LEARNING NOT TO LIVE WITH EUROCENTRIC MYOPIA: A Reply to Professor Laurence's *Learning to Live With the Plenary Power of Congress Over the Indian Nations**

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PART I

In my article, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*,[1] I set out a genealogy of American Indian tribal rights and status in European and European-derived legal thought and discourse. Tracing the descent and emergence of the critical analytic concepts of contemporary Federal Indian law, I argued in *The Algebra* that American Indian Nations have been judged and their legal rights and status determined in European legal thought and discourse by alien and alienating norms derived from the European's experience of the world. The central texts of contemporary Federal Indian law, beginning with its grounding legal text, the Doctrine of Discovery, deny respect to American tribal peoples' fundamental human rights of autonomy and self-determination.

In *The Algebra*, I argued for the condemnation of a conqueror's racist and eurocentric legal vision and law which denied respect to the Indian's tribal vision of life and self-determination, and which threatened that vision with extermination. In place of the European's colonial law I urged the adoption of an Americanized vision of the appropriate structuring of political and legal relationships between two peoples, Indian and European-derived, with two radically divergent world views. I cited as just one example of that Americanized vision the Gus-Wen-Tah (the Two Row Wampum).

The principles embodied in the Gus-Wen-Tah were the basis for all treaties and agreements between the great colonizing nations of the Haudenosaunee Confederacy (called the Seven Nations of the Iroquois Confederacy by Europeans) and the great colonizing nations of Europe. These basic

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* *Editors' Note:* The Editors of the *Arizona Law Review* invited Professor Williams to write this reply to the preceding article by Robert Laurence which appears in this issue at page 413.

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1. Williams, 1986 WIS. L. REV. 219 (1986).

principles were the covenant chain linking these two different peoples by which each agreed to respect the other's vision.

> When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.[2]

In short, I argued in *The Algebra* that modern Federal Indian law ought to cease its focus on sanctioning and eliminating the difference presented by the American tribal self-governing vision. Instead, modern Federal Indian law, as well as those lawyers who write and practice in the field, ought to be liberated from a genocidal, imperialist past and adopt a perspective of tolerance and respect for the fundamental human right of American Indian people to self-determination which can only be achieved through decolonization.[3]

In his reply to my article, *The Algebra*, Professor Laurence gratuitously labeled the Gus-Wen-Tah and its more tolerant vision respecting the funda-

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2. *See* INDIAN SELF-GOVERNMENT IN CANADA, REPORT OF THE SPECIAL COMMITTEE (back cover) (1983). The Gus-Wen-Tah is discussed in Williams, *supra* note 1, at 291-99.

3. The growing legal literature on American Indian Nations and their rights and status under international human rights law represents the most exciting and dynamic new perspective in the field of American Indian law. *See, e.g.*, INDIAN RIGHTS–HUMAN RIGHTS: HANDBOOK FOR INDIANS ON INTERNATIONAL COMPLAINT PROCEDURES (1985); Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73 (1983); Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INTL. L. 369 (1986); Andress & Falkowski, *Self-Determination: Indians and the United Nations—The Anomalous Status of America's "Domestic Dependent Nations"*, 8 AM. IND. L. REV. 97 (1980); Clinebell & Thomson, *Sovereignty and Self-Determination: Rights of Native Americans Under International Law*; 27 BUFFALO L. REV. 669 (1978); Ryan, *Indian Nations Compared to Other Nations*, 3 AM. INDIAN J. 2 (1977). *See also* G. BENNET, ABORIGINAL RIGHTS IN INTERNATIONAL LAW (1978); Churchill, *Indigenous Peoples of the United States: A Struggle Against Internal Colonialism*, 16 THE BLACK SCHOLAR 29 (1985).

While a lively debate on the international legal status and rights of American Indian Nations has been going on for over a decade now, the small coterie of scholars comprising the Indian law "establishment" (as insightfully identified by Professor Milner Ball, *see* Ball, *Constitution, Court, Indian Tribes*, 1987 J. AMER. B. FOUND. RES. 1) have paid this corpus scant attention. The type of attitude expressed by Professor Laurence, who professes "little faith in the ability of public international law to protect any valuable rights . . . [or] put bread on American Indian tables, *see* Laurence, *infra* note 4, at 428, may well begin to explain this marginalization of contemporary international human rights law in the dominant legal discourses of the Indian law "establishment." *But see* the statistics on reservation Indian socioeconomic status demonstrating the failure of United States law to put bread on American Indian tables, *infra* at note 13. In any event, it is illuminating that Indian law, with historical roots so firmly grounded in international law, *see* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573-74 (1823); *see also* Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983), has, with the scholarly assistance of the Indian law "establishment," successfully suppressed and delegitimized the more universalized normative foundations of international legal discourse. Of course, those scholars who repeatedly forget the past always condemn those who refuse to ignore it.

mental human rights of Indian people to govern themselves free of unilateral colonial domination "charming".[4] The implication of this dismissive label for the vision contained in the Gus-Wen-Tah would appear to be that hard-assed empire builders, or their descendants who enjoy the material as well as intellectual legacy of their labors, know the world as they see it and they see no realistic possibility that American Indian Nations will ever receive the fundamental human right of true self-determination from their colonizers, the United States government. Professor Laurence's reply to *The Algebra's* "charming" idealism counsels American Indian people instead to learn to live, like he has, with racist, eurocentric, and ultimately genocidal legal doctrines like Federal Indian law's plenary power doctrine. This doctrine, the most important extension of the Discovery Doctrine's underlying assumption of Indian diminished legal status and rights, vests in Congress' unilateral authority to alter or destroy treaty-guaranteed Indian tribal status and self-governing rights.

It is indeed a good thing that Professor Laurence can "live with the plenary power" of Congress over the Indian Nations.[5] Perhaps now he can teach the Navajo grandmothers who are being relocated up at Big Mountain and the Hopi tribal government how they might all learn to live with the plenary power of Congress in Indian affairs.[6] To date, both the grandmothers and the Hopis do not seem to have learned the lesson so easily grasped by Professor Laurence. Perhaps Professor Laurence can instruct the Menominee elders who still tell of Congress' "termination" of their tribe's federal status way back in the bad old days (the 1950's) how to learn to live with the plenary power doctrine.[7] Maybe the good professor can teach the Sioux people who desire the return of the Blackhills,[8] and not a cash settlement from the government which stole their holylands, how to learn to live with the plenary power of Congress.[9] And perhaps Professor Laurence can even instruct a Lumbee Indian how to better live with his tribe's 1956 Federal Recognition Act[10] by which Congress gratuitously declared, without providing a rational or even an arbitrary and capricious reason, that "Nothing in this Act shall make such [Lumbee] Indians eligible for any services performed by the United States, and none of the statutes of the United States which affect Indians because of their status as Indians shall be applicable to

4. Laurence, *Learning to Live with the Plenary Power of Congress Over Indian Nations*, 30 ARIZ. L. REV. 413 (1988). Here, I must confess that I similarly find the ideal embodied in the United States legal vision of equal rights under the law for all men and women, regardless of race or ethnic status, "charming," but incapable of achievement, given "the actual state of things" (*see id.* at 435) in the sexist and racist white patriarchy which the United States is.

5. *Id.* at 418.

6. On the U.S. government's efforts to relocate Navajo families residing on lands claimed by the Hopi tribe, see Whitson, *A Policy Review of the Federal Government's Relocation of Navajo Indians under P.L. 93-531 and P.L. 96-305*, 27 ARIZ. L. REV. 371 (1985).

7. On Congress' "termination" of the Menominee Tribe of Wisconsin, *see* Herzberg, *Menominee Indians: Termination to Restoration*, 6 AM. INDIAN L. REV. 143 (1978).

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

9. *See On the Warpath: Sioux Indians' Battle to Regain Blackhills Goes Back to Congress*, The Wall St. J., Dec. 24, 1987, at 1, 16. *See also* Remberton, *"I Saw That It Was Holy": The Black Hills and the Concept of Sacred Land*, 3 LAW & INEQUALITY 287 (1985).

10. *See* Lumbee Indians of North Carolina, Chap. 375 - Pub. L. 570 (1956).

the Lumbee Indians."[11]

It would indeed be a great day in the long history of Western civilization's incessant tutorial efforts if Professor Laurence could teach American Indians how to "live with the plenary power" doctrine.[12] For to learn to live with the plenary power doctrine, Indian people would have to close their hearts and minds to the sorrowful present-day manifestations throughout Indian country of the doctrine's racist and genocidal past. The wrongs and assaults upon human and tribal rights committed by Congress and the federal government under a facilitating plenary power doctrine years ago, decades ago, or centuries ago, continue to be felt, and continue to manifest themselves in the present-day statistics of Indian poverty, disease, youth suicide, poor education and all the other figures in the calculus of powerlessness which the plenary power doctrine sustains.[13]

These past wrongs committed under the plenary power doctrine continue to affect the lives of Indian tribal peoples today just as the wrongs committed against Blacks under the law years ago, decades ago, or centuries ago, continue to manifest themselves in American society today. It took White Americans four hundred years to move from legally treating Black Americans as separate and unequal, to separate but equal, finally arriving at equal under the law, but still unequal in all that really matters in United States society. The march of American history under White American legal rule has trod no less lightly on Indian people, and the footprints on the backs of both Black and Indian Americans are there for anyone to see who would care to look.

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11. *Id.* Contained in the Senate Report accompanying the Lumbee Indian Recognition Act is a letter to the Committee on Interior Insular Affairs from the Department of Interior, Office of the Secretary, urging that if the Lumbee recognition bill should be recommended for enactment, "it should be amended to indicate clearly that it does not make these persons [Lumbee Indians] eligible for services provided through the Bureau of Indian Affairs to other Indians." S. REP. NO. 2012, May 16, 1956 [to accompany H.R. 4656] at 2715 (1956).

12. Laurence, *supra* note 4, at 418.

13. *See* REPORT OF THE TASK FORCE ON INDIAN ECONOMIC DEVELOPMENT, U.S. Department of Interior, July 1986, Chapter 1, *The Socioeconomic Status of American Indians.* This most recent, and perhaps most comprehensive, federally sponsored and conducted survey of American Indian Nation socioeconomic status calibrates precisely how well Indian people have learned to live with the plenary power of Congress. According to the Report, 14.4 percent of reservation households had incomes below $2,500 per year, as compared with 4.6 percent for Americans as a whole. Fewer than 20 percent of reservation households earned more than $20,000 per year, as compared with 41 percent of all U.S. households. *Id.* at 42. Poverty rates for reservation Indians, according to the Task Force Report, "are predictably much higher than for the United States as a whole — 41 percent versus 12 percent," *Id.* at 45. In 1985, the BIA found an unemployment rate of 39 percent for all Indians included within its service population. This figure was five to six times the national average. Only four percent of reservation Indians ages 25 and older have completed four years of college, as compared with 16 percent for the U.S. population as a whole. In the age group 18 to 24, 51 percent of reservation Indians have graduated from high school, as compared with 70 percent for the U.S. population as a whole. *Id.* at 53.

These dire figures would seem to indicate that Indian people have indeed learned to live with the plenary power of Congress, the body entrusted with the self-assumed, treaty-pledged, fiduciary duty of assuring the continued welfare of American Indian Nations. In fact, according to the Report, "American Indians have the highest birthrate in 1980 of any major racial/ethnic group, equal to 25.9 births per 1000 population, as compared with 19.9 births for the white U.S. population." *Id.* at 38. Indian people apparently have recognized that in order to survive as tribal peoples in the United States, they must procreate at a faster rate than Congress' exercise of its plenary power over their nations can kill them off. Professor Laurence should take comfort in the fact, therefore, that reservation Indians are so adaptable.

Those who do look, and bear witness to the imprinted traces left on the destinies of peoples of color in America, are usually not profusely thanked or honored for their efforts at retrieval and anamnesis. A while back, United States Supreme Court Justice Thurgood Marshall had some unpleasant things to say about the venerated United States Constitution of 1787. That sacred text of United States history did not functionally include Negro slaves, women, or (it should be added) Indians. In a speech reprinted in the Harvard Law Review offering his historical reflections on the Constitution,[14] Justice Marshall stated uncontrovertible and therefore uncomfortable facts about the "miracle at Philadelphia."

> No doubt it will be said, when the unpleasant truth of the history of slavery in America is mentioned during this bicentennial year, that the Constitution was a product of its times, and embodied a compromise which, under other circumstances, would not have been made. *But the effects of the framers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes.*[15]

I emphasize the last two sentences of the quote taken from Justice Marshall's speech because they serve to underscore my own profound disagreements with so much of what Professor Laurence writes in response to my article, *The Algebra*.

The history of United States' race-oriented jurisprudence demonstrates, to my mind at least, and, apparently to Justice Marshall's mind also, one uncontrovertible and therefore uncomfortable fact. The effects (poverty, disease, or whatever the particular effects are from the legal calculus of powerlessness determined for a particular minority group under the history of United States race-oriented jurisprudence) of a diminished, unequal status for any racial minority in United States law cannot begin to be attacked and erased until the *contradictions* in the legal status of that minority group are recognized and rejected. While we might not find Justice Marshall's unique insights on the Constitution comforting, we ought not to reject his different but uniquely American vision. We must instead learn from the first Black American to sit as an Associate Justice of the United States Supreme Court and his legal vision of race relations in America which teaches that we are inescapably saturated in our history and its contradictions. We cannot escape either, though denial of both history and contradiction is the privilege of the fortunate majority in this country who sense no manifest obstacles on their paths towards a privileged destiny. One does not have to be a Marxist to sense that history is to some degree determinative in the grand scheme of things. All you have to be is a person of color in the New World.

PART II

In reply to my article rejecting the historical and theoretical foundations of the Discovery Doctrine in Federal Indian law and its derivative

14. *See* Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

15. *Id.* at 3-4 (emphasis added).

principle, the plenary power doctrine, Professor Laurence provides seven different reasons why he can "live with the plenary power" of Congress in Indian affairs.[16] As I will argue, much of the comfort Professor Laurence derives from the plenary power doctrine itself derives from a historical perspective detached from the racist past, present, and future of the field we call Federal Indian law. This detached perspective in turn defines a field with very narrow historical and theoretical boundaries. The past, in Professor Laurence's words, is full of "ideas . . . divinely and outrageously egotistical and ethnocentric",[17] that are admittedly "smelly and unattractive".[18] "The law," however, "is not a structure" determined by "the slimy muck"[19] of that past. "The law" according to Professor Laurence, "is a process and it evolves".[20] Thus, "hope" springs eternal for the future, as those who must live under this "process" called Federal Indian law anticipate "further evolution into a [plenary power] doctrine better than its precedents".[21] Professor Laurence's vision quest seeks a doctrine that may be applied with both "brains and heart and a doctrine that works".[22]

Professor Laurence, in other words, advocates a Progressive Historian's vision of the field of Federal Indian law, replete with Kierkegaardian leaps of faith and risk-averse wagering in the shadow of Pascal. The past, we all admit quite frankly, sucked, but things have to get better because to think otherwise would leave us full of despair. Let us build, therefore, upon the mistakes of the past as we leap forward, full of faith, into a future we are assured will be populated by people of goodwill towards all other people; a future *sans* Seventh Cavalry, *sans* Nazis, *sans* Ku Klux Klan, *sans* Aryan Brotherhood, *sans* anti-Indian treaty groups, *sans* etc., *sans* etc. Granted, Professor Laurence writes from within a great tradition, one which has served white America well in its heroic vision quest to let "democratic values" evolve out of a system of government originally and steadfastly committed to Indian genocide, slave labor, and white manhood suffrage.

Given my own tribalist, materialist, and so called "radical"[23] inclina-

16. Laurence, *supra* note 4. Professor Laurence's seven propositions are as follows:
1. "Plenary does not mean 'absolute.' Really. It means 'without subject-matter limitation' " *Id.* at 418.
2. "I do not feel myself bound by Professor Williams' history" *Id.* at 420.
3. "The plenary power is acceptable, but only in direct proportion to the extent that it is counterbalanced by a conflicting, and inconsistent, recognition of inherent tribal sovereignty" *Id.* at 422.
4. "I have some faith in the ability of the United States Congress and federal court system to exercise the plenary power with a delicate touch" *Id.* at 424.
5. "I have little faith in the ability of public international law to protect any valuable rights. I have no faith in the ability of public international law to put bread on American Indian tables" *Id.* at 428.
6. "Most of the depredations that Professor Williams enumerates do not flow from exercises of the plenary power" *Id.* at 430.
7. "We are talking here about 'the actual state of things' " *Id.* at 435.
17. *Id.* at 417.
18. *Id.* at 421.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 416.

tions, I deny Professor Laurence's "wait and see" theory of legal evolution (or, at least, I'm not that patient) and I feel the archaeological record is on my side. Justice for peoples of color in this country has been a four hundred year wait and see proposition, and given what is to be seen of the present-day results of the formal legal equality only recently achieved by peoples of color in this evolving process, the wait was hardly worth it. I myself prefer a version of evolution which postulates cataclysmic irruptions altering the course more suddenly, whether that is achieved by scholarship, or, as is more likely, by other means.[24]

1. Plenary Semantics.

Professor Laurence's first of seven propositions explaining why he can "live with the plenary power" doctrine in Federal Indian law focusses on the interpretation of the word "plenary." According to Professor Laurence " 'plenary' does not mean 'absolute'. Really. It means 'without subject matter limitation.' "[25] Professor Laurence is certainly correct when he notes in this first section that Congress can enact a criminal code for Indian Country or regulate other such colonial administrative matters under its plenary power in Indian affairs. But he then asserts in his semantical discussion of "plenary" that Congress does not have the power "to deny *due process* or *equal protection* or the *freedom of religion and speech*. Not under my 'plenary power' at any rate".[26]

Professor Laurence hits upon an important issue when he focusses on semantical concerns in Federal Indian law. The meanings assigned to the key words and phrases of Federal Indian legal discourse indeed require patient explanation and careful elaboration. Take, for example, the phrase "equal protection," referred to by Professor Laurence himself in discussing the limits of the plenary power doctrine.[27] The *sui generis* "equal protection" analysis the Supreme Court has developed for assessing Congressional actions involving Indian affairs[28] has resulted in Indians getting a substantively and uniquely different type of "equal protection" not afforded other American citizens. Whether the Supreme Court's distinct form of Indian equal protection analysis is "better" or "worse" than non-Indian equal protection analysis is open to debate, but it is important to recognize that in talking about the Constitution and Indians, a whole separate apparatus of rules applies.[29] We are in a different semantical field. I am talking here of

24. Witness the case of the Miskito and other Atlantic Coast Indians so far effective, activist, defense of their tribal sovereignty against the gradualist, incorporationist thematics proferred by the Sandinista government of Nicaragua. The Atlantic Coast Nicaraguan tribes are in the process of negotiating important concessions from the regime respecting their autonomy. *See Preliminary Draft of the Law on the Autonomous Regions of the Atlantic Coast*, reprinted in AUTONOMY: RECOVERING NATIONAL UNITY (Autonomy Commission, Nicaragua, 1987).

For an enlightening and thought-provoking discussion from an Indian perspective on alternative visions of evolution and the nature of being itself, *see* V. DELORIA, JR., THE METAPHYSICS OF MODERN EXISTENCE (1979).

25. Laurence, *supra* note 4, at 418.

26. *Id.* at 419 (emphasis added).

27. *Id.*

28. *See, e.g.*, Morton v. Mancari, 417 U.S. 535 (1974).

29. Under the Supreme Court's standard articulated in *Morton*, 417 U.S. at 555 for equal pro-

course about things as they "really" are.[30]

With respect to the key phrase "plenary power" in Federal Indian legal discourse, Professor Laurence's lesson in semantics again neglects the vital principle that, just as with the term "equal protection," the term "plenary" possesses a semantic dimension in the field of Federal Indian law absent from non-Indian-directed United States legal discourse. The Supreme Court of the United States has been careful to note on a number of occasions that "all aspects of Indian sovereignty are subject to defeasance by Congress."[31]

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tection analysis of congressional exercises of the plenary power over Indian tribes, so long as Congress' actions respecting Indians "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." As Professor Milner Ball notes in his recent article *Constitution, Court, Indian Tribes*, 1987 AMER. BAR FOUND. RES. J. 1, 126 n.666 (citing to Washington v. Confederated Bands, 439 U.S. 463, 467 (1979)). "[S]tate legislation specially directed to Indians would not receive like treatment since states do not enjoy this same unique relationship with Indians." Ball's superb analysis of the troubling implications of this *sui generis* form of equal protection for Indians, and the damage it has worked on tribal interests in subsequent cases, merits close attention by anyone who would argue that Indian people ought to learn to live with the plenary power of Congress, assuming the Supreme Court will presumably step in to correct abuses of that power. *Morton v. Mancari* upheld Congress' creation of an Indian hiring preference in the Bureau of Indian Affairs in the face of an equal protection attack by a non-Indian BIA employee. The Supreme Court held that this special treatment for Indians was "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton*, 417 U.S. at 555. The hiring preference in essence recognized the unique political status of Indian tribes in the federal system, and thus was political rather than racial in nature under the Court's analysis. Professor Ball states, "By classifying Congress' special treatment of Indians as political rather than racial, equal protection arguments were disabled. Consequently, if Congress' differential treatment of Indians is detrimental and provides them with less than equality mandates, Indians do not have recourse to equal protection law. The discrimination is political, not racial, and so is insulated from equal protection scrutiny." Ball, *supra* note 3, at 127.

While Professor Ball is a noted constitutional law scholar, other prominent scholars in the field of Indian law have likewise expressed dismay over the way the United States Supreme Court has learned to live with the plenary power of Congress in Indian affairs. According to Professor Nell Jessup Newton, whose article *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 284 (1984), is the leading study on federal plenary power in Indian affairs, the Court's analysis in *Morton v. Mancari*, rather than serving as a shield for Indian tribes, "was transformed in later cases into a judicial sword used to support conclusions that legislation unfavorable to tribes or Indian interests is . . . not suspect. The only consistent application of *Mancari* . . . has been to uphold the exercise of congressional power and to justify judicial deference to Congress." *Quoted* in Ball, *supra* note 3, at 127.

30. *See infra* notes 84-88 and accompanying text.

31. This cited clause's ubiquity in recent Supreme Court cases underscores its bedrock doctrinal status in contemporary Federal Indian jurisprudence. This is proved by the fact that the clause is oftentimes tucked away in non-controversially regarded footnotes. The clause has appeared in National Farmers' Union Ins. v. Crow Tribe of Indians, 471 U.S. 845, 850 n.10 (1985); Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians, 466 U.S. 765, 788 n.30 (1984). *See also* United States v. Wheeler, 435 U.S. 313, 323 (1978). I am indebted to Professor Ball's recent genealogy of the clause pointing out its ubiquity in contemporary Supreme Court Indian law cases. *See* Ball, *supra* note 3, at 49 n.213.

In commenting on the significance of this ubiquitous clause, Professor Ball states:

> The present Court believes that plenary power means the United States can do whatever it wishes to Indian nations. Such power is not only plenary but is almost the most singular and extensive power of Congress. (The only greater and more unusual power would be the power to declare nuclear war, thereby ending all nations. I think Congress has no such legitimate power.) If *National Farmers Union* is right, then it is difficult to imagine that such power has a legitimate ground [footnotes omitted].

Id. at 49.

Professor Ball's argument raises two interesting and related questions. If, as Professor Laurence believes, Indian people must learn to live with the plenary power of Congress over their lives, would Professor Laurence also require that they must learn to live with Congress' power to declare nuclear war and end all nations, including Indian Nations? And from an Indian Nation's perspective, should it matter how Congress decides to exterminate tribal existence; either by a general nu-

If Professor Laurence takes the Supreme Court at its word, then saying that Congress has "plenary" power over Indian activity *is* like saying that Congress can "murder"[32] (or "lynch," "exterminate," "terminate;" choose whatever annihilating verb form you wish) tribal sovereignty, for to deny tribal sovereignty is to kill the life of the tribe; an alive and dynamic force in the lives of many Indian people. Sadly, reading through Professor Laurence's article, one finds little in the way of positive discussion on the importance of the idea of the "tribe" in Federal Indian law. Throughout his article he talks of Indian "activity"[33] and the Indian "community"[34] and Indian "lawyers"[35] and other such particularized entities floating around in his Westernized atomistic worldview of what must be important to Indians. There is very little discussion, however, of the phenomenology of tribes *qua* tribes, and their role and *significance* in the lives of American tribal peoples.

Just as significantly, Professor Laurence's sense of the limitations on Congress' exercise of the "plenary power" doctrine only seems concerned with the types of Western-oriented, individualistic rights that the United States Constitution was drafted to protect. "Due process . . . equal protection . . . the freedom of religion and speech"[36] are usually individually-contextualized rights in United States constitutional adjudicative theory, which is precisely why Indian *tribal*, group-oriented rights have fared so poorly under the Constitution. Again, semantics comes into play. When Indian tribal people talk about important "rights", the word possesses a whole different meaning. Their focus is on protection and perpetuation of their people's tribally-oriented existence. This critical "right" to be Indian, the "right" to a tribal existence, has never been protected by the white man's law or courts.

2. Prometheus Unbound.

Professor Laurence's second point of attack on *The Algebra* asserts that he does not feel himself "bound" by the history I relate.[37] We should all be so capable of such Promethean feats. Here, the historical materialist in me naturally bridles at the liberal progressivism of a viewpoint which recognizes the "smelly and unattractive"[38] nature of a legal structure but assumes that men and women of goodwill can come out smelling like roses if they apply, "with both brains and heart," the few cleansed principles deemed worthy of saving from the deracinated structure.[39] Here, Professor Laurence's detached historical perspective allows him to comfortably assume that his European-derived contemporaries in this country are as liberal and as full of

clear holocaust, or by a more localized one carried out under Congress' plenary power in Indian affairs? One point I tried to make in *The Algebra* was that some Indian people believe that adoption of the type of enlightened Indian vision represented in the Gus-Wen-Tah might actually help secure the West's survival. *See* Williams, *supra* note 1, at 295 n.282.

32. Laurence, *supra* note 4, at 418.
33. *Id.*
34. *Id.* at 433 n.104.
35. *Id.* at 421 n.50.
36. *Id.* at 419.
37. *Id.* at 420.
38. *Id.* at 421.
39. *Id.*

goodwill towards Indian people as he himself supposes he is. If he's wrong (which I think he is) about his contemporaries, or his contemporaries' children or grandchildren, however, it is not too difficult for me to picture some twenty-second century legal academic describing the disappearance of American Indian tribes from the United States polity by quoting the "divinely and outrageously egotistical and ethnocentric"[40] assumptions about Congress' power over Indian tribes which dominated twentieth century legal discourse and thought; you know, way back in the dark ages. It is not too difficult for me to imagine either that that same future legal scholar will write about the casuistical exercises of the twentieth century Federal Indian law establishment in a one hundred page tenure law review piece entitled *The Marshallian and Cohen Era Origins of the Annihilation of the American Indian Tribe in Western Legal Thought.*

3. Neo-crit.

Professor Laurence's third point similarly relies on a tremendous act of faith, despite the ominous lessons of history. The plenary power doctrine, he states, is acceptable only so long as "it is counterbalanced by a conflicting, and inconsistent, recognition of inherent tribal sovereignty".[41] Professor Laurence places faith in a federal judiciary populated during the last few years with ideologues possessed by a rationalizing philosophy committed to eradicating the types of inefficient contradictions Professor Laurence so "relish[es]".[42] Further, given the United States Supreme Court's recent reaffirmations of the core threat to tribal existence contained in the plenary power doctrine, in other words, that "all aspects of Indian sovereignty are subject to defeasance by Congress,"[43] I am not sure that such a system as he proposes for Federal Indian law is achievable in today's legal and political world[44]. Given the Court's views on the ephemeral nature of asserted tribal

40. *Id.* at 417.
41. *Id.* at 422.
42. *Id.*
43. *See supra* note 42 and accompanying text.
44. In one famous instance, the final case in the Cherokee Nation cases, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the United States Supreme Court under Chief Justice John Marshall's leadership was willing to take a supportive stand on tribal sovereignty in the face of violent political opposition from the Executive and Congress. The Indians' fate, however, was no better served by this firm, but ultimately impotent stand taken by the Court. *See* Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969). The Cherokees were shown the Trail of Tears by Andrew Jackson and the United States Congress for their efforts to obtain justice in the white man's courts. Even today, *Worcester v. Georgia's* central holding that states have no business interfering in reservation affairs has been eviscerated by numerous recent and, according to every commentary in the field on the topic, inconsistent, and contradiction-laden Supreme Court decisions. If the contradictory tensions of Federal Indian law mapped out in Justice John Marshall's seminal nineteenth century opinions have collapsed in the face of strong state interests which the Supreme Court has felt compelled to acknowledge, why have any faith that the Court won't similarly back down in the face of any compellingly stated federal interest, no matter what potential damage such an action might wreak on tribal sovereignty? *Worcester v. Georgia* was a richly contradictory legal text that has entertained generations of Indian law scholars who have sought either tenure or the chimera of a legal discourse capable of protecting tribal sovereignty while at the same time recognizing Congress' plenary power. History teaches me that the effort to construct a legal discourse guaranteeing justice for Indian tribes yet which proceeds from foundational and functional premises of Indian inferiority and diminished status is doomed to ultimate failure. *See supra* notes 12-13 and accompanying text. No human intellect, no matter how full of liberality, goodwill, or

sovereignty, it is either preposterous or disingenuous to talk about the theoretically-postulated sovereignty of Indian tribes ever possessing the "potential to destroy"[45] the plenary power of Congress. Tribal sovereignty as the Supreme Court understands that term today (as the Supreme Court has always understood that term) does *not* conflict with congressional plenary power, for Congress can unilaterally and whimsically destroy the ability of tribes to exercise self-governing powers Congress finds inconvenient or unwise. And the Court has left itself with enough avenues of conceptual escape in its contemporary Federal Indian law jurisprudence to avoid an uncomfortable confrontation with Congress over saving Indian tribes.

The sad facts are that the Court has avoided the role of savior for Indian tribes too many times in the past. What air-tight argument is there that the Court won't avoid the role too many times in the future? Thus, while I relish Professor Laurence's neo-crit acceptance of a central tenet of critical social theory that law is full of contradictions, there are no "contradictory tenets" at work in Federal Indian law.[46] Congressional plenary power can exterminate tribal sovereignty at any time according to the generous license issued by the United States Supreme Court. Thus, my self-conscious, overly-strident advocacy of an "uncontradicted recognition of tribal sovereignty"[47] only recognizes that unless United States colonial legal theory moves closer to such an uncontradicted status, nothing stands between tribal survival and hostile expressions of national will except a sometimes fair-weather friend and coordinate branch of the conqueror's government.

4. Acts of Faith.

Point number 4 of Professor Laurence's reply attests to his faith in the ability of the United States Congress and federal court system to exercise the plenary power with a delicate touch. In *The Algebra*, I implied by the following listing of human rights abuses and government-directed terrorism carried out by the United States under the plenary power doctrine's regime that the touch has been exercised in anything but a delicate fashion.

> Besides justifying unquestioned abrogation and unilateral determination of tribal treaty and property rights, the plenary power paradigm has been interpreted to permit the denial of other fundamental human rights of Indian people in the United States. Violent suppression of Indian religious practices and traditional forms of government, separation of Indian children from their homes, wholesale spoliation of treaty-guaranteed resources, forced assimilative programs and involuntary sterilization of Indian women represent but a few of the practical extensions of a false and un-Americanized legal consciousness that at its core regards tribal peoples as normatively deficient and culturally, politically, and morally inferior to Europeans.[48]

Hegelian insight, can ever overcome such contradictions. *See infra* notes 42-43 and accompanying text.

45. Laurence, *supra* note 4, at 422.
46. *Id.*
47. *Id.*
48. Williams, *supra* note 1, at 264-65.

Professor Laurence acknowledges that my list of human rights abuses under the one hundred and fifty year old regime of terror installed under the plenary doctrine "is enormously serious stuff," but he supports "none of it".[49] Instead he challenges the adequacy of my supporting footnotes for this list. On the chance that it does not go without saying, I think my footnotes are more than adequate. As any Nazi-hunter or *glasnost*-inspired Soviet historian will attest, the Germans only poorly documented the Holocaust and Comrade Stalin did not instruct his apparatchiks to footnote their reports as to the methods used to achieve the latest version of the five year plan. Euphemisms such as "re-education camps," "cultural revolution," "relocation" and "reservations" are found in the history books of apologists, and those who could have offered a different version of the events obscured by such benign terms have been effectively silenced. Thus, for example, much of the "true" history of the conditions and treatment of Blacks under American slavery has disappeared with those who could have documented it, but mostly cared not to, and those who cared to document it, but mostly couldn't.[50] The "truth" will never be fully known, particularly so long as it remains true that the conquerors will write history and history will therefore lie.[51]

I therefore see no need or fruitful purpose served by overdocumenting the history of Indian genocide in this country with footnotes from the conqueror's library. I wrote *The Algebra* primarily for Indian people intensely interested in the colonizing legal discourse ruling their tribal lives and existence, a small but growing audience, and therefore one well worth addressing. (Then why did you write it "in a writing style that does not exactly foster page turning",[52] Professor Laurence asks? Because this is enormously serious stuff.) Indian people don't need footnotes to know the "truth." The grandmothers and grandfathers who are walking, talking, and living foot-

49. Laurence, *supra* note 4, at 425.

50. *But see* the literature and essays on African Maroon communities of runaway and renegade slaves in the New World collected in R. PRICE, MAROON SOCIETIES: REBEL SLAVE COMMUNITIES IN THE AMERICAS (1973).

51. Glancing through a local newspaper I did come across an interesting reference regarding one of the types of abuses allegedly inadequately footnoted in my infamous listing. The reports of acts of genocide against Indian people are apparently more ubiquitous than I had originally assumed. If Will Rogers were around today, he wouldn't have to hear about involuntary sterilization of Indian women from his Cherokee grandmothers. He'd know all about it from reading the newspapers:

> The Indian Health Service for years has injected some mentally handicapped Indian women with the drug Depo-Provera to prevent them from menstruating or becoming pregnant.
>
> The Food and Drug Administration has twice denied approval for that long-acting hormonal drug as a contraceptive because it caused cancer in lab animals.
>
> *The Arizona Republic* revealed the IHS' use of Depo-Provera on handicapped Indian women in a 1986 investigation that prompted a congressional hearing this year where one congressman called the IHS practice a "frightening prospect."
>
> However, the IHS director, Dr. Everett Rhoades, has defended the injections.

The Ariz. Republic, Oct. 7, 1987, at A15, appearing in the Republic's eight part series "Fraud in Indian Country: A Billion-Dollar Betrayal." This series of articles represents the most significant investigation into the legendary incompetence of the Bureau of Indian Affairs during the modern era. It explains in excruciating detail the ultimate end-product of Congress' Plenary Power in Indian Affairs, a huge and wasteful bureaucracy that has systematically violated the fiduciary obligations attached to its ministerial responsibilities to execute Congress' power over the Indian Nations.

52. Laurence, *supra* note 4, at 414.

notes to history in our own time can tell stories of the "delicate" treatment Indian people have received at the hands of Congress and the federal courts.

I know I am not wrong about the extent of the egregiousness of the human rights depredations committed against Indian people under the one hundred and fifty year regime of terror and gross neglect carried out under Congress' plenary power in Indian affairs, at least from my Indian angle of vision. I respect Professor Laurence's own angle of vision, and willingly concede that from his perspective as a non-Indian looking at the way his race treated my race, he is entitled to think that I am wrong. That is precisely why I advocate an uncontradicted form of tribal sovereignty insulated as much as possible from his type of vision.

Nor is it enough to say as Professor Laurence says that "if these practices exist, the plenary power is not to blame. If the body of the Constitution does not protect against involuntary sterilization and violent infringements of religion, then there is no hope for any of us".[53] I do not share Professor Laurence's apparent sense of election or divine Providence, much less "hope" in the ability of human contrived institutions to protect me from those who wield power over me, particularly if I am different from those in power. This lack of hope extends especially to the United States Constitution and court system assigned to enforce its admittedly noble, if overly emphasized individualistic values. I've read too much American Indian history, too many *Plessy v. Ferguson's*[54] and *Korematsu's*,[55] to entertain such hope. Ask a gay or lesbian person today in the wake of *Bowers v. Hardwick*,[56] what hope he or she holds in the ability of the body of the Constitution to protect sexual preference—a value arguably as important, particularly if you are gay or lesbian, as the values represented in reproductive autonomy (particularly if you are female) and the free exercise of religion (particularly if you are religious). The body of the Constitution, in fact, has held out too little hope too many times to those who seek protection because of their radical difference from those who wield power in this society and whose ancestors wrote the Constitution. To ask Dred Scott,[57] Mr. Korematsu,[58] Lone Wolf,[59] or the Tee-Hit-Ton Indians[60] what happened to

53. *Id.* at 426.

54. 163 U.S. 537 (1896). Blacks had to learn to live with *Plessy*'s "separate but equal" doctrine for more than half a century, until the United States Supreme Court acted with all deliberate speed in Brown v. Board of Education, 347 U.S. 483 (1954).

55. Korematsu v. United States, 323 U.S. 214 (1944) taught Japanese-American citizens that they had to learn to live with Congress' decision to place them in concentration camps for the duration of World War II.

56. 478 U.S. 186, *reh'g denied*, __ U.S. __, 107 S. Ct. 29 (1986) (upholding Georgia's prosecution of a homosexual under its sodomy laws).

57. Dred Scott v. Sanford, 60 U.S. (19 Harv.) 393 (1857).

58. *See supra* note 55.

59. *See* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), where the United States Supreme Court held that the treaty made with Mr. Lone Wolf's tribe, and treaties with Indian tribes in general, could be unilaterally abrogated by act of Congress. The Court presumed that Congress would of course act in perfect good faith in violating an Indian treaty.

60. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955). In this case, the Tee-Hit-Tons of Alaska had to learn to live with the Supreme Court's holding that lands on which they had lived from time immemorial were not property for fifth amendment just compensation purposes. The Tee-Hit-Tons had never gone to war with the United States, so therefore their rights in their aboriginal lands had never been recognized by treaty. Congress, under the exercise of its plenary

their faith in the body of the Constitution to protect them in their difference would make for a wonderful fictional book of interviews with historical figures who naively put their hopes in the Constitution and got righteously screwed. And you would probably want to also include in that book the gay litigant in *Bowers v. Hardwick*,[61] charged under Georgia's sodomy laws.

If the plenary power doctrine, along with the administrative apparatus made possible by that doctrine (e.g., the Seventh Cavalry with its orders to suppress the Ghost Dance, the Bureau of Interiorcolonial Affairs [BIA]) is not responsible for the past crimes of genocide and government supported terrorism against Indian people I so cavalierly list, then what, or who is? Perhaps, individuals, non-Indian individuals more precisely, must be ultimately responsible. But of course they were only carrying out orders, or facilitating (in the case of United States courts) what they interpreted as Congress' good faith exercise of its plenary power in Indian affairs. That this power legitimated and even spawned policies designed to exterminate, assimilate, allot, or terminate the brutes as you have it, (again the choice of annihilatory verb is yours to make, depending on what historical period of Congressional policy towards Indian tribes you are attempting to describe) is an uncontrovertible and therefore uncomfortable fact of American history. So let's assume that the plenary power doctrine and the Constitution are not to blame for this fact of American history and that no historical figures are able to stand up and take direct responsibility for such past crimes of Indian genocide. Let's then just let the buck stop at the last line of conceptual defense before descending into utter lawlessness in a Hobbesian state of nature where the plenary power doctrine and Constitution are but gleefully defiled icons. That last line of conceptual defense for the way in which Indian people have been treated under United States law of course would be the medieval feudal doctrine of conquest embodied in the Discovery Doctrine, which denied the natural rights of American Indians to the lands they had controlled and possessed since time immemorial. But alas, you see, the Discovery Doctrine as articulated by Chief Justice John Marshall in the seminal case of Federal Indian law, *Johnson v. M'Intosh*[62] is, after all, the conceptual foundation of the plenary power of Congress in Indian affairs.[63] Check and mate.

As for Professor Laurence's optimism in the ability of Congress and the courts to handle the plenary power with care in the future, I share none of it. He is absolutely right when he remarks that I would challenge the legitimacy[64] of the Indian Civil Rights Act (ICRA), or its application to the resolution of the problem presented in *Oliphant v. Suquamish Indian Tribe*[65] of

power in Indian affairs, could, according to the Court's reasoning in *Tee-Hit-Ton*, therefore dispose of the tribe's lands "without any legally enforceable obligation to compensate the Indians."

61. *See supra* note 56 and accompanying text.

62. 21 U.S. (8 Wheat) 543 (1823).

63. *See* Williams, *supra* note 1, at 258-65.

64. Laurence, *supra* note 4, at 426.

65. 435 U.S. 191 (1978). As a matter of setting the record straight, Professor Laurence took me to task for including within the corpus of legal literature fiercely criticizing the *Oliphant* opinion Professor Richard Collins' article *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979). *See* Laurence, *supra* note 4 at n.93. He stated that I had not been "entirely fair" *id.* to Professor Collins by listing his article in *The Algebra* along with other articles critical of

whether Indian tribal courts should have criminal jurisdiction over non-Indians. The ICRA's roots are indeed embedded "in the Discovery Doctrine and a cultural egotism which holds that notions of due process, equal protection and the like ought to be honored even by governments which had no say in their evolution."[66] That does not mean I lack respect or admiration for those values sought to be captured by those Anglo-American notions. Any overly-large and too centralized a government exercising powers over its people ought to recognize and abide by the types of values sought to be contained by Anglo-American terms like due process and equal protection. But by the same token, different peoples hold different values, values that might even conflict at points with the precise ways Anglo-Americans understand words and concepts like "due process" and "equal protection."

Like Professor Laurence[67] I hold great respect for Indian governments, but I hold even greater respect for the Indian people who elect those governments. I therefore would have trusted them to "evolve" their own notions on the values that ought to be incorporated into their governmental systems and institutions. The ICRA stole that opportunity away, over the objections of many tribal voices. It is an indefensible and arrogant imposition of the white man's vision on the Indian.

In any event, if the reports from Indian country are true that tribal governments are highly unstable, turning over from one election to another,[68] then it might be safe to assume that Indian people have a very low threshold for tribal governmental tyranny. If enough Indian people in a tribe do get screwed by their governments, it appears that Indian people have learned how to vote the rascals out of office. As the Founding Fathers discovered when they encountered and negotiated treaties with the great Indian confederacies, ideas such as democracy, checks and balances, and official accountability to the electorate weren't the sole inventions of Europeans. Amazing, I know, but true. Indian people invented and "evolved" these tools of "civilization" without the white man's help.[69]

The ICRA, however, was invented by whites, and imposed on tribes without their consent. The racist insult aimed at Indian people by this imposition is no less diminished because the Great White Father's Congress or Supreme Court, borrowing the words of Professor Laurence, "went considerably less far" than they might have in invading the fundamental human

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now Chief Justice Rehnquist's opinion in that much maligned case. If I am guilty of unfairness to Professor Collins, I apologize, for myself, and also for all the apparently "radical" judges who sat on the 9th Circuit case of Duro v. Reina, 821 F.2d 1358 (9th Cir. 1987), and who were not "entirely fair" to Professor Collins either. The following sentence and citation appear in that opinion: "Commentators have sharply criticized the Court's use of historical authority in *Oliphant* to support its first two arguments. *Collins, supra*, at 490-99." Duro v. Reina, 821 F.2d 1358, 1362 (9th Cir. 1987).

66. Laurence, *supra* note 4, at 426.

67. *Id.* at 433 n.104.

68. *See, e.g.*, REPORT OF THE TASK FORCE ON INDIAN ECONOMIC DEVELOPMENT, *supra* note 13, at 158-66. "Perhaps the greatest concern of business is the instability and uncertainty of tribal rules, regulations and agreements. Much of this instability derives from the frequency of tribal changes in government and the far reaching policy and personnel changes that often have accompanied the shift from one tribal government to another." *Id.* at 159.

69. *See, e.g.*, Cohen, *Americanizing the White Man*, 21 THE AM. SCHOLAR 177 (1952).

right of Indian people to self-determination.[70] I would applaud the effort on the part of any creative individual to distinguish the genus of ethnocentric goodwill and high principles represented in the enactment of the ICRA from an earlier generation's deeply-held, sincere belief that civilizing and modernizing the Indian could only be accomplished by allotment of the reservation and turning the savage into the paragon of then-regarded Western virtues and values; the yeoman farmer with 160 acres in fee.[71] European-descended Americans now carry out their myopic civilizing mandate towards Indian people with the supposedly self-executing legal rules and standards of the ICRA, rather than by Indian agents or Christian missionaries; a truly depressing example of the oft-noted tendency towards overlegalization of all aspects of life in American society. At least if you ignored the missionaries long enough, they went away. The ICRA, however, is here to stay, as will be the harangues of the Anglo-American "civil rights" inquisitors demanding that tribal governments abide by the letter of these alien institutions of government.

5. In Praise of Folly.

My point about alien institutions leads me to a discussion of Professor Laurence's statement that he has "little faith in the ability of public international law to protect any valuable rights . . . [or] in the ability of public international law to put bread on American Indian tables".[72] Once again, we are in the realm of competing religions. Mr. Laurence's civic religion of faith in the secular institutions of United States government denies the ability of other types of civic religions, in other words, those based on belief in more indigenously articulated tribal institutions of government or more diversely articulated international institutions, to realize on earth his ten commandments (the Bill of Rights with subsequent emendations). My sect believes that Professor Laurence's faith equals the civic equivalent of the moral majority in American political and legal thought (those people who believe, as Professor Laurence apparently does, that their way is the only right way and therefore why complain when their way is forced upon you, so long as it is done with a "delicate" touch). My sect is more deist in outlook, believing there are many paths to the protection of human rights. One need only look at the Miskito Indians of Nicaragua and their armed resistance to the incorporationist thematics of the Sandinista Revolution. The vile Leninist regime only began to consider the idea of autonomy talks with the Miskitos after the international Indian and non-Indian human rights watchdog community repeatedly raised its collective voice against the sullying of the ideals of Comrade Sandino by the Revolution's shabby treament of Nicaragua's east coast Indians. It is also worth noting how quickly the craven Reagan Administration, in furtherance of its own sinister, run-amok hemispheric strategy, cynically latched onto the international human rights watchdog community's outcries and discourse, thereby increasing the pres-

70. *Id.* at 426.

71. On the Allotment era of Federal Indian policy, *see* F. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984).

72. Laurence, *supra* note 4, at 428.

sure on the Sandinistas to enter negotiations with the Miskitos over their demands for greater autonomy. Comrades Ortega, Borge, and the rest of the Sandinistas of course are godless Marxist-Leninists, and as soon as the international human rights watch-dog community retires from the scene, we know that all the Sandinistas' expressions of goodwill will be for naught. But until that day comes, score one for public international law and the protection of indigenous peoples' rights. Without the discursive vehicle provided by public international law, the Miskitos might well have been extinguished as a tribe by now.

Of course, the Miskitos did have to take up arms, and that action also obviously affected the process of negotiation. It's too late in the day for United States Indian Nations to resort to the militant course of action taken by their patriot grandfathers and grandmothers (and what, I wonder, would the great Indian patriots have thought about their dying to protect tribal sovereignty, which as exercised today, requires an Indian tribal court to provide most, but not all, of the protections of the United States Constitution's Bill of Rights before a tribal member can be locked up in a United States government funded reservation jail for no more than one year per offense). I nonetheless stand by my assertion that it would likely constitute a significant political embarrassment for the United States to protest against other nations' abuses of human rights when United States Indian Nations regularly appear before international forums asserting unresolved human rights claims. A growing corpus of recent scholarship would seem to suggest that it might not be "folly"[73] for Indian advocates to pursue the possibility of more firmly defining the status of Indian nations among the states of the world.[74] International law, like Federal Indian law, is politics, and Indians must make their voices heard and felt in international law and politics, just as they must make their voices heard and felt in domestic law and politics.

6. So What!

Point 6 of Professor Laurence's article is titled as follows: "Most of the depredations that Professor Williams enumerates do not flow from exercises of the plenary power".[75] I've already discussed my impatience with that basic claim made earlier in Professor Laurence's reply,[76] but I find it interesting to note that in a section so titled, the bulk of pedantic discussion is devoted to hypotheticals on how I (or the reader) might react to "abuses" by tribal governments perpetrated upon individuals coming under tribal jurisdiction. Apparently, Professor Laurence is worried that without the protections of the Anglo-American values embodied in the ICRA, individuals coming under the jurisdiction of Indian tribes will find themselves miserably oppressed. He provides a series of Socratically-fashioned "supposes" postulating various Indian taxing schemes he obviously would regard as irrational.[77] "Suppose" Professor Laurence asks, "a tribe were to double the tax

73. *Id.* at 430.
74. *See, e.g.*, sources cited *supra* in note 3.
75. Laurence, *supra* note 4, at 430.
76. *See supra* text accompanying note 53.
77. Laurence, *supra* note 4, at 435.

against a taxpayer that refused to undertake an Indian hiring program".[78] My response would be that that seems fine to me, but if I'm the hiring taxpayer, I might take my business elsewhere. All of Professor Laurence's "supposes" are, in his view, "ICRA questions".[79] He is correct to a degree when he states that for me these "are inquiries for the tribal decision-makers alone".[80] I would only qualify that statement by adding that most tribal decision-makers I have met are, for good reasons,[81] very responsive to the traditions of fairness and leadership-accountability held by their tribal constituents. No tribal decision-maker ever truly acts "alone." Mr. Laurence has a vision of reservation governmental decision-makers run amok without Anglo-American values imposed upon their decision-making. I am no *carte blanche* defender of tribal governments, but of those who are usually cited as being the least responsive to their polities, I have often heard it told that ill-suited Anglo-American values and institutions represented the initial point of departure for the running amok process.

Thus, in answer to Professor Laurence's student-initiated statement and question, "They were here first," and "So what?",[82] I can respond to the "So what?". Indian people built and evolved governments, values, and institutions that were *envied* by European-Americans prior to the American Revolution.[83] Then European-Americans launched a continent-wide war upon Indian people to seize their land and dictate the terms of their spiritual salvation, beginning the genocidal deconstruction of the American Indian's vision. The point of *The Algebra* was that the European-derived peoples who invaded the Indian's America ought to recognize that some distinctively indigenous American values that were here first were systematically denied legitimacy. Both Indians and non-Indians ought to realize that there may be something of value to be derived from that Americanized vision, if European-derived Americans would only allow that value to be resuscitated.

7. The ASOT.

Thus, my reactions to the final section (7) of Professor Laurence's article have already been anticipated. We may be talking "here about the 'actual state of things' " (ASOT),[84] and that the vision contained in the Two Row Wampum[85] suggesting that the white man stop trying to steer the Indian's canoe is "charming",[86] but ultimately unrealistic in today's complex world. The world has always been complex, however, and today's "aircraft carriers," and "super tankers"[87] most likely possess the same relative degree of awesome facticity felt by Gandhi in his challenge to the power and might of the British Empire and by Dr. King in his encounters with the brutal

78. *Id.*
79. *Id.*
80. *Id.*
81. *See supra* text accompanying note 68.
82. Laurence, *supra* note 4, at 434.
83. *See* Cohen, *supra* note 69, at 183-84.
84. Laurence, *supra* note 4, at 435.
85. *See* Williams, *supra* note 1, at 291-99.
86. Laurence, *supra* note 4, at 437.
87. *Id.*

ignorance and bigotry of the Bull Connors, George Wallaces and southern sheriffs-by-day-who-wore-white-sheets-at-night all committed to maintaining that grand old institution, mid-twentieth century American apartheid.

Professor Laurence is one of those "things as they are" people I guess. I'm a foolish idealist. I'm a "things as they've never been" person. I can only take comfort from the fact that *Uncle Tom's Cabin* was written despite the "actual state of things" (the ASOT), Rosa Parks rode where she damn well wanted to ride despite the ASOT, Cesar Chavez passed around union cards despite the ASOT, Sitting Bull fought the Seventh Cavalry despite the ASOT, the Passamaquodies demanded Maine back despite the ASOT, Cromwell and the Puritans plotted to overthrow a King's divine right and then chopped off his head despite the ASOT, and a bunch of radical exiles from the Norman Yoke got together in Philadelphia in 1776 and declared their independence from an Old World despot despite the ASOT.[88] They all refused to learn to live with the "actual state of things;" so too, Indian tribal people must refuse to learn to live with the Eurocentric myopia of a vision which cannot see beyond the actual state of things in Federal Indian law. There is too much work still to be done in Federal Indian law before we can begin to learn to live with the actual state of things. Blacks were never equal when they were separate. It was only the lie of words and the self-serving obeissance of White America to a contradiction-laden legal discourse sustaining the fiction of a separate but equal status for Blacks that permitted American apartheid to exist as it did for centuries as the ASOT. Indian people will never secure the most fundamental of human rights, the right to true self-determination, until the lie of words sustained by Federal Indian legal law and its blind obeissance to the Discovery Doctrine and the closely related Congressional plenary power doctrine can no longer be lived with as "the actual state of things."

88. On the discourse of the Norman Yoke and its impact on the Revolutionary generation, see Williams, *Jefferson, The Norman Yoke, and American Indians Lands*, 29 ARIZ. L. REV. 165 (1987).