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Green Colonialism: Sidelined While on the Front Lines

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I. Introduction

In July of 2022, the United Nations General Assembly recently unanimously adopted a resolution recognizing the "right to a clean, healthy and sustainable environment as a human right."[1] Commentary from numerous U.N. leaders emphasized the historic nature of the resolution. The resolution was heralded by U.N. Environment Programme (UNEP) Executive Director Inger Andersen as a "victory for people and the planet," and it was described as a catalyst for action by U.N. Special Rapporteur on Human Rights and the Environment David Boyd.[2] Boyd went on to say that the resolution could encourage States "to enshrine the right to a healthy environment in . . . constitutions and regional treaties."[3] This short essay examines this resolution as it relates to Indigenous peoples worldwide, but with

† Professor of Law, University of Oklahoma and an enrolled citizen of the Chickasaw Nation. I am grateful to Tracy Pearl, Meera Deo, Michael Kelly, John Knox, and Lindsay Robertson for contributing to my thinking on these issues. I am also thankful to Amanda Price and the amazing staff of the *Case Western Reserve Journal of International Law*.

1. G.A. Res. 76/300, at 3 (July 28, 2022).

2. *UNGA Recognizes Human Right to Clean, Healthy, and Sustainable Environment*, Int'l Inst. for Sustainable Dev. (Aug. 3, 2022), https://sdg.iisd.org/news/unga-recognizes-human-right-to-clean-healthy-and-sustainable-environment/ [perma.cc/JBF2-4UH9].

3. *In Historic Move, U.N. Declares Healthy Environment A Human Right*, U.N. Env't Programme (July 28, 2022), https://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right [perma.cc/3YHG-5W69].

a particular focus on Native Nations in the United States. Despite the landmark nature of the resolution's recognition of the right to a healthy environment, significant questions remain about methods of implementation and of engaging Indigenous peoples, participation by Indigenous peoples in that process, and the possibility of competing interests between Indigenous peoples and environmental protection. Ultimately, successful implementation of the resolution from the perspective of many Indigenous peoples depends upon the resolution's ability to give those communities a legitimate voice in the processes of identifying solutions and executing them. These concerns are informed by the experiences of Native Nations in the United States. Environmental law and policy in the United States has historically ignored Native Nations as stakeholders or rights holders, thereby sidelining those Nations and forcing them to function as protestors rather than participants. This is a foundational error that tarnishes the otherwise well-intended policy underlying environmental protection of any sort. Both the international community and international rights associated with climate change must avoid these early missteps. There are additional benefits to treating Indigenous peoples as more than simply interest groups. In so many ways, Indigenous peoples represent the drivers and implementers of policy and contribute invaluable traditional ecological knowledge in understanding the interdependency and interconnectedness of the environment and communities. Across the globe, Indigenous peoples are on the front lines suffering from the effects of climate change, and they should have the opportunity to take a leading role in developing and protecting the newly identified U.N. Right to a Healthy Environment.

II. Background

Ultimately, for the U.N. Right to a Healthy Environment (hereinafter U.N. Right) to have particularized impact, States must incorporate the resolution into domestic law. But if the State in question lacks meaningful domestic legal recognition of Indigenous rights, the implementation of the U.N. Right will likely cause the same historical injustices again by overriding the voices and interests of Indigenous peoples.[4] At this point, the United Nations already has a document—the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)—that delineates normative law and policy regarding State legal regimes and Indigenous peoples.[5] Therefore, at the outset, the U.N. Right must be incorporated into a State legal regime

4. *See, e.g.,* Nina Lakhani, *A Continuation of Colonialism: Indigenous Activists Say Their Voices Are Missing at Cop26*, The Guardian (Nov. 3, 2021, 2:00 AM), https://www.theguardian.com/environment/2021/nov/02/cop26-indigenous-activists-climate-crisis [perma.cc/C4HK-SRLX].

5. *See generally* G.A. Res. 61/295 (Sept. 13, 2007).

that either (1) already contains a solid legal regime that recognizes the unique rights of Indigenous peoples consistent with UNDRIP or (2) enmeshes the U.N. Right with UNDRIP and incorporates both at the same time. Without this, the U.N. Right risks functioning as another instrument of colonialism over Indigenous peoples. States must reckon with the history and continued presence of legal colonialism and work specifically towards undoing that legacy and creating solutions that are anti-colonial by involving Indigenous peoples at the forefront rather than as an afterthought.

It must be acknowledged that Indigenous peoples are not a monolith.[6] Indigenous peoples are culturally, racially, ethnically, linguistically, and spiritually diverse.[7] Too often stereotypes, misinformation, and assumptions fill in the gaps in knowledge regarding what Indigenous peoples need, want, and value.[8] Reflexive gap-filling measures like these do not necessarily come from a place of ill-intent or malice. Stereotypes can easily function under circumstances where an individual, group, or institution lacks first-hand experience with something.[9] Given the often-isolated locale of Indigenous peoples and lands, those unfamiliar with our lives and communities refer to longstanding tropes and assumptions to fill the void.[10] Now, with that being said, there is at a more general level a common trait as well as a common historical experience that can describe Indigenous peoples across the globe.

First, Indigenous relations to land and water and places are distinct from settlers and colonizers.[11] Lands are not simply commodities or tracts to be deeded, leveraged, or transacted. There is a significant divide between Western or Continental conceptions of land and the historical legal characterization of land and an Indigenous worldview.[12]

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6. *See* Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 Wash. L. Rev. 1133, 1138-40 (2012) [hereinafter Tsosie, *Indigenous Peoples and Epistemic Injustice*]; *see also* Rebecca Tsosie, *Indigenous Sustainability and Resilience to Climate Extremes: Traditional Knowledge and the Systems of Survival*, 51 Conn. L. Rev. 1009, 1015 (2019).

7. Erin Shields, *Countering Epistemic Injustice in the Law: Centering an Indigenous Relationship to Land*, 70 UCLA L. Rev. 206, 210 (2023).

8. *See* Stephanie A. Fryberg et al., *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 Basic & Applied Soc. Psych. 208, 210 (2008).

9. *Id.* at 209.

10. *Id.*

11. Cyndy Baskin, *Spirituality: The Core of Healing and Social Justice from an Indigenous Perspective*, New Directions for Adult & Continuing Educ., Winter 2016, at 51, 52-53.

12. Tsosie, *Indigenous Peoples and Epistemic Injustice, supra* note 6, at 1137-39.

For Indigenous peoples, lands are places with stories, ancestors, families, relations, histories, and identities.[13] Regardless of where in the world an Indigenous community may be, they have a *sui generis* connection to the land unique to those people and that place.[14] Second, nearly all Indigenous communities have undergone an experience with settlers and colonialism—and, of course, most are still enduring that process. Colonization takes on all forms from legislation, judicial rulings, and executive policy to attitudes and norms and can be both implicit and express. At this high level of generality, these two common characteristics undergird much of the Indigenous experience. Fundamentally, law and policy should work to (1) recognize Indigenous conceptions of land while (2) refraining from furthering the colonial enterprise. The solution for both is relatively straightforward, but difficult to implement. The solution can be expressed in one word: sovereignty. The next section situates this common Indigenous experience and the struggle for voice and control within the law and history in the United States as it relates to Native Nations.

III. Indigenous Peoples and the United States

Federal Indian Law is the label given to the body of law describing how Indigenous peoples within the borders of the United States fit into the legal structure of the United States.[15] It originates with what is known as the Marshall Trilogy, so named for Chief Justice, John Marshall, which includes *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*.[16] Each case contributes to foundational pillars of historic and contemporary Federal Indian Law. Knowing this history is necessary for crafting principles and norms under contemporary international law.[17]

13. M. Alexander Pearl, *Human Rights, Indigenous Peoples, and the Global Climate Crisis*, 53 Wake Forest L. Rev. 713, 713, 716 (2018).

14. *See id.* at 728–30.

15. *Federal Indian Law*, Jud. Council of Cal., https://www.courts.ca.gov/27002.htm [perma.cc/BG4V-XUFK].

16. Johnson v. M'Intosh, 21 U.S. 543, 603 (1823); Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831); Worcester v. Georgia, 31 U.S. 515, 559 (1832); *see* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev. 431, 436, 460 (2005); *see also* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137, 1164 (1990); *see also* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 384 (1993).

17. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev. 431, 436, 460 (2005); *see also* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 Cal. L. Rev. 1137, 1160–64 (1990); *see also* Philip P. Frickey, *Marshalling Past and Present: Colonialism,*

A. The Marshall Trilogy and Tribal Control

In *Johnson v. M'Intosh*, the Supreme Court decided a relatively narrow issue concerning the legitimacy of land title as between two parties.[18] One party purchased the land from the leadership of Indigenous communities while the other party obtained title from the United States government, which had previously purchased the lands from Indigenous peoples by treaty.[19] Scholars have uncovered evidence demonstrating that the parties' land claims did not conflict which means that there was no actual case or controversy and so the Supreme Court should have never authored such an advisory opinion.[20] However, the larger issue of which title was legitimate resonated beyond the instant dispute. All across the country land speculation was occurring while the United States was also purchasing land from Indian tribes through treaties.[21] In other words, the newly created United States government needed to resolve the question of how land could be acquired.[22] In an opinion that simultaneously recognized (1) the political separation of Indigenous peoples from the United States and (2) the political incapacity of Indigenous peoples compared to colonists, Justice Marshall explained that only the United States government may obtain land rights from Indian tribes and that no purely private transaction is recognized under federal law.[23] The effect of this decision extended beyond questions of land ownership. *Johnson* stood for a principle of weak, or incomplete, tribal property rights to those very lands possessed by Indigenous peoples since time immemorial.[24] Despite their unquestioned and longstanding possession, the Court rejected a strong conception of tribal property rights held by Indigenous peoples.[25] *Johnson* represents one of the first cases to inflict a loss of control over lands originally held by Indian tribes by rejecting the application of Western-centered property doctrine to Indigenous peoples.

In *Cherokee Nation v. Georgia*, the Court encountered a very different question from property rights in land: Indigenous sovereignty

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Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381, 393–437, 437 n.243 (1993).

18. Johnson v. M'Intosh, 21 U.S. at 571–72.

19. *Id.* at 572, 579.

20. *See* Lindsay G. Robertson, Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands 7–10 (2005).

21. *Id.* at 25–26.

22. *Id.* at 43–44.

23. Johnson v. M'Intosh, 21 U.S. at 587–88.

24. *See id.* at 595–96.

25. *Id.*

within the United States constitutional system.[26] The legislature of the State of Georgia had passed a statute extending the laws of Georgia into the territory of the Cherokee Nation.[27] The aboriginal lands of the Cherokee people were acknowledged and protected by a treaty negotiated between the Cherokee Nation and the United States.[28] The Cherokee Nation sought to challenge that Georgia state law by filing an action directly in the Supreme Court based on original jurisdiction.[29] The Court first examined the jurisdictional question of whether the Cherokee Nation was a proper party to seek the Court's review under original jurisdiction.[30] In a case between two states of the United States, for example Texas and Oklahoma, the Court would have original jurisdiction over the dispute.[31] However, the Court determined that the Cherokee Nation was not a "State" under the Constitution and found no other justification for finding original jurisdiction, which would have permitted the Cherokee Nation to file an action against a U.S. State directly to the Supreme Court.[32] Despite the rejection of the Cherokee Nation's claim, the Court did describe the Cherokee Nation as a distinct political entity and used language seemingly recognizing the sovereign and self-determining capacity of the Tribe.[33] The *Cherokee Nation* decision, while a loss for the Tribe, does operate to establish a principle that Indian tribes maintain some distinctive and separate sovereignty despite the presence of the United States government and various state governments.[34]

Finally, in *Worcester v. Georgia*, the Court's focus again shifted, examining a narrower question of criminal jurisdiction.[35] The State of Georgia, having extended sits laws into the Cherokee Nation's treaty protected territory, sought to charge a non-Native individual who was present on the lands of the Cherokee Nation with a violation of Georgia law.[36] The Georgia law at issue criminalized "residing within the limits of the Cherokee nation without a license."[37] The Court determined that

26. Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831).

27. *Id.* at 15.

28. *Id.* at 22–23 (Johnson, J., dissenting).

29. *Id.* at 15–16 (majority opinion).

30. *Id.* at 15–16.

31. Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 Minn. L. Rev. 625, 632 (2002).

32. *Cherokee Nation*, 30 U.S. at 18.

33. *Id.* at 16.

34. *Id.*

35. Worcester v. Georgia, 31 U.S. 515, 541 (1832).

36. *Id.* at 537.

37. *Id.*

the laws of Georgia can have "no force" within the boundaries of the Cherokee Nation because it would be inconsistent with the treaties negotiated between the Tribe and the United States.[38] The Court further explained that permitting the application of Georgia law "interfere[s] forcibly with the relations established between the United States and the Cherokee Nation" and that the regulation of Tribal-Federal relationships is "committed exclusively to the government of the Union."[39] *Worcester* takes a portion of the principle established in *Cherokee Nation*—recognition of tribal self-determination and political distinctiveness—and applies it to the scope of State sovereignty to intrude upon Tribal sovereignty.

In the aftermath of *Cherokee Nation* and *Worcester*, President Andrew Jackson negotiated treaties removing Indigenous peoples of the southeastern United States to the Indian Territory, west of the Mississippi River.[40] President Jackson's actions to negotiate removal treaties did not technically offend any principle established in *Worcester* or *Cherokee Nation*. The treaties were negotiated between sovereigns, but a fuller account of the various perspectives of history from the Indigenous vantage point suggest that duress and concerns about their survival played a significant role in their decision to ultimately walk from their aboriginal homelands westward to Indian Territory.[41]

What do cases from the early 19th century have to tell us about the contemporary legal issues in international law? A lot. The language of property rights, sovereignty, political self-determination, consent, negotiated treaties and others are abstract words and principles. Without context or circumstances or commitments, they do not really exist. The language in a U.N. right or resolution may indeed sound correct; it may very well offer the opportunity to create a norm breaking from colonial behavior that has ignored Indigenous needs and concerns. But what happens on the ground, and whether those acts are driven by the normative language contained in the law, is what matters most.

38. *Id.* at 561.

39. *Id.*

40. Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 Duke L.J. 875, 906 (2003); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality,* 21 Stan. L. Rev. 500, 503–05 (1969).

41. J. Stanford Hays, *Twisting the Law: Legal Inconsistencies in Andrew Jackson's Treatment of Native-American Sovereignty and State Sovereignty*, 21 J.S. Legal Hist. 157, 163 (2013).

B. From the Trilogy to the Trust Relationship and Consultation

Of course, the Marshall Trilogy left open significant questions regarding the relations between the United States and Indian tribes.[42] U.S. law continues to grapple with the continued existence of Native Nations and how they fit within the structure of the United States legal system.[43] In the Marshall Trilogy, Tribal Nations lost complete property rights and were seen as "domestic dependent nations," which for all its ambiguity, does not entail a right to complete political Indigenous sovereignty.[44] Both of these amount to a loss of control over what happens to the Indigenous community. Property rights can entail, under Western derived principles, a strong right to exclude regardless of reasonableness or economy. However, inchoate property rights cannot afford that expansive and unbounded authority. A diminished recognized sovereignty similarly results in an inability to exercise authority over those limited property rights.

With a more limited ability to protect their communities, Indigenous peoples in the United States have long asserted the existence of a trust relationship between the United States, as trustee, and the Tribal communities, as beneficiaries.[45] The existence of the trust relationship arises from the treaties negotiated between Tribes and the United States and certain decisions of the Supreme Court.[46] The trust relationship can be seen as operating to create additional opportunities for the federal government to assert control on behalf of Tribal nations—thereby mitigating the lost inherent control from inchoate property rights and diminished sovereignty. Therefore, when the federal government acts—either by Congress or the Executive branch—the trust relationship may condition or urge those acts to conform with the

42. *See* Frank Pommersheim, *Is There A (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 J. CONST. L. 271, 276–77 (2003).

43. *The United States Government's Relationship with Native Americans*, NAT'L GEOGRAPHIC: EDUC., https://education.nationalgeographic.org/resource/united-states-governments-relationship-native-americans/7th-grade/ [perma.cc/V4AA-G4VP].

44. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

45. *See, e.g.,* MATTHEW L.M. FLETCHER, PRINCIPLES OF FEDERAL INDIAN LAW 128, 131 (2017); Elizabeth Kronk Warner et. al., *Changing Consultation*, 54 U.C. DAVIS L. REV. 1127, 1138 (2020); *see also* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1219 (1975); *see also* Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

46. Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After* Mitchell, 31 CATH. U. L. REV. 635, 637–38 (1982); Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CAL. L. REV. 1751, 1776 (2017); *see, e.g., Seminole Nation*, 316 U.S. at 296–97.

preexisting and longstanding obligations to Tribal Nations.[47] This is, perhaps, especially true when thinking about lands and environmental conservation and when considering the unique, multifaceted, and interconnected role place plays in Indigenous communities.

President Theodore Roosevelt is typically associated with dedicating federal legal instruments and resources towards conservation of natural resources to preserve scenic beauty.[48] In one particular speech about the Grand Canyon—prior to its designation as a National Monument—President Roosevelt described its unmatched beauty and wonderful grandeur while connecting these resources to the idea that these rare and beautiful places were particular to the American existence.[49] Until recently, the "dark side of our conservation history [was] seldom discussed in conventional accounts of environmental law-making."[50] Professor Sarah Krakoff has written the definitive article on this dark side of conservation in the United States, and it is essential for an understanding of the historical connection to the trust relationship.[51] Her work also functions as a warning to the forward-looking connection to the U.N. Right.

Conservation originates from the intention to prevent the exploitation of natural resources for commercial or economic gain.[52] Typically, the exploitation of those natural resources despoils them so as to eliminate their enjoyment or appreciation by anyone and everyone.[53] Krakoff argues the conservation movement has, since its outset, regularly ignored Indigenous voices.[54] This should not be altogether surprising, given that "in a political economy rooted in structures of inequality, conservation policies (like all other policies)

47. Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 Cal. L. Rev. 495, 506–08 (2020); Daniel I. Rey-Bear & Matthew L. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indian*s, 6 Mich. J. Env't. & Admin. L. 397 (2017); Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 Neb. L. Rev. 885 (2017).

48. Julia L. Ernst, *The Legacy of Theodore Roosevelt's Approach to Governmental Powers*, 92 N.D. L. Rev. 309, 318–19 (2017).

49. Theodore Roosevelt, U.S. President, Address at the Grand Canyon (May 6, 1903); Zachary Bray*, From "Wonderful Grandeur' to "Awful Things': What the Antiquities Act and National Monuments Reveal About the Statue Statutes and Confederate Monuments*, 108 Ky. L.J. 585, 615 (2020).

50. Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 Harv. C.R.-C.L. L. Rev. 213, 215 (2018).

51. *See generally id.*

52. *See id.* at 219.

53. *Conserving Earth*, Nat'l Geographic, https://education.nationalgeographic.org/resource/conserving-earth [https://perma.cc/79L9-65MJ].

54. Krakoff, *supra* note 50, at 216.

inevitably further inequality unless they deliberately aim to do otherwise."[55] That deliberation, stated by Krakoff, is an essential principle and the story of the Grand Canyon and many other national monuments and natural parks demonstrate the problems that come from a lack of deliberation.

The Antiquities Act[56] was passed in 1906 and signed into law by President Theodore Roosevelt.[57] Krakoff notes that the Grand Canyon and its surrounding lands are aboriginal homelands to several Indigenous peoples in the United States.[58] She explains that President Roosevelt and other federal officials had intentions to preempt the efforts and actions of entities and individuals interested in exploiting the natural resource of the Grand Canyon and the surrounding region.[59] Among those resources subjected to exploitation was the cultural heritage of the original inhabitants of the area. While mining and homesteading were being encouraged, other westward settlers were interested in taking ownership of Indigenous artifacts—like pottery, arrowheads, and other items.[60] This potential removal and privatization of Indigenous cultural heritage was viewed by anthropologists and archaeologists as a significant "risk to the United States' unique heritage."[61] Although the Antiquities Act was a major executive tool deployed by the President to unilaterally affect the status of and access to public lands, it was not at all the only tool.[62]

Throughout this late 19th century and early 20th century time frame, while natural resource conservation policy was growing, federal Indian policy continued a familiar trajectory. The Dawes Act enacted during this same time period,[63] ushered in the policy of allotment of reservation lands that were held in common by the tribal nation.[64] Under dubious intention to encourage the development of tribal lands by individual

55. *Id.* at 217.

56. American Antiquities Act of 1906, 54 U.S.C. §§ 320301.

57. *Id.;* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 Ga. L. Rev. 473, 484 (2003).

58. Krakoff, *supra* note 50, at 234; *see, e.g.,* Stephen Hirst, I Am the Grand Canyon: The Story of the Havasupai People 23–35 (3d ed. 2006); Robert H. Keller & Michael F. Turek, American Indians & National Parks 156–57 (1998).

59. *See* Krakoff, *supra* note 50, at 218, 220.

60. *Id.* at 220.

61. *Id.*

62. *See id.* at 225.

63. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331–334 (1887)) (repealed 1934).

64. Kenneth Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 Vand. L. Rev. 1559, 1564 (2001); Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. Rev. 1, 9 (1991).

Indians to their benefit, the Dawes Act allotted individual parcels of former tribal lands to individual tribal citizens.[65] The breakup of tribal lands is now recognized as having caused another period of significant loss of lands by tribal nations. [66] Indeed, President Roosevelt himself described the Dawes Act as "a mighty pulverizing engine to break up the tribal mass.[67] The Dawes Act continued in the tradition of limiting tribal control and removing tribal property rights first initiated under the Marshall Trilogy.

At the same time as the Dawes Act was breaking up tribal lands and undermining the existence of tribal governments, the Antiquities Act and other conservation statutes operated to "preserve" natural resources from spoilation.[68] The problem was and still is, that the act of preserving these lands never included tribal voices. Indeed, Indigenous peoples were seen as an impediment to conservation objectives.[69] Krakoff summarizes this time period of policy: "[t|o save a certain version of American heritage-archaeological, environmental, and genealogical--space had to be cleared and set aside. Because these lands were persistently and pervasively occupied by Native Americans, virtually every act of conservation entailed acts of restricting or eliminating American Indian presence."[70] The trust relationship, initiated in the Marshall Trilogy, is nowhere to be seen in these acts regardless of whether one focuses on the statutes enacted to implement either conservation or tribal policies. A reasonable question asks what the implementation of the trust relationship would look like in the context of passing legislation.

Applying the trust relationship in the legislative and administrative context typically takes the form of agency consultation.[71] In the foregoing examples of implementing conservation policy by designating national monuments, parks, and forests, federal agencies and policy makers should have been operating under a statutory requirement to engage with the affected Indigenous peoples. Instead, tribal voices were

65. Kenneth Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 Vand. L. Rev. 1559, 1564 (2001); Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. Rev. 1, 9 (1991).

66. *See* Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 Wis. L. Rev. 729, 733 (2003).

67. President Theodore Roosevelt, President's First Annual Message to Congress (Dec. 3, 1901).

68. *See* David Harmon et. al., *The Antiquities Act: The First Hundred Years of a Landmark Law*, 23 George Wright F. 5, 6 (2006).

69. Krakoff, *supra* note 50, at 227.

70. *Id.* at 230.

71. *See* Elizabeth Kronk Warner et. al., *Changing Consultation*, 54 U.C. Davis L. Rev 1127, 1138 (2020).

flatly shut out.[72] Moreover, those people were seen as the problem rather than as a participant in the conversation of identifying the problem and crafting a solution.[73] Recent scholarship (1) examines the history of federal-tribal consultation from its origins in the Marshall Trilogy, treaty rights, individual statutory directives, and Executive orders and (2) contemplates how it can be improved and rendered more effective and robust.[74] Whereas the early conservation period is a clear example of the express denial of tribal voices, Warner identified a more recent case study providing more detailed examples of the problem of consultation implementation: the Dakota Access Pipeline protests.[75]

The Dakota Access Pipeline involved the proposed construction of a pipeline for transportation of oil and gas through a part of North Dakota.[76] The pipeline was not planned to enter the tribal lands of the Standing Rock Sioux Nation, but it would potentially impact nearby water sources.[77] Beyond endangering water resources, the Standing Rock Nation maintained cultural, religious, and spiritual connections to places along the construction route which would be disturbed by the pipeline.[78] Warner explains that an initial route that was proposed located the pipeline north of Bismarck, North Dakota but that it was rejected in part because of concerns over a possible pipeline leak or spill and the negative effects that it could have on a major population center and its water supply.[79] The choice to move the pipeline to within the traditional lands of the Sioux Nation should have been the subject of dialogue with the affected tribal nation and especially the Standing Rock Sioux Nation, because of its direct proximity.

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72. *Id.* at 1150–52.

73. *Id.* at 1163.

74. *See generally* Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 Am. Indian L. Rev. 253 (2011); *see also* Fletcher, *supra* note 47; *see also* Rey-Bear & Fletcher, *supra* note 47; *see also* Fletcher & Singel, *supra* note 47.

75. Warner, *supra* note 71, at 1174.

76. *Id.* at 1166–67; Kristen A. Carpenter & Angela R. Riley, Standing Tall: The Sioux's Battle Against a Dakota Oil Pipeline Is a Galvanizing Social Justice Movement for Native Americans, SLATE (Sept. 23, 2016, 1:30 PM), https://slate.com/news-and-politics/2016/09/why-thesioux-battle-against-the-dakota-access-pipeline-is-such-a-big-deal.html [https://perma.cc/ JFU6-QSHY] (discussing the litigation over the Dakota Access Pipeline).

77. Warner, *supra* note 71, at 1167.

78. *Id.* at 1169.

79. *Id.* at 1167; Amy Dalrymple, *Confused About Dakota Access Controversy? This Primer Will Get You Up to Speed*, Inforum (Sept. 24, 2016, 11:00 AM), https://www.inforum.com/news/confused-about-dakota-access-controversy-this-primer-will-get-you-up-to-speed [https://perma.cc/6BLH-5YTT].

Over the following five years, a mix of litigation, agency decision-making, and Executive actions tell a complicated story of tribal consent, federal obligations, and resource protection.[80] Warner, in summarizing the Dakota Access Pipeline saga, wrote that it "exemplifies a situation where the federal government failed to engage in effective consultation with the relevant Tribes."[81] More specifically, she characterizes the scope of the federal government's consultation efforts as "shallow," and notes the result of these efforts was that the voice of the Standing Rock Nation was not valued.[82] A reasonable question is whether much substance has changed since 1906 with its unilateral executive actions that expressly ignored tribal voices in the name of conservation. One hundred years later, a consultation process technically occurred, but as Warner puts it, that process "was not organized in ways that reflected free, prior, and informed consent or Indigenous philosophies such as respect, trust, and friendship."[83] However, as Warner notes, federal consultation is not always a negative experience.[84] Indeed, she provides seven discretionary suggestions for agencies to incorporate in improving the tribal consultation to render it more effective and inclusive.[85]

C. From Trust and Consultation to Inherent Control

If the federal government refuses to seek meaningful consultation with Indigenous peoples prior to taking an action, tribal nations could opt to deploy their inherent sovereignty to regulate and adjudicate the conduct of private parties, states, and even the federal government within their lands. In other words, if there is no meaningful consultation and the tribe has lost property rights within their reservation borders, the tribal government may still seek to exercise regulatory and adjudicatory control over the conduct of others. Such a pathway attempts to reclaim sovereignty and rejects the component of the Marshall Trilogy that construes Native Nations as diminished sovereigns.

If, for example, a company sought to engage in mining on land it owned within the borders of a tribe's reservation, the tribe could seek to regulate that conduct through the enactment of its own codes prohibiting such actions. If the company disregarded the code prohibition, the tribal government could seek to enjoin the company's conduct via a court order from the tribal court. In both steps, the fundamental question is a jurisdictional one: whether the tribe has authority over a non-Native company or person within its reservation's

80. *See* Warner, *supra* note 71, at 1167–69.

81. *Id.* at 1174.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 1179–82.

boundaries. Under the Supreme Court's decision in *Montana v. United States*, federal law presumes that all tribal governments lack the authority to regulate non-Indian conduct on lands within the boundaries of their reservation borders.[86] In *Montana*, the Crow Tribe sought to prohibit non-Indians from hunting and fishing on land owned in fee by non-Indians within the boundaries of the Crow Nation reservation.[87] The *Montana* Court determined that there are two limited exceptions to the general rule that tribes lack civil jurisdiction over non-Indians: (1) "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements, and (2) A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[88] These are commonly referred to as the *Montana* 1 and *Montana* 2 exceptions.

In circumstances of common pool resources, like aquifers, oil and gas reservoirs, fish, and game, where the resources either move or cover wide swatches of lands subject to varying ownership types, this fractured regulatory structure is both unworkable and impairs the tribal community.[89] *Montana* created a tribal jurisdictional patchwork and undermined the very existence and perception of tribal sovereignty—especially by non-tribal citizens. Now, Montana is subject to two exceptions where the tribal government can regulate the non-Indian: (1) where there has been express consent (as in the case of business contracts) to be subject to the laws of the tribal nation and (2) where the "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[90]

While so called *Montana 1* exceptions are relatively straightforward in application, *Montana 2* exceptions are significantly ambiguous. Regardless of the imprecision of *Montana 2*, the presumption is that tribal governments lack control.[91] The Supreme Court's divestiture of this core attribute of sovereignty—authority to control outsiders—operates as a significant cost to Indigenous peoples and their communities. Indeed, this lack of authority over outsiders often times can put tribal nations in the position of seeking aid from the federal

86. Montana v. United States, 450 U.S. 544, 549 (1981).

87. *Id.* at 545.

88. *Id.* at 565–66.

89. *See generally* Jane Marx et. al., *Tribal Jurisdiction Over Reservation Water Quality and Quantity* 45 S.D. L. Rev. 315 (1998).

90. *Montana*, 450 U.S. at 565–66.

91. Judith Royster, *Montana at a Crossroads*, 38 Conn L. Rev. 631, 635 (2006).

government to address the issue in their capacity as trustee, rather than solving their own problems themselves.[92]

Since 1789, the experience of Indigenous peoples in the United States has been marked by the exercise of colonial authority.[93] Beginning with the Marshall Trilogy, Indigenous peoples suffered a loss in the form of denying strong legal recognition of property rights.[94] The recasting of place as commodity operated as a rejection of the multifaceted and *sui generis* connections that each Indigenous community maintains with its place.[95] The failure of federal law to require a rigorous conception of consultation derived from the trust relationship that exists between tribal nations and the federal government exacted another loss to Indigenous peoples in the form of consent and their lands. Finally, the Supreme Court's divestiture of inherent tribal authority over non-citizens is yet another pathway created to limit tribal sovereignty over Indigenous places.[96] These are, more generally, the colonial experiences of nearly all Indigenous peoples and international law should operate to undo them and chart a new path.[97]

IV. International Law and Indigenous Peoples: The Big Picture

Starting with ILO Convention no. 169 and moving to the more recently adopted U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), international law has evolved to embrace important norms and principles trained on improving the experience of Indigenous peoples across the world.[98] It is critical that international law not merely

92. *See generally id.*

93. *See* M. Alexander Pearl, *The Consequences of Mythology: Supreme Court Decisionmaking in Indian Country*, 71 UCLA L. Rev. 6, 19 (2024).

94. *See supra* Section III.

95. Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 Ind. L. Rev. 1291, 1302 (2001) ("There is a dynamic and on–going relationship between Native peoples and the land. Although this relationship is often misunderstood by non-Indians and depicted as 'nature worship' or something similar, the land carries a critical significance to indigenous peoples. Professor Frank Pommersheim described the significance, writing: 'Beyond its obvious historical provision of subsistence, it is the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape.'") [hereinafter Tsosie, *Land, Culture, and Community*].

96. *See supra* Section III(C).

97. *See supra* Section II.

98. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), arts. 16(1)–(2), May 27, 1989, 1650 U.N.T.S. 384; G.A. Res. 61/295, *supra* note 5.

appropriate the terminology of self-determination and sovereignty so critical to Indigenous peoples, but that it elevates and prioritizes these concepts throughout all aspects of international law. Professor Kirsten Carpenter, a prominent scholar of international Indigenous peoples law, has written that the UNDRIP's "specific purpose is to contextualize universal human rights . . . in the Indigenous peoples context."[99] The newly enshrined U.N. Right to a Healthy Environment must function in that same way. There are important examples of how the United Nations and other international organizations meaningfully incorporate UNDRIP's call for recognition of Indigenous peoples' rights.[100]

Indigenous peoples are not eligible for membership status under the United Nations.[101] This, Professor Carpenter notes, has not stopped certain North American Indigenous Nations from adopting the UNDRIP and binding themselves to those international law standards anyway.[102] Nonetheless, the exclusion of Indigenous peoples from the primary international decision-making body is relevant. For example, the Conference of Parties is the main decision-making body for the United Nations Framework Convention on Climate Change (UNFCCC).[103] This is the forum during which major international agreements dealing with climate change—like the Paris Agreement[104] are debated and adopted. Indigenous peoples are not able to represent themselves formally in those spaces.[105] Instead, Indigenous peoples must hope that the colonial nations within which they reside will properly represent their interests. Although the Conference of Parties in the years since the 2016 Paris Agreement has attempted to enhance the

99. Kristen A. Carpenter, *"Aspirations": The United States and Indigenous Peoples' Human Rights*, 36 Harv. Hum. Rts. J. 41, 41, 46 (2023).

100. *See, e.g.,* U.N. Econ. & Soc. Affairs, State of the World's Indigenous People's, U.N. Doc. ST/ESA/371 (2019); *see also* CIGI, The Internationalization of Indigenous Rights: UNDRIP in the Canadian Context (Carol Bonnet et. al eds., 2014).

101. Shin Imai & Kate Buttery, *Indigenous Belonging: A Commentary on Membership and Identity in the United Nations Declaration on the Rights of Indigenous People* 14–15 (Osgoode Hall L. School of York Univ., Working Paper No. 49, 2013).

102. Carpenter, *supra*, note 99, at 48.

103. Calvin Bryne, *Climate Change and Human Migration*, 8 UC Irvine L. Rev. 761, 774–76 (2018).

104. Railla Veronica D. Puno, *Integrating Social and Environmental Safeguards in the Implementation of the Paris Agreement's Sustainable Development Mechanism*, 51 Env't. L. Rev. 205, 207 (2021); Laurence Boisson de Chazournes, *The Climate Change Regime-Between A Rock and A Hard Place*?, 25 Fordham Env't. L. Rev. 625, 636 (2014).

105. *See, e.g.,* Press Release, Econ. & Soc. Council, Indigenous Peoples Representatives Must be Included in work of United Nations Bodies, Policy-Making Initiatives, Speakers Tell Permanent Forum, U.N. Press Release HR/5470 (Apr. 28, 2022).

participation of Indigenous peoples, these efforts function on the margins and still depend on colonial states representing Indigenous interests, which does little to expressly chart a different colonial course.

The presence and participation of Indigenous peoples in these decision-making moments is not simply about optics. As Krakoff painstakingly points to, the U.S. experience demonstrates that where there are conflicts between environmental values and Indigenous rights, policymakers have not given significant weight to Indigenous views and values. If Indigenous peoples are not present, the resolution will lack legitimacy.[106] Such an outcome reflects the absence of consultation and consent. Non-participation by Indigenous peoples at these foundational meetings seems to fly against free, prior, and informed consent. Moreover, non-participation by Indigenous peoples all but confirms the loss of sovereignty and property rights at an international level, which is at the very least in tension with the purpose of UNDRIP. International decision-making bodies must model the applied concepts of UNDRIP to enmesh those very principles throughout all existing international agreements and customary law.

Success in this context must incorporate the two common Indigenous traits discussed at the outset: (1) acknowledgement of the history of colonial efforts to deny Indigenous peoples' property, control, and sovereignty and (2) incorporation of Indigenous connections to land in policymaking. In more concrete fashion, international bodies should work to emphasize the interests of Indigenous peoples as maintaining a political legal existence rather than by either race/ethnicity or property rights. Too often the experiences and interests of Indigenous peoples are lumped within the experiences of racial minorities. While some Indigenous peoples may have more clear ethnic distinctions as compared to the colonial states, not all do.[107] Moreover, the rights at issue for Indigenous peoples are more generally premised upon political existence separate from a colonial state, rather than rights under that colonial state. In other words, the concept of sovereignty must be directly and unequivocally tethered to Indigenous peoples.

Even if a more robust vision of Indigenous sovereignty is possible in the context of colonial states, a rigorous and meaningful commitment to consultation and free, prior, and informed consent is feasible. Indigenous voices must matter rather than simply being heard—they must contribute to identifying problems and fashioning solutions to those problems. The consultation experience for most U.S.-based tribal nations reflects a watered-down discretionary consultation under which the United States faces few legal consequences for failing to consider

106. *See* Paul Keal, *Indigenous Self-Determination and the Legitimacy of Sovereign States*, 44 Int'l Pol. 287, 289 (2007).

107. *See* Michael Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels* 23 Am. Indian Q. 1, 11 (1999).

the views of Indigenous peoples.[108] Comparatively, the United States has a strong history of federal common law considering the presence and place of Indigenous peoples in the structure of the American legal system.[109] In other countries where the legal status of Indigenous peoples is less well settled, the role of consultation may be even more difficult to engrain given the significant shift that it may represent from the past.[110] Regardless of a nation's domestic legal structure and the recognition of Indigenous peoples within it, a commitment to rigorous consultation and consent must exist.

Lastly, in crafting the U.N. Right, there would be value in a clear express commitment to the interdependence of the U.N. Right and UNDRIP. Seeing these two Rights as intertwined and inherently interconnected is extremely important. One may not always involve the other, but when they do, they must be understood as informed by the other. The language of the U.N. Right mentions Indigenous peoples only once:

> Recognizing that, while the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by women and girls and those segments of the population that are already in vulnerable situations, including indigenous peoples, children, older persons and persons with disabilities . . . [111]

The harm described in this paragraph is characterized as "environmental damage."[112] This description fails to capture the extent of the harm felt by Indigenous peoples and reinforces a land-as-commodity worldview common to Western thinking.[113] In addition, listing Indigenous peoples alongside the other population groups ignores Indigenous people's self-determinacy and unique, multi-faceted connection to land.[114] In essence, the recognition that is contained in the paragraph does not account for the unique position of Indigenous peoples.

At the outset of the Resolution recognizing the U.N. right, a reaffirmation paragraph specifically names certain treaties and rights

108. Kieran O'Neil, *In the Room Where it Happens: How Federal Appropriations Law Can Enforce Tribal Consultation Policies and Protect Native Subsistence Rights in Alaska* 98 Wash. L. Rev. 659, 674 (2023).

109. *See* Michael Blumm & Lizzy Pennock, *Tribal Consultation: Toward Meaningful Collaboration with the Federal Governmen*t, 33 Colo. Env't L.J. 101, 103–05 (2022).

110. Warner, *supra* note 71, at 1150.

111. G.A. Res. 76/300, at 2 (Aug. 1, 2022).

112. *Id.*

113. Tsosie, *Land, Culture, and Community, supra* note 95, at 1303, 1306.

114. *See generally id.*

and references as "relevant international human rights treaties, and noting other relevant regional human rights instruments."[115] While UNDRIP may very well be included in the catch all phrasing at the end of the reaffirmation paragraph, given the newness of UNDRIP and the historic colonial experience of Indigenous peoples, a more express recognition of UNDRIP would further its legitimacy and permanence. An express statement acknowledging the intertwined nature of these rights will benefit both.

V. Conclusion

Moving forward, States and international bodies must be intentional with respect to their actions, processes, and laws in order to avoid compounding historical wrongs while working to undo longstanding inequities. First steps towards this solution begin with recognizing the immemorial existence of Indigenous sovereignty over lands and their communities by committing to Indigenous self-determination. While Indigenous peoples across the globe are as diverse as other nations, there are foundational experiences common to each community. First, Indigenous peoples have unique connections to lands and waters that ground their culture, spirituality, sovereignty, and identity.[116] Second, nearly every Indigenous community has endured the experience of colonialism and many still are living in that phase.[117] Colonialism has effectuated a loss of rights by Indigenous peoples.[118]

In the United States, the American legal system has exacted three types of losses. First, Indigenous peoples lost property rights through Supreme Court decision-making and the adoption of the Doctrine of Discovery.[119] Second, tribal nations in the United States struggle with ensuring that their political voices are heard in the crafting of federal policies and Executive actions affecting Indigenous communities.[120] Lastly, through more recent Supreme Court decision-making, tribal nations have lost a component of their own intra-border sovereignty by limiting tribal jurisdiction to tribal citizens.[121] This colonial experience,

115. *Id.* at 1.

116. *See generally* Tsosie, *Land, Culture, and Community, supra* note 95.

117. *See generally* Pearl, *The Consequences of Mythology: Supreme Court Decisionmaking in Indian Country, supra* note 93.

118. *See supra* Section III.

119. *See supra* Section III(C).

120. *See supra* Section III(B).

121. *See supra* Section III(C).

while specific to tribal nations in the United States, often mirrors the trajectory of experience for other Indigenous peoples across the globe.[122]

With respect to natural resource protection or exploitation, Indigenous peoples have often suffered specifically from those acts.[123] The history of natural resource conservation in the United States has a dark side that resulted in a significant loss of land and access to lands which are uniquely meaningful to those Indigenous peoples.[124] Well intentioned environmental values won out over the values and needs of Indigenous peoples.[125] What is most unfortunate is that all of those negative outcomes could have been avoided had Indigenous peoples been involved in identifying the problem, thinking about the objectives, and crafting solutions that work for all communities.[126]

International law increasingly recognizes the unique harms experienced by Indigenous peoples that have come through colonialism.[127] With the adoption of the UNDRIP, international law seeks to halt the effects of colonialism and set a new course for respecting Indigenous self-determination.[128] However, given the lack of familiarity with Indigenous issues, the international community should remain steadfast in its commitment to furthering compliance with principles expressed in UNDRIP. Part of that commitment extends to the express incorporation of UNDRIP into the U.N. Right. Without an intentionality directed towards Indigenous self-determination, the concern is that the experience of Indigenous peoples in the United States will be repeated. When it comes to protecting lands and resources in light of the burgeoning impact of climate change, Indigenous peoples experience distinct hardships.[129] There is an asymmetry to the scope of the harm felt by Indigenous peoples caused by climate change, forced migration, and changing land use patterns.[130] While Indigenous peoples are on the frontlines enduring climate change, they are on the sidelines when it comes to crafting international

122. S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 Ariz. J. Int'l & Comp. L. 13, 13 (2014).

123. Krakoff, *supra* note 50, at 215.

124. *Id.* at 214–15.

125. *Id.*

126. *See supra* Section III(C).

127. *See* Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 Mich. J. Int'l L. 177, 189–90 (2008).

128. G.A. Res. 61/295, *supra* note 5, arts. 4–5.

129. Pearl, *Human Rights, Indigenous Peoples, and the Global Climate Crisis, supra* note 13, at 716–19.

130. *See id.*

environmental law and policy.[131] There cannot be success while Indigenous communities are left to operate as protestors rather than protectors.

There is a significant opportunity to embrace Indigenous sovereignty in the context of the urgency of climate change. Indigenous peoples have traditional ecological knowledge that can inform policy decisions and solutions.[132] In addition, climate change requires global contributions and Indigenous peoples stand ready to facilitate global efforts to address climate change. Including Indigenous peoples at the outset in selecting policy and executing processes functions to undo a colonial past and work together towards a safer future.

131. *See supra* Section III(3).

132. *See* Erika Zimmerman, *Valuing Traditional Ecological Knowledge: Incorporating the Experiences of Indigenous People into Global Climate Change Policies* 13 N.Y.U Env't. J. 803, 831–36 (2005).