from assimilationist practices. This was one of the goals of the Indian Child Welfare Act, however this legislation proved to be ineffective and paternalistic, reinforcing a dynamic of dependency on and therefore submission to the federal government. To protect the cultural development of Native American children, and to prepare them for life as members of their respective nations, this thesis argues that educational sovereignty would allow for individualized and culturally appropriate educational systems for each Native American nation.

Ultimately, while analyzing the hypocricy and paradoxes of federal Indian policy, this thesis asserts that sovereignty and greater self-determination for Native American nations and individuals is paramount to combating the social ills that plague the Native American reservations. It is no secret that many of the Native American nations are struggling against a loss of culture, economic burdens, and mental health and substance abuse issues. Greater respect for tribal sovereignty would allow for the Native American nations to address these issues in a way that is culturally appropriate and most relevant to life on a reservation today, allowing for much more inventive and effective solutions than a non-Indian bureaucrat or politician could invent.

Bibliography

Adams, David Wallace, and Crista DeLuzio. 2012. On the Borders of Love and Power: Families and Kinship in the Intercultural American Southwest. University of California Press.

Alexander, Yonah, and Robert A. Friedlander. 1980. Self-Determination: National, Regional, and Global Dimensions. Westview Press.

Almqvist, Jessica. n.d. Human Rights, Culture and the Rule of Law. Human Rights Law in Perspective: V. 6. Oxford : Hart, 2005.

Barnes, Richard L. 2011. "From John Marshall to Thurgood Marshall: A Tale of Innovation and Evolution in Federal Indian Law Jurisdiction." Loyola Law Review 57: 435.

Bodin, Jean. 1606. The Six Bookes of a Commonwealth. Harvard University Press.

Briggs, Laura. 2012. Somebody's Children: The Politics of Transnational and Transracial Adoption. Duke University Press.

Brunner, Georg, and Herbert Küpper. 2002. ""European Options of Autonomy: A Typology of Autonomy Models of Minority Self-Governance."

Cassese, Antonio. 1995. Self-Determination of Peoples: A Legal Reappraisal. Cambridge University Press.

Charbonneau-Dahlen, Barbara K., John Lowe, and Staci Leon Morris. 2016. "Giving Voice to Historical Trauma Through Storytelling: The Impact of Boarding School Experience on American Indians." Journal of Aggression, Maltreatment & Trauma 25 (6): 598–617.

"Cherokee Nation v. Georgia 30 U.S. 1 (1831)." 2017. Justia Law. Accessed June 6.

Cross, Terry L. 2014. "The Indian Child Welfare Act: We Must Still Fight for Our Children." Reclaiming Children and Youth 23 (2): 23–24.

Cross, Terry L., and Kathleen Fox. 2005. "Permanency for Children and Youth: Customary Adoption as a Resource for American Indian and Alaska Native Children." In Child Welfare for the Twenty-First Century, 423.

Dana Irina. 2011. "A Culture of Human Rights and the Right to Culture." Journal for Communication and Culture, Vol 1, Iss 2, Pp 30-48 (2011), no. 2: 30.

Dinstein, Yoram. 1976. "Collective Human Rights of Peoples and Minorities." The International and Comparative Law Quarterly 25 (1): 102–20.

Fletcher, Matthew L. M. 2006. "The Iron Cold of the Marshall Trilogy." North Dakota Law Review 82: 627.

Ford, Algeria. "The Myth of Tribal Sovereignty: An Analysis of Native American Tribal Status." 2010. International Community Law Review, Volume 12, Issue 4,

Fowler, Michael Ross, and Julie Marie Bunck. 2010. Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty. Penn State Press.

"Frequently Asked Questions." 2017. Native American Rights Fund. Accessed May 2. http://www.narf.org/frequently-asked-questions/.

Hannum, Hurst. 2011. Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights. University of Pennsylvania Press.

Hoffman, John. 1998. Sovereignty. University of Minnesota Press.

Ioannidis, Christoforos. 2014. "ARE THE CONDITIONS OF STATEHOOD SUFFICIENT? AN ARGUMENT IN FAVOUR OF POPULAR SOVEREIGNTY

AS AN ADDITIONAL CONDITION OF STATEHOOD." Jurisprudencija, no. 21(4): 974–87.

Iorns, Catherine J. 1992. "Indigenous Peoples and Self Determination: Challenging State Sovereignty." Case Western Reserve Journal of International Law 24: 199–348.

"Johnson v. M'Intosh 21 U.S. 543 (1823)." 2017. Justia Law. Accessed June 6.

Kalt, Joseph P., and Joseph William Singer. 2004. "Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule." SSRN Scholarly Paper ID 529084. Rochester, NY: Social Science Research Network.

Kirsch, Noah. 2017. "Dakota Pipeline Billionaire Slams Standing Rock Protests." Forbes. Accessed April 30.

Krakoff, Sarah. 2004. "A Narrative of Sovereignty: Illluminating the Paradox of the Domestic Dependent Nation." Oregon Law Review 83: 1109–1202.

Krasner, Stephen D. 1999. Sovereignty: Organized Hypocrisy. Princeton University Press.

Kymlicka, Will. n.d. Liberalism, Community and Culture. Oxford [England] : Clarendon Press, 1991, c1989.

Liebich, Andre. 2003. "Must Nations Become States?" Nationalities Papers 31 (4): 453–69.

Lomawaima, K. Tsianina, and Teresa L. McCarty. 2002. "When Tribal Sovereignty Challenges Democracy: American Indian Education and the Democratic Ideal." American Educational Research Journal 39 (2): 279–305.

Lorde, Audre. 2012. Sister Outsider: Essays and Speeches. Potter/TenSpeed/Harmony.

McCarty, Teresa, and Tiffany Lee. 2014. "Critical Culturally Sustaining/Revitalizing Pedagogy and Indigenous Education Sovereignty." Harvard Educational Review 84 (1): 101–24.

Moore, Margaret. 2015. A Political Theory of Territory. Oxford University Press.

Paine, Robert. 1999. "Aboriginality, Multiculturalism, and Liberal Rights Philosophy." Ethnos: Journal of Anthropology 64 (3): 325–49.

Penn-Roco, Amber. 2016. "Standing Rock and the Erosion of Tribal Rights." National Lawyers Guild Review 73 (3): 176–79.

Pevar, Stephen. 2012. The Rights of Indians and Tribes. OUP USA.

Prygoski, Philip. 2017. "The Supreme Court's Changing Stance on Tribal Sovereignty." American Bar Association. Accessed June 6.

Riley, Angela R. 2016. "Native Nations and the Constitution: An Inquiry into Extra-Constitutionality." Harvard Law Review Forum 130: 173.

Rousseau, Jean-Jacques, and G. D. H. Cole. 2003. On the Social Contract. Courier Corporation.

Surface-Evans, Sarah L. 2016. "A Landscape of Assimilation and Resistance: The Mount Pleasant Indian Industrial Boarding School." International Journal of Historical Archaeology 20 (3): 574–88.

Swindler, Ann. 1986. "Culture in Action: Symbols and Strategies on JSTOR." American Sociological Review 51.

Tamir, Yael. 1995. Liberal Nationalism. Princeton University Press.

"Text of S. 1214 (95th): Indian Child Welfare Act (Passed Congress/Enrolled Bill Version)." 2017. GovTrack.us. Accessed June 6.

"Tribal Sovereignty: History and the Law." 2017. Accessed June 6. /content/tribal-sovereignty-history-and-law.

Trowbridge, Scott. 2017. "Understanding the 2016 Indian Child Welfare Act Regulations." Child Law Practice 36 (1): 6–10.

"United States v. Lara 541 U.S. 193 (2004)." 2017. Justia Law. Accessed June 6.

Wakeling, Stewart, Miriam Jorgensen, Susan Michaelson, and Manley Begay. 2002. "Policing on American Indian Reservations." Australian Indigenous Law Reporter 7: 109.

"Worcester v. Georgia 31 U.S. 515 (1832)." 2017. Justia Law. Accessed June 6.