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CHAPTER 3

The Law of the Land

Tribes as Higher than States, Indians as Lower than Human

In his all but forgotten 1971 anthology, *Of Utmost Good Faith*, Deloria argued with respect to the government documents that he assembled for the purpose of indicting the U.S. federal government of multiple treaty and trust violations that Americans have been the victim of a grave historical hoax. More specifically, they have been led to believe by generations of historians that the march toward nationhood and status as a global power was the result of triumphant moments of conquest and progress in which a more perfect nation ultimately was created for all. In the case of the American Indian's role in this narrative, when it was acknowledged at all, it was typically recounted in "unbiased," "neutral" tones. "It is not so," Deloria asserted. "Each and every incident, every treaty, statute and case is loaded with values, viewpoints and biases." As such, the history of federal Indian law and policy, and the documents they generated, was overflowing with wisdom, courage, and justice, as much as they were with greed, selfishness, and cruelty. To focus, then, on the American Indian perspective on these legal and political documents, as opposed to marginalizing that view point vis-à-vis the non-Indian conquest narrative, is to engage directly with the innumerable violations of federal and international law, not to mention human rights violations. With respect to what Deloria thought he was doing in *Of Utmost Good Faith*: "It makes, for example, provocative efforts to call attention to the

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unresolved liabilities of the United States government for massacres of Indians at Wounded Knee and Sand Creek."[1] Before proceeding with Deloria's critique of federal Indian law and policy, it may be worth noting that *Of Utmost Good Faith* appeared the same year as his revised edition of Jennings C. Wise's *The Red Man in the New World Drama*, which took an unforgiving view of European and American colonialism in North America. Interestingly, Wise's original publication occurred in 1931, just after the outrage generated by the 1928 Meriam Report and not long before the passage of the 1934 Indian Reorganization Act. Perhaps with the publication of these two volumes Deloria hoped to signal that American Indians were once again at the cusp of a major new era of reform. Only this time, Indian thinkers like Deloria would play more of an active intellectual role at articulating the objectives and agenda.

As noted in chapter 1, Deloria's most significant contribution to the American Indian community was his passionate argument for tribal self-determination. Much more than a critical analysis of federal Indian law and policy, Deloria's articulation of sovereignty originated in the peoplehood that bound each tribe together, which federal forces sought to eliminate, but which nevertheless endured until they were revalidated by the 1934 Indian Reorganization Act. Indian Commissioner John Collier's reforms not only enabled tribes to form their own governments, but also to begin revitalizing their cultural values as tribal peoples. "The Act," as D'Arcy McNickle summarized in a 1938 issue of *Indians at Work*, "made possible the granting of specific powers to tribal governments. These powers were written into the constitutions or charters which the tribes are adopting." As intended, tribes began to reawaken to their former powers of self-governance. "A tribal government which successfully performs the duties assumed by it will find itself taking over more and more of the authority which in the past was exercised by the Commissioner of Indian Affairs and his agents."[2] Termination policy notwithstanding, the self-determination genie had been let out of the bottle. On this basis, Deloria argued for reasserting tribes' nationhood status by pursuing their political agenda on the premise that they had historically engaged foreign nations, including the United States, as nation to nation. This historic relationship was documented on the nearly

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century-long tradition of treaty making, which occurred between 1778 and 1871. With respect, then, to the objective of reestablishing the treaty-making custom of Indian-white relations, complete with the sovereign nationhood that that entailed, like all of Deloria's most important ideas, it began with *Custer*.

More to the point, Deloria, in *Custer* chapter 2, "Laws and Treaties," did more than bemoan the colonization of Indigenous nations, he also offered suggestions for turning these unprecedented historical events into constructive legal strategies. More exactly, Deloria argued that the basis of federal Indian policy, which was subsequently turned into public laws, was a triad of perfidy, theft, and exploitation. At the root of Indian colonization was the infamous Doctrine of Discovery, a legal concept that went back to the Spanish and English invasions of the Western Hemisphere. Because the Age of Discovery was so long ago, when men sailed in wooden boats, one may think that the doctrine is a mere relic of the past, like the crossbow and musket. Yet, however archaic and reactionary, the effectiveness of this sixteenth-century doctrine at justifying the seizure and occupation of Indian lands was so thorough, as evidenced in the complete aggrandizement of the Western Hemisphere, that colonial Americans did not think twice about assuming its power of expropriation.

At the onset of Deloria's explication, the Doctrine of Discovery was not merely an historical artifact, but a prominent part of contemporary Indian affairs, a point he illustrated with references to Presidents Lyndon Johnson and Richard Nixon. The former was portrayed as affirming America's need to honor its commitment to Vietnam,[3] while the latter was quoted reviling the Soviet Union's broken treaty promises.[4] Deloria was unsurprisingly sarcastic about the American presidents' moralizing about commitments and promises, given their nation's shameful record at absolving itself from its treaty promises to Indigenous nations. Indeed, the assertion that the United States had frequently and unilaterally violated its hundreds of treaties with tribes was so pervasive that it had become an unquestioned truism among proponents of Indian rights. In fact, the double indignity of being a primitive people tragically robbed of their land by a superior race of men became the stuff of legend powerful

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enough to influence the legal minds of the Supreme Court, as displayed in *Tee-Hit-ton Indians v. United States* (1955).[5] Francis Paul Prucha, however, who expressed the antinomy of the Delorian worldview, argued many years later, in his monumental *American Indian Treaties: The History of a Political Anomaly*, that the historical record was much more nuanced than Deloria's unsparing accusation of American perfidy made it appear. After quoting *Custer* on the point of the legislative violations of treaties perpetrated by Congress, Prucha observed:

> The matter is not that simple. . . . There certainly are well-confirmed cases in which the federal government failed to live up to the stipulations of the treaties, just as there are cases in which the Indian signatories "broke" the treaties. Neither the United States nor the Indian tribes were able to control the actions of their subjects, as aggressive white settlers moved illegally into lands reserved for the Indians and as young Indian warriors continued their raids on white settlements after the chiefs had agreed to permanent peace. On the side of the whites the governmental system contributed to the problem, for treaties negotiated and signed in good faith by the executive branch were delayed, amended, or rejected by the Senate, and Congress was often slow or negligent in appropriating the funds needed to implement the treaties. But it is not proper to maintain, as some Indian groups have done, that an initial treaty is absolute and that any subsequent treaty, agreement, or statute that changes its provisions is an illegal abrogation of the original treaty.[6]

While one ought to be more cognizant of the historical circumstances in which treaties were made, maintained, and violated, there was no question that the United States exploited the treaty-making function for its own purposes, namely to extinguish Indian land title while concurrently pressuring tribes into accepting the status of nonthreatening dependents, whose political rights would be in question for generations to come. Or, as Deloria rebutted Prucha's argument in his 1995 review:

> Prucha seems to accept the idea of Manifest Destiny as a proven fact and aligns his discussion to suggest that these treaties were no longer

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> the bargains made by two sovereign entities. Missing, of course, is the admission that a good many of these treaties were made necessary by the failure of the United States, indeed its refusal in many instances, to keep its word. One cannot fault a smaller nation for trying to negotiate in good faith with a larger one whose word is generally worthless.[7]

As of 1969, Deloria observed in *Custer* that at the same time America was presumably defending the free world from communism, it violated one of its oldest treaties with an Indigenous nation. Article 3 of the 1794 Pickering Treaty, which was a product of President Washington's effort at acquiring the Iroquois confederacy's much-needed friendship against the British, clearly affirmed "Seneka" land rights, which would remain theirs, undisturbed by the United States, until the Seneca chose to sell them to the United States. Nearly two centuries later, when the United States determined that it needed to build a dam in Seneca territory it did not wait for the Seneca to choose to sell—it forced them. This was hardly the first time, it should be noted, that the United States violated its treaty with the Seneca, merely the latest in an American tradition of duplicity. The dam, which flooded much of the land protected by the Pickering Treaty, was allegedly "the price of keeping Pennsylvania in line for John F. Kennedy at the 1960 Democratic convention."[8] Stealing Indian land for political or economic gain, alas, is a longstanding American political custom, which, as Deloria observed sardonically, was regularly sanctioned by federal laws that exonerated the United States from its fiduciary and humanitarian obligations to Indigenous people whenever they determined that there was a greater interest at stake, most obviously the non-Indian settlers who supposedly would "improve" the lands they occupied with their "civilization."

As indicated above, the notion that one nation could claim rights to a given area by virtue of "discovery," even if the land was already occupied by Indigenous people, was a legal non sequitur inherited from the Spanish and British empires. Moreover, as these lands were "discovered," whereas the claims of any other Christian nation would be recognized, those of non-Christians would not be accepted as valid. In other words, Indigenous people did not possess a right to say "no" to invasion precisely

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because they were non-Christian primitive peoples who neither possessed souls nor the rights of Christian men.[9] Consequently, Christianity "endorsed and advocated the rape[10] of the North American continent, and her representatives have done their utmost to contribute to this process ever since."[11] The United States in turn retained in the founding of its own republic the fundamental prejudice that non-Christian, not to mention nonwhite, people were incapable of legally possessing land. Holding land title, after all, is contingent upon a people's ability at maintaining a recognizably Western, preferably Anglo-Saxon, legal system, in addition to the intellectual maturity, which is to say educated in the finest Western-style schools, to comprehend legal principles. Once discovered—or, more precisely, when the British right of discovery was assumed after the 1787 Treaty of Paris—the United States embarked on a treaty-making campaign, the purpose of which was to ostensibly establish peace between Indians and settlers, but which also carried ulterior motives, ones that were nothing if not heinous acts of extortion.[12]

As pointed out earlier, Deloria went on to expand upon his historical analysis of the Doctrine of Discovery in *Behind the Trail of Broken Treaties*, which Delta Books published in 1974. In between, Deloria published, among other works, his sequel to *Custer*, *We Talk, You Listen* (1970) and *God Is Red*. In the case of *We Talk, You Listen*, Deloria argued that tribalism, which, more than the customary practices of Indigenous people, was the only viable way in which the various power movements, including Red Power, could organize the demand for the political rights into a coherent policy treating groups as corporate entities under U.S. constitutional law. Indians, after all, are designated as such in the Commerce Clause, alongside states and foreign nations. With respect to *God Is Red*, it was not just that Indian religious customs and beliefs were fundamentally related to a given place, a homeland, whereas Christianity was based on a particular notion of time expressed in the New Testament; rather, it was that tribes possessed a relationship with their environment, which, as an integral part of their religious lives, required legal protections that were not covered by the First Amendment, such as access to sacred places on public land. According to the principles stipulated in the Doctrine

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of Discovery, public lands were the product of a superior civilization, i.e., the United States, affirming its rightful place as the true owner of the continent, including the right to set an agenda for stewarding the land, an approach that was more about regarding the land as a natural resource in the economic sense as opposed to being a place in which spirits dwelled. Equally noteworthy is the fact that in addition to Nixon's 1970 message to Congress on Indian affairs, in which the president asserted: "Self-determination among the Indian people can and must be encouraged without the threat of eventual termination," the 1972 Trail of Broken Treaties occupation of the Bureau of Indian Affairs building had produced its "Twenty-Point Position Paper," in which was proposed that the 1871 House rider that unilaterally ended treaty making be legislatively overturned and the president's treaty-making power with tribes be reenacted. All of the foregoing, one can argue, informed Deloria's discourse on the Doctrine of Discovery in *Broken Treaties*. For what mattered more than the dissolution of the occupation of Alcatraz Island or the disappointing end to the Trail of Broken Treaties occupation was the realization among Indigenous peoples everywhere that they were nations and that, even when the headlines have ended and Americans have moved on to other things, tribes still have a way of understanding their self-determination.

Because of the treaty-based notion of independence that Deloria advocated, which was inspired by the Trail of Broken Treaties' "Twenty-Point Position Paper"—a drastic departure from the customary dependent domestic nation definition of tribes—many balked at the idea of reinstituting treaty making and according tribes international status, even if Deloria meant that in the "protectorate" sense, as articulated in a bevy of treaty articles. In his 1974 review of *Broken Treaties*, Robert A. Fairbanks found Deloria's and his coauthors', Kirke Kickingbird and Fred Ragsdale,[13] argument to be flawed:

> Apparently, the text was written by American Indians to be read by American Indians. Undoubtedly, the text reflects the state of confusion and conflict which pervades the American Indian community. *Behind the Trail of Broken Treaties: An Indian Declaration of Independence*,

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> "written to demonstrate that the proposal to reopen the treaty-making procedure is far from a stupid or ill-considered proposal," will accomplish little in the way of convincing adverse parties to implement its suggestions regardless of its merits.[14]

In spite of the lackluster impression that *Broken Treaties* obviously made on some readers, Frederick E. Hoxie acknowledged the book as "foundational," equaled only by *God Is Red*. As Hoxie observed: "*Behind the Trail of Broken Treaties*, which appeared ten months [after *God Is Red*], summarized Deloria's views of the Red Power phenomenon and outlined the principal political adjustments that could ensure the long-term viability of the nation's tribes."[15] Indeed, in a 1973 editorial that Deloria published in *Akwesasne Notes*, which more than likely Fairbanks did not read, the "Twenty-Point Position Paper" was presented as a rallying point around which those seeking meaningful reform in Indian affairs could focus their efforts: "While I did not become involved in the Trail of Broken Treaties, it has seemed to me that the Twenty Points which the people of the caravan drew up and were to have presented to the federal government were the most comprehensive and inclusive list of reforms that I have seen presented to any government officials for quite a while." Furthermore, Deloria argued to his readers that the twenty points should form the basis of how tribes, be it in the form of tribal governments or urban Indian organizations, should develop a unified agenda focused on "a new federal relationship which we need and which we must have to bring any sense out of the present state of Indian Affairs [*sic*]."[16]

Deloria, more specifically, after recounting the Indian protest movement from its emergence in the early 1960s with the Pacific Northwest fish-ins to the occupation of the Bureau of Indian Affairs building in Washington DC and the armed confrontation at Wounded Knee during the early 1970s, Deloria segued back into the colonial history of the Western Hemisphere. Not only were the early European exploration and settlement of the "New World," and the competition for resources that that entailed, the origin of the Doctrine of Discovery, but also the context in which Deloria formed the basis of his claim that Indian affairs needed to

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be regarded as a facet of international relations.[17] Although Anglo-Saxon legal thinking reduced Indigenous peoples' centuries-long inhabitation of their lands to mere "Aboriginal title," as affirmed in *Johnson v. M'Intosh* (1823), Deloria argued that the implicit recognition that the Indians possessed rights—however diminutive in the minds of the English and Americans—formed the basis of his rebuttal of the claim that white settlers possessed a superior right to the land because of their presumed superior civilization. The latter is no more than the right of the stronger and not the superior. For if in fact the Indians possessed a civilization and a humanity at least comparable to the European invaders, then the claims of superiority were invalid. Certainly, the reversal of the Indian Bureau's historic efforts at suppressing Indigenous cultures enacted by President Franklin D. Roosevelt's commissioner of Indian affairs John Collier and the 1934 Indian Reorganization Act, which acknowledged the Indians' capacity for self-rule, not to mention direct support for the maintenance of traditional culture articulated in the 1935 Indian Arts and Crafts Act, were unequivocal evidence that the U.S. federal government recognized that Indians possessed cultures and societies that had as much of a right to exist as their own. All of which would be reinforced by the 1975 Indian Self-Determination and Education Assistance Act and the 1978 American Indian Religious Freedom Act.

With the above objective in mind, Deloria did not hesitate, in *Broken Treaties*, to point out that some early settlers emphatically rejected the egregious claims of conquest against the Indians' rights as nations and as human beings. In other words, one did not need to wait for modern times to find persons who were well aware of the injustices being visited upon Indigenous peoples. More specifically, Deloria observed in his historical analysis the subversives who laid the groundwork for an Indigenous confutation of the Doctrine of Discovery's principles. Deloria cites in this regard the work of the Spanish humanist Franciscus de Vitoria; the English theologian and founder of Rhode Island Colony, Roger Williams; not to mention the American legal scholar, Roger Cohen. Of course, subversives notwithstanding, most of what Deloria recounted in his treatment of the Doctrine of Discovery was the plundering of Indian lands, which was done under the color of law. At the same time, Deloria

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made clear that, in the aftermath of the 1787 Treaty of Paris, the Americans did not encounter tribes that were either weakened or chastened by their unsuccessful alliances with Britain. On the contrary, the tribes west of the Appalachians were still very much in control of their domains, which was further evidence against the American claim about superiority.

> In all of this [post-Revolution] confusion, the articulation of the status of the Indian tribes and the nature of their land titles lagged behind the development of the national political identity. During colonial times, the eastern lands were quite often acquired from the Indians by purchase, despite any grants from the King that colonists possessed. When the settlers began to encounter the larger and more and more powerful tribes in the Mississippi Valley and Illinois country, they discovered that all lands had to be purchased. As the controversies swirled around the development of the policy of removing the Indians from the lands east of the Mississippi—which came to fruition in the 1830s—the nation was forced to examine its treaties with the Cherokees, Creeks, and Choctaws of the south and the powerful Miami confederacy of the Indians' Illinois country, and the question of the full nature of Indian title arose.[18]

Consequently, as the United States assumed political control over the territory ceded to it by Britain, which was augmented by the 1804 Louisiana Purchase from France, according to the principles of the Doctrine of Discovery, the United States acquired the exclusive right to extinguish Indian title to the lands within its territorial boundaries. Complicating the situation were some of the individual states, most significantly Georgia, which wanted jurisdiction over Indian affairs, insofar as any pertinent Indian lands lay within state boundaries.[19]

Prior to the Georgia crisis, there was of course the situation that arose in Piankashaw Indian country, where Thomas Johnson purchased land from the tribe during the 1770s, which his descendants inherited. In the intervening years, however, William M'Intosh obtained a land grant from the United States for the same real estate, which created a dispute that went all the way to the Supreme Court. Ultimately, the court decided in favor of M'Intosh on the basis that the Piankashaw only possessed

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"aboriginal title" to their land, while Britain, which at the time held political control of this land, possessed the superior right to extinguish the title. Consequently, because the Piankashaw only possessed usufructuary rights, as opposed to property-owner rights, they could not sell their own land to Johnson. While the attitude toward the Piankashaw could have been substantially worse—they could have been dismissed altogether as possessing no more rights than the deer inhabiting the forest—it was still the case that the Court's decision in *M'Intosh* was premised on a blatantly racist preconception of Indians. The *M'Intosh* decision in *Broken Treaties* was juxtaposed to Marshall's subsequent opinion in *Worcester v. Georgia* (1832), in which the Cherokee were designated as a "sovereign nation." More important, Deloria's—and his co-authors'—analysis of these two opinions led to the conclusion that the limits of the Doctrine of Discovery were defined by the limits of what the "feeble settlements made on the seacoast" were capable of controlling, which was no more than the actual lands occupied by these settlements—as opposed to the wrongful presumption that such settlements entailed a much more expansive land claim. This, then, went against the popular image of discovery as symbolized by numerous images of Columbus, surrounded by his men, ceremoniously claiming the "New World," all of it, on behalf of the Christian God and the King of Spain. The historical reality was much different. Indigenous nations were, in spite of Spanish arrogance, still very much in control of all of their lands. Furthermore, given that the United States, its victory over Britain notwithstanding, was still a feeble nation at the time it inherited British territory west of the Appalachians, it stood to reason, as Deloria argued, "It would be pure folly to assert that in 1832 (and even more in 1788) the United States had conquered the Indian nations."[20]

Even during the darkest days of the Indian Removal Era, which occurred during the 1830s to 1850s, Indian title endured as a legal right, even as the United States continued to assume—as seen in the Georgia-Cherokee controversy—that it had a superior right and a more compelling need for Indian land. Remarkably—some might say, paradoxically—the United States maintained treaty making as a vehicle for its removal policy, most notably with a range of southern tribes. As Prucha summed up this astounding era of federal Indian affairs:

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> The southern Indians had been forced into treaties they did not want, treaties whose validity they denied but which were adamantly enforced by the federal government. The hardships of removal were extreme. Yet these Indian nations were not destroyed. . . . The removal was accomplished by means of formal treaties (which [President Andrew] Jackson had earlier called farces), which in their recognition of the Indians' nationhood and the fee simply[*sic*] ownership of land formed a foundation for continuing political existence that even tribal factionalism did not crush. With regard to the southern Indians, the treaty system had a new lease on life.[21]

Nevertheless, the American judicial system remained reticent at affirming Indigenous rights as the rights of sovereigns equal to itself. However, because of the tradition of legal precedent, the notion of Indian title proved difficult to topple, as seen in two cases: *Holden v. Joy* (1872)[22] and *United States v. Shoshone Tribe* (1938).[23] These were significant not only for how they maintained Indian title against the intense pressures of westward expansion, but also for how they demonstrated the tenacity of this basic principle of tribal sovereignty—and land title—in defiance of an era defined by the 1887 Allotment Act:

> Sovereignty as expressed by the Jamestown colony to the Indians on the James River bears little resemblance to the ideas of sovereignty of the Indian tribes of California in relation to the State of California. But this does not mean that sovereignty is a meaningless concept. *Implicit in the relationship is recognition of a degree of independence by the stronger to the weaker*. This recognition of the residuals of complete freedom and control is the sovereignty which courts seem to discuss in the Indian cases that reach them. Treaties in the formative years of the existence of the United States were a type of sovereign manifestation because they were exercised under the independent wills of the respective contracting parties [emphasis added].[24]

Deloria went on to affirm the enduring principle of sovereignty, namely independence, irrespective of Congress's unilateral 1871 motion to end treaty making, which was less about rejecting the fundamental sovereignty

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of tribes and more about the House of Representatives not wanting the United States to enter into additional contracts, i.e., treaties, in which the United States would be obliged to appropriate annuities. Congress, because it still dealt with tribes as distinct groups, went on to forge "agreements," which were tantamount to treaties, thereby maintaining the political independence of tribes, entailing, according to Deloria, that "the international theory of treaties still remained a viable operating principle."[25]

In the end, as Deloria, et al., concluded their analysis of the Doctrine of Discovery in *Broken Treaties*, while America's attitude toward treaty making may have been increasingly more cynical and insincere as its imperial ambitions moved farther westward, replete with exploiting the economic and political disadvantages that tribes faced as an overwhelming number of settlers moved in, this did not mean that tribes lost their inherent right as independent sovereigns in the process. Similar to an individual who maintained their free will and the inherent rights of being human, regardless of the oppression and abuse they may be forced to endure, so too does an Indigenous people maintain its sovereignty and the inherent right of all nations for self-governance. As such, just because a tribe agrees to cede, sell, or lease land—even under extreme duress—did not entail that they had surrendered all claims to their dignity. Even prisoners, hostages, and victims retain fundamental human rights. So, too, do nations. For no matter the terms of the treaty, each tribe that signed expected the agreements to be upheld and their status as nations to be respected. As evidenced in the Pacific Northwest in 1964 and at Wounded Knee in 1973, Indians were fed up with feeling disrespected. "Aboriginal title did not extinguish the political rights of the Indian tribes, and they still have the right to be recognized among the nations of the earth, even with the domestic legal doctrines of the United States guaranteeing the validity of their titles as held in a protected status by the United States against the European nations."[26]

In exchange for American protection, as the treaty making proceeded, the United States asserted its exclusive right to any lands that the Indigenous nations entering into a treaty with them may choose to sell. In other words, the United States did not want any Indigenous nations to sell any lands to Britain, France, or Spain. Furthermore, accepting U.S.

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protection meant that the signatory nations entered a trust relationship, in which their assumed inferiority became the basis of their treatment as colonial charges of the U.S. federal government, which was to say that Indigenous nations were submitting to American imperial power. Consequently, as Deloria observed: "submission became merely the first step from freedom to classification as incompetents whose every move had to be approved by government bureaucrats," such as the Department of Interior, which assumed control of Indian affairs in 1849.[27] With regard to the antiquity of these preconceptions, the 1785 treaty, for example, between Cherokee Nation and the United States—popularly referred to as the Hopewell Treaty—was at the crux of the 1830 dispute between the Cherokee and the State of Georgia. The dispute then went to the U.S. Supreme Court, where, in its 1831 ruling, Chief Justice John Marshall wrote on behalf of the majority. The 1785 treaty was cited therein as integral to the explanation for defining the Cherokee as a "domestic dependent nation."[28] The Hopewell Treaty also set the stage for the new United States' post-Revolution agenda for treating with tribes.[29] Specifically, article 3 stated, as Marshall quoted: "The said Indians for themselves and their respective tribes and towns do acknowledge all the Cherokees to be under the protection of the United States of America, and of no other sovereign whosoever."[30]

In the spirit of their British—or, more specifically, English—forebears, the United States established a form of feudalism over Indigenous lands and peoples, in which, as noted above, Indigenous nations possessed no more than usufructuary rights to the lands they had inhabited for countless generations.[31] Whatever privileges Indigenous people enjoyed under American occupation they were few, meager, and enforced at the pleasure of the Indian Bureau, which was the federal agency in charge of implementing U.S. federal Indian policy.[32] Under such conditions, Indigenous nations were frequently coerced into relinquishing even more land in hopes of alleviating the suffering they endured under Indian Bureau control. As Deloria further observed:

> Incompetency was a doctrine devised to explain the distinction between people who held their land free from trust restrictions and those who

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> still had their land in trust. But it soon mushroomed out of proportion. Eventually any decision made by an Indian was casually overlooked because the Indian was, by definition, incompetent.[33]

Yet, as Deloria argued, this trend toward regarding Indians as "wards" or "incompetents" was in contradistinction to the equally important notion that tribes were, not only worthy allies, but necessary ones, capable of fulfilling their obligations as cosigners of the treaties into which they entered with the United States. Beginning with the 1794 Treaty with the Six Nations, more commonly called the Pickering Treaty, in honor of Timothy Pickering (1745–1829), who was George Washington's secretary of state, the United States recurrently offered protection, friendship, plus goods and annuities, in exchange for land. In article 6 of the Pickering Treaty, the United States proclaimed to assembled delegates:

> In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars.[34]

What was initially an agreement between equally sovereign and independent nations turned into an unequal affair between a dominant trustee and its dependent ward. In other words, the protection, friendship, goods, and annuities went from being compensation for land relinquished to a form of dependency as Indigenous nations saw their sovereignty and self-reliance diminish under the pressures of an increasingly expanding settler-colonial power.[35]

With regard to the fundamental traditions of discovery and treaty making, and the powerful tribes that the settlers encountered, Deloria reminded his reader treaties "were originally viewed as contracts."[36] Moreover, the contracting parties were not only equal, as made clear in the language used, but also it was the United States that sent out treaty

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commissions for the purpose of acquiring much-needed allies against the British. As for Indigenous nations being regarded as dependent, Deloria made quick work at disabusing his reader from assuming that Indigenous nations have always been regarded as dependent inferiors. On the contrary, Deloria referred to articles 5 and 6 of the 1778 treaty with the Delawares, which was the first ratified treaty between the newly independent United States and an Indigenous nation. In fact, the treaty with the Delawares came a mere seven months after the two treaties that the United States signed with France, both on February 6, 1778, which were the first two treaties that the United States signed after declaring its independence from Britain. The implication here was that the United States needed the Delawares more than they needed the United States. It was in this tumultuous context in which the United States acknowledged the Delawares as partners in a "well regulated trade" in which both nations were recognized as "contracting parties" who were forming a "confederation," complete with an opportunity for "other tribes" to join "who have been friends to the interest of the United States."[37] In addition to becoming trade partners, the United States offered the Delawares the possibility of entering the American republic as "states," complete with congressional representation. Indeed, the United States repeated this offer to the Cherokee in the "Hopewell Treaty," in which article 7 stated: "That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress."[38]

As for the Delaware treaty, according to Prucha, in contradistinction to Deloria, it "accomplished little, and it left a bad taste in the mouths of the Delawares." More specifically, while the Delaware understood that the treaty acknowledged their "territorial rights," with respect to the rebelling colonials, the Delaware agreed to do no more than allow the colonial army to access a route through their lands to their British enemy. Consequently, it came as a surprise to John Killbuck, one of the Delaware signatories, that he "was looked upon as a Warrior," a status that implied something other than the neutrality that the Delaware acceded to maintaining. In other words, the Delaware wound up feeling duped by the Americans. Moreover, when the colonial trader George

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Morgan arranged for a Delaware delegation to bring their grievances to the colonial capital of Philadelphia in 1779, it was to no avail, the "peace and friendship between the United States and the Delawares collapsed." In light of which, Prucha suggested that when the Americans approached the Wyandots with a similar treaty, they adamantly refused to allow the colonial army to march through their lands.[39]

While Deloria did not respond to Prucha's interpretation of the Delaware treaty directly, be it in his 1995 review for the *American Indian Quarterly* or in any of his subsequent books and essays, one could say that Deloria nonetheless had anticipated Prucha's criticism many years before in the pages of *Broken Treaties*. More specifically, in the chapter titled "Dependent Domestic Nations" Deloria added to his argument in *Custer* that tribes were not regarded as incompetent wards, but as nations equal in status to the fledgling American republic. Because the Americans were rebelling against a king and his empire, they sent a delegation to Fort Pitt in western Pennsylvania, where they, as indicated above, requested the Delawares' permission "to travel over its lands in order to attack the British posts in southern Canada." With that objective in mind, Deloria cited article 3 of the treaty, which acknowledged that the Americans undeniably needed the Delawares' assistance with their military ambition to attack the British of southern Canada. However, the article also stated, in spite of what John Killbuck may have thought, that the Delaware nation agreed to "engage to join the troops of the United States aforesaid, with such a number of their best and most expert warriors as they can spare, consistent with their own safety." Whether or not the latter point was made clear to the Delaware was not apparent in either Deloria's or Prucha's comments about this treaty. Obviously, there was a Delaware account of what happened at the treaty council that was missing from both texts. Nevertheless, the agreed upon terms stipulated in article 3, with respect to Deloria's critique of the theory that tribes were dependent domestic nations that were incapable of managing their own affairs, had an opposite meaning:

> Plainly, the colonists were on the ropes in the West, and had the Delawares refused to allow passage, the United States might have been

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> faced with a violent Indian war in addition to its scrimmage with the British. To have pretended decades later that the American Congress had always asserted its claim to Indian lands under the doctrine of discovery, or that it had always regulated the internal affairs of the Indian tribes in its guardianship capacity, is sheer self-serving rhetoric when the nature of this first treaty is understood. If the Delaware treaty exemplified the way that the United States asserted its plenary power over the Indian tribes, it was certainly a humble way of doing so.[40]

Regardless of how one feels about an Indigenous nation availing itself to becoming a joint member of a colonial power, as was the case in both the Delaware and Cherokee treaties, the implication of Deloria's historical references was clear: the treaty-making tradition was a tradition instituted between sovereign nations—not between trustee and ward—in which the Indians possessed the same power of representation as did their American counterparts. Because the United States–Indian treaty-making custom was one between equally sovereign nations, as documented in the historical record, the assumption that Indigenous nations were "surrendering" to the superior strength of the United States—like Confederate general Robert E. Lee at Appomattox or the Japanese foreign affairs minister Mamoru Shigemitsu onboard the USS *Missouri*—was simply incorrect and an egregious misrepresentation of historical fact. Equally erroneous was the supposition that because of the aforementioned treaty promises enumerated above, e.g., goods and annuities, Indian lands were legally "purchased" and that the Indian descendants of the treaties' signatories, such as those partaking in the 1964 fish-ins, were crying over spilt milk when they demanded that treaties be honored and land restored. On the contrary, while specific lands were ceded to the United States, the agreed-upon compensation often extended into perpetuity. In many cases, unfortunately, the stipulated goods, services, and annuities were either never delivered or, at best, only sporadically. Among the most offensive beliefs among the knowledge-challenged, though, was the belief that treaties "gave" land to Indigenous nations as an expression of American largesse and magnanimity. As Deloria so aptly responded: "The truth is that practically the only thing the white men ever gave the

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Indian was disease and poverty. To imply that Indians were given land is to completely reverse the facts of history."[41]

In opposition to the above misconceptions about Indian treaties, Deloria assembled an array of examples in which "Indian rights to lands [were] reserved by them," including treaty articles that became critical to later generations seeking to substantiate the hunting and fishing rights that were legally guaranteed to them when the treaties with their nations were ratified by Congress.[42] In spite of repeated American violations, the treaties were still valid, which, ironically, was confirmed by numerous congressional statutes. In spite of attempts at attrition, tribal leaders consistently did their best to assert their right to self-determination against a growing tide of settlers and imperialistic ambitions. As for the American republic and its promises, Deloria commented in *Custer*:

> The United States pledged over and over again that it would guarantee to the tribes the peaceful enjoyment of their lands. Initially tribes were allowed to punish whites entering their lands in violation of treaty provisions. Then the Army was given the task of punishing the intruders. Finally the government gave up all pretense of enforcing the treaty provisions.[43]

Yet, even at the lowest point in the history of Indian-white relations, which occurred during the 1870s to 1930s, Indigenous nations still made an effort at affirming the covenants between themselves and the United States. The most well-known and historically important example during this epoch was when the Kiowa leader Lone Wolf sought an injunction against the allotment of lands guaranteed to them in the 1867 treaty with the Kiowa and Comanche.[44] In complete disregard to the articles of this lawfully binding agreement, on February 7, 1903, the Committee on Indian Affairs proposed allotting 505,000 acres of Kiowa, Comanche, and Apache lands in the state of Oklahoma. In the proposed rider to H.R. 16280, the lands in question were acknowledged as belonging to the Indians under the provisions of the 1867 treaty; nonetheless, as Sen. John Fletcher Lacey (R-IA) argued on behalf of his committee's decision:

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> It has been the usual method in opening Indian lands for settlement to first obtain the consent of the Indians by treaty. But in the present case the subject of opening their reservation was fully considered by Congress and by the Indians, and a treaty was agreed upon. The lands in question were included in the original reservation, and the situation is therefore fully understood, and your committee do not deem it necessary that there be future negotiation on the subject. *Congress is the guardian of the Indians and members of the tribes are wards of the nation* [emphasis added].[45]

As far as the tribes, not to mention Lone Wolf, were concerned, those 505,000 acres could not be allotted without their consent. Nevertheless, when Lone Wolf took his case to the U.S. Supreme Court, the tribes not only lost but also the court ruled "that the tribes had no title to the land at all. Rather the land was held by the United States and the tribes had mere occupancy rights. Therefore the [plenary] power of Congress to dictate conditions of life and possession on the reservations was limited only by its own sense of justice."[46] Such was the context in which treaties would be understood thereafter. Supposedly, this plenary power formed the basis of all subsequent treaty violations, including that of the 1794 Pickering Treaty, which justified the Kinzua Dam, not to mention all of the termination acts. What resulted on the part of Congress and the Supreme Court, which successive presidential administrations have perpetuated, was a distorted and biased theory of Indian-white relations, in which land was given to the Indians, who then lived off the government dole and somehow dwelled in the paradoxical existence of primitive splendor (culturally wealthy) and grinding poverty (financially depleted). Such was the Indian condition, if you will, as Deloria wrote about it in *Custer*. In a sense, one can say that much of what Deloria wrote throughout his books and essays was motivated by the never-ending conflict between Indian reality and white fantasy.

As for the theory of plenary power, Deloria confronted this blatant and arrogant violation of tribal sovereignty in *Broken Treaties*. In light of the decision reached in the infamous *Lone Wolf* (1903) case, it was hardly

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surprising in its contempt for tribal treaty rights. Congress, according to the court's opinion, had power beyond appeal to unilaterally abrogate its treaties with tribes. Consequently, as Deloria pointed out, if tribes could not sue the federal government for violating its treaty agreements, because of its sovereign immunity, then the only option left to tribes was to turn their grievances into political causes, which was a tactic that defined twentieth-century Indian activism. "Indians had come to realize, by 1973," Deloria observed, "that political activism was their only hope. Even assuming the best of intentions by Congress, they could not achieve a modicum of justice." After all, Congress had recently spent more than a decade passing termination bills, which unilaterally ended its trust responsibilities to tribes, treaty or no treaty. Furthermore, the Nixon administration had categorically rejected the Trail of Broken Treaties' "Twenty-Point Position Paper" as a valid approach to reforming Indian affairs. In particular, they were adamant about rejecting the proposal to restart the treaty-making process: "The treaty points were most strenuously rejected by members of the administration task force on the vague grounds that the Indian Citizenship Act of 1924 had precluded the United States from dealing with Indian tribes by treaty because the individual members thereof happened to be United States citizens."[47]

Such discrimination, as exemplified in federal termination policy, was the consequence of Indians having long been vulnerable to congressional fiat due to their poorly defined place in the federal system. In fact, a major concern during much of the allotment era, 1887–1934, was the political status of individual American Indians, as they were being pressured into surrendering their tribal identities. Prior to 1924, for the most part, Indians were only members of tribes, which placed them outside of federal law (see *Ex parte Crow Dog*, 1883). Tribes, as such, were extraconstitutional. Yet, they were simultaneously within American territorial boundaries, thereby placed within the political reach of Congress (the Commerce Clause of the Constitution gave Congress authority over Indian affairs). However, as individuals, Indians were not U.S. citizens during this time. In the parlance of today, Indians were resident aliens, meaning that they had very little access to the justice system, in addition to being denied the right to vote. Deloria emphasized

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the exceptional denial of Indian voting rights in his explication of *Elk v. Wilkins* (1884), in which John Elk was denied the right to vote in the state of Nebraska, despite having cut off all ties with his tribe and making great effort at assimilating into white society. Insofar as Elk was an Indian, and thereby identified with a group regarded as "alien and dependent," he was judged as still unqualified to practice the right to vote.[48] As a civil rights case, *Elk* was a spectacular display of legal gymnastics in order to arrive at the conclusion that the Indian plaintiff could not become a citizen, let alone vote—even though federal Indian policy told him that this is what he ought to pursue. "The Indians who had followed the directions of the United States and severed their tribal ties thus became men without a country."[49] A mere three years later, the 1887 Allotment Act provided a path to citizenship, however, it was prolonged (twenty-five years), and ultimately depended, after the 1906 Burke Act, on being judged "competent" to manage one's affairs. Only after the 1924 Indian Citizenship Act was passed did Congress clear up the individual status of American Indians. As for the political status of tribes, that was still subject to the conflicting opinions between Indians and the federal government. Whereas tribes saw themselves as sovereign nations (the Iroquois, in fact, famously declined to have the 1924 Indian Citizenship Act applied to them), the federal government maintained its insistence that Indians were wards. As for the Indian attitude toward citizenship, which was at best ambivalent, Deloria explained:

> Unwittingly, the United States was preserving for the Indians of the future a peculiar dimension—a foreignness, if you will—to their political existence which could not be denied. To find, then, at Wounded Knee and other places, the assumption by American Indians that their tribes had international status and that they owed no allegiance to the United States, should not be strange in light of *Elk v. Wilkins*.[50]

Affirming that Indians were ultimately aliens within the American legal system informed the pursuit of citizenship for Indians that defined the Progressive Era, in which Indian disenfranchisement was the source of the deprivations of a reservation system that did not consider Indian voices demanding fundamental reforms. By and large, Indians accepted

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U.S. citizenship only under duress and only insofar as they could interpret the attendant rights and privileges as an extension of their rights as sovereign nations.

> The Iroquois have continually maintained that they are not citizens of the United States and that the Indian Citizenship Act was illegally extended over them. Now other tribes are beginning to examine their peculiar status and to consider the advantages of dual citizenship. It may be that the *Elk* case will provide the basis of a new ideology of separatism for the nationalists of all minority groups.[51]

Furthermore, the affirmation of tribal independence was more than a cultural conceit, it was a political status corroborated in federal statutes and case law. *Talton v. Mayes* (1896),[52] for example, as Deloria explored this case in *Broken Treaties*, was about the plaintiff, Bob Talton, who claimed that the Cherokee sheriff who arrested him, the Cherokee grand jury that indicted him, and the Cherokee court that found him guilty of murder as charged, consequently sentencing him to death, were in violation of the U.S. Constitution. Talton's attorney, L. D. Yarrell, argued that the Cherokee Nation must abide as a domestic dependent nation under U.S. law, in which tribes were now covered by the 1885 Major Crimes Act. Upon this premise, Talton petitioned for a writ of habeas corpus against Sheriff Mayes, which was ultimately denied on the basis that the origin of Cherokee Nation self-governance preceded the U.S. Constitution and therefore was not limited by its provision, namely the Fifth Amendment, which stipulated rules for a lawful grand jury and was cited in Talton's appeal. Moreover, in addition to possessing powers of self-governance: "As the court described it, the relationship of the Cherokee Nation to the United States was hardly that of tutelage but rather a protectorate relationship in which the United States had a minimum power to interfere with the self-government of the Cherokee people."[53] Indeed, Deloria went on to point out that, despite the federal government's subsequent actions at dissolving the Cherokee government, including its court system—similar to the supposed end of treaty making—was belied by the ongoing governmental powers that have persisted to today. "The tribe's original rights," Deloria concluded, "as

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articulated in the *Talton* case would seem to be unimpaired, if presently inoperative, under the theory of the case."[54]

> Thus there remains an unanswered question of Constitutional law—can Congress legally extend the Bill of Rights to affect the rights of Indian tribes over their tribal members? Since 1968 it has been assumed by many people that the Civil Rights Bill of that year settled the question forever. *but*, it has not yet been settled and may yet emerge as yet another hot issue of the 1970's in Indian country.[55]

As legal precedent, *Talton* enabled tribes to realize that the self-governing powers of Indigenous nations did not derive from the U.S. Constitution, nor was their power of self-governance given to them in the 1934 Indian Reorganization Act. On the contrary, the Constitution articulated the limits of federal power, namely Congress, as its articles and amendments demarcated the rights of the people that it could not violate. In the case of tribal rights, Deloria brought up two examples. First, a 1954 case in which members of Jemez Pueblo brought suit against Pueblo elders, whom the plaintiffs accused of violating their constitutional rights when they were refused permission to bury their dead in the community cemetery, in addition to not allowing Protestant missionaries into the Pueblo to visit with the plaintiffs. Second, the 1959 Native American Church case against Navajo Nation, in which Navajo church members claimed that their constitutional rights were violated when the Navajo government issued an ordinance forbidding the introduction of peyote onto the reservation. In both cases, the federal government cited *Talton* as precedent in its deferral to tribal jurisdiction, stating in *Native American Church v. Navajo Tribal Council*: "Indian tribes are not states. *They have a status higher than that of states*. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the supreme law of the land, but it is nonetheless a part of the laws of the United States [emphasis in original]."[56] It is worth bearing in mind when looking at the two aforementioned cases that these decisions were handed down during the time of termination, when Congress was ostensibly dissolving its trust relation with tribes. While the court and Congress have frequently

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been at odds with their respective understanding of the Constitution, it is significant that even under such a politically unfriendly time for tribes, the Supreme Court ruled that there was still some level of nationhood that remained to tribes, even as Congress aggressively sought to abrogate its historic responsibilities to them.[57]

At the same time, as Deloria was compelled to acknowledge that what looked like progress in overcoming *Cherokee Nation v. Georgia*'s assumption that tribes were in a state of tutelage with respect to the United States—as stated in *Talton*, tribes were higher than states—was subsequently offset by the court allowing for habeas corpus in *Colliflower v. Garland* (1965). More specifically, writ was granted for the Fort Belknap Indian Reservation because of the extent to which its court system was under federal control. The significance of *Colliflower* was that it provided Congress justification for its 1968 Indian Civil Rights Act, in which Congress assumed that the conditions found at Fort Belknap were characteristic of the reservation system as a whole.[58] The latter was in addition to the situation that arose at Jemez Pueblo, which was brought up in their 1954 Supreme Court case, noted above. In other words, even though the court made clear in *Colliflower* that the Fort Belknap reservation was a unique situation, this did not stop federal lawmakers from assuming that the inordinate dependence of the Fort Belknap tribal court on federal control was typical of all tribal courts. Indeed, when it comes to the assumptions that federal courts made about the political status of tribes, the most pervasive and problematic one was that the Bureau of Indian Affairs (BIA) was responsible for fulfilling the federal trust relation as a form of "guardianship" over "the property of individual Indians." While there was ample justification for the federal government having a trust responsibility for Indian property, especially land, there was no justification for "regarding the corporate political entity of tribal government as a 'ward' of the executive branch of the [federal] government."[59] This is to say, it was one thing to claim that the U.S. government had a trust responsibility for protecting Indian lands from unlawful expropriation, which it did, for example, when Congress passed the 1934 Indian Reorganization Act, which formally ended the land allotment policy; it was quite another to claim that the Indigenous

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people living and governing themselves on that land were in need of guardianship. The BIA existed to facilitate the former, not the latter. Because of the ambivalence of the federal understanding of "trust," tribes were often caught in between their definition of trust and the Department of Interior's. The department in particular was quick to assert its role as guardian whenever it deemed fit, while repeatedly reneging on its actual responsibilities to Indians. The Pyramid Lake Paiute's frustrations, for example, over getting their rights to "the Truckee-Carson river system" clarified and the Quinault Tribe's ignored petition to protect their forest from illegal cutting by outside timber companies demonstrated how the "theory of wardship has proven a tragic farce."[60]

At this juncture, Deloria brought his historical analysis in *Broken Treaties* to the more recent disputes over the violation of treaties in the Pacific Northwest. Citing article 3 of the 1854 Treaty of Medicine Creek, which the United States signed with "delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T' Peek-sin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets,"[61] Deloria affirmed the tribes' right to fish in all their customary places. As such, no action was required of Congress. Nevertheless, as Deloria expressed the tribes' exasperation: "The major difficulty Indians face is getting the United States to respect these articles which require only the good faith of the United States."[62] Unfortunately, as made clear by the numerous treaty disputes, be they at Puget Sound, the Indian Claims Commission, or elsewhere, the United States had been negligent at, not only displaying any good faith, but also at respecting tribes as being higher than states. Instead, the United States insisted on asserting for itself the role of guardian over the rights and resources of people it claims in a condescending political fiction are "dependent" on it.[63] Sadly, it has been within this legal environment that duly ratified treaties, complete with self-operating articles like the Medicine Creek one cited above, had been either ignored or flagrantly violated as "federal and state governments" nit-picked "about the interpretation of the articles" or pretended that "the mere passage of time and changing of conditions is sufficient to invalidate them."[64]

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With the sovereign status of tribes weighing in the balance, Deloria concluded his analysis of the doctrine of plenary power by arguing that tribes' relation to the Constitution was clearly defined by *Cherokee Nation* and *Native American Church*, which was to say that tribes were each an "international protectorate," complete with the powers of self-governance that placed them "higher than states." It was because the federal government, namely Congress, had unilaterally chosen to ignore its own Supreme Court's decisions that the chaotic situation that confronted tribes had been allowed to develop, as of the early 1970s, into a nationwide crisis. In light of which, Deloria proposed a "strict construction of the constitutional relationship between Indian tribes and the United States" for the purpose of unburdening tribes of the "many inconsistent and onerous interpretations of the [federal-Indian] relationship" that hindered "tribal progress" at effectively utilizing their assets. "Considering the many lawsuits," Deloria added, "that have been filed against the United States for its inept management of Indian assets, the determination of a distinct status of the tribes as advocated by the development of the concept of an international protectorate should be considered."[65] At this point, Deloria sought to define tribal self-determination beyond the limits demarcated by U.S. federal Indian law and policy, instead reaching for an international scope to Indigenous nationhood.

While *Lone Wolf* may appear to have settled the question of Indian tribal political status, namely that they were in fact wards whose treaties could be unilaterally abrogated whenever Congress saw fit, the 1924 Indian Citizenship Act and the 1934 Indian Reorganization Act (IRA) subsequently complicated the picture. At the same time, then, that Congress may seek to absolve itself of its treaty promises, it was obliged to respect the rights and privileges that Indians maintained as citizens. Moreover, as members of Indigenous nations, the Indian Citizenship Act stated: "the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."[66] In turn, the IRA not only ended the terrorism of land allotment but also reinvigorated Indigenous peoples' sense of nationhood. However cautious one ought to be about idealizing Commissioner John Collier's epic change in Indian affairs, there was no denying the fact that the

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wording of this legislation unequivocally stated: "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare."[67]

For many Indigenous nations, their common welfare depended on protecting the land and resources promised to them in their treaties—and, in many cases, executive orders—with the United States. Securing hunting and fishing rights, a natural resource, was another recurring and important topic in innumerable treaties, not just the ones that became a lightning rod of conflict and controversy in the Pacific Northwest during the early 1960s. Nonetheless, what Deloria said about the Pacific Northwest was relevant to other regions in which tribes battled local non-Indians over their ratified treaty rights to traditional sources of sustenance.[68] Paralleling the conflicting worldviews mentioned above, Deloria pointed out in *Custer*: "Today hunting and fishing are an important source of food for poverty-stricken Indian peoples, but they are merely a *sport* for white men in the western Pacific states."[69] Consequently, since Indigenous people were concerned about feeding themselves, as opposed to making a profit, as occurred in the sporting industry, their needs were regarded as wasteful and a threat to "conservation."[70] This type of attitude goes all the way back to American agitation for Indian lands during the 1820s in the Southeast, when Cherokees were accused by Georgians during the 1820s of wasting the natural resources of the region by trying to limit the land to a few Indians, namely the Cherokee who wandered the vast stretches of their "wilderness" for the purpose of chasing deer. Such aggressive and vindictive stereotyping is what led to the 1830 Indian Removal Act and the precedent it set for federal Indian policy. Indeed, this will be how Deloria characterizes termination policy in chapter 4.

Given that treaties were written by the Americans and ratified by Congress, one might think that Indigenous nations would have an easy time at convincing the federal government, not to mention the American people, of its obligations. Unfortunately, because of America's borderline personality disorder, the treaty relations that Indigenous nations had striven to maintain had been anything but reliable. While the United States made numerous treaties for the purpose of acquiring allies against

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the British, promising tribes the sun and the moon, they just as anxiously took actions to betray their much-needed allies as soon as the danger had passed.[71] Other treaties were promulgated under similar conditions, complete with equally outrageous violations. Consequently, whenever Indigenous nations bring up their treaty concerns, they are confronted with the same response: "In many instances, when the tribes have attempted to bring their case before the public, it has turned a deaf ear, claiming that the treaties are some historical fancy dreamed up by the Indian to justify his irresponsibility."[72]

As an example of American duplicity, Deloria referred his reader to the Choctaw Nation whose treaty relations with the United States culminated in 1825, when "articles of a convention made between John C. Calhoun, Secretary of War, being specially authorized therefor by the President of the United States [John Quincy Adams], and the undersigned Chiefs and Head Men of the Choctaw Nation of Indians, duly authorized and empowered by said Nation" were signed by both parties, agreeing to specific provisions regarding Choctaw lands. Of particular interest was article 7: "It is further agreed . . . that the Congress of the United States shall not exercise the power of apportioning the lands, for the benefit of each family, or individual, of the Choctaw Nation, and of bringing them under the laws of the United States, *but with the consent of the Choctaw Nation*" [emphasis added].[73] Nonetheless, as the Choctaw were pressured against their will into accepting lands in Oklahoma, individual tribal members had the option of staying in Mississippi. However, as the Choctaw Nation recounts on its web page: "the price of doing this was the loss of Choctaw identity and the acceptance of United States and Mississippi citizenship." Unsurprisingly, most Choctaw reluctantly chose to relocate, embarking on a very difficult and often fatal trek to their new lands in southeastern Oklahoma. As for those that stayed in their traditional homeland:

> So many of those who remained were cheated out of their land by corrupt officials of the state and local governments that in 1842 the Federal government was once again forced to intercede. This time in a slightly less unfriendly way. Choctaw who had . . . lost their land

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were reimbursed, but only if they relocated to their new land in Indian Territory, now known as Oklahoma. As a result of this fresh round of removal only 3000 Choctaw remained in Mississippi.[74]

In addition to their nation being rent asunder by an inhumane removal policy, the Choctaw continued to endure further hardships at the hands of federal bureaucrats. As of 1969, when *Custer* appeared on bookshelves: "the Choctaws and other people of the other 'Civilized' Tribes are among the poorest people of America."[75] Of course, poverty remained a prevalent problem across the reservation system throughout the United States, including American Indian communities living off reservation.[76] In which case, the Choctaws were emblematic of Deloria's account of United States–Indian treaty relations, which were exacerbated by the termination policy that dominated the 1950s and 1960s. Indeed, the congressional action that initiated termination, HCR 108, which led to multiple termination acts, in addition to P.L. 280, was a prominent example of how statutes undermined treaty rights and agreements.[77] As Deloria observed: "Although a treaty would promise one thing, subsequent legislation, designed to expand the treaty provisions, often changed the agreements between tribe and federal government completely."[78] Prucha, as may be recalled, challenged Deloria on this particular point in *American Indian Treaties*. Needless to say, as far as Deloria was concerned, American treaty breaches and the violation of human rights they precipitated was a recurrent theme of federal Indian policy, which was often done with the color of law.

Further illustrating Deloria's argument that treaties were often broken through statutes and resolutions passed unilaterally by Congress, a number of other instances were mentioned in *Custer*, beginning with a joint resolution passed on April 16, 1800, regarding "copper lands adjacent to Lake Superior."[79] The objective of the resolution was to authorize the president to appoint an agent in charge of determining the terms on which the "Indian title" to the land could be "extinguished."[80] In the 1826 treaty with the Chippewa that followed, signed by Lewis Cass and Thomas L. McKenney, on behalf of the United States, and eighty-five signatories representing a dozen communities, which was "done at the Fond du Lac of lake Superior, in the territory of Michigan,"[81] article 3

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granted to the United States the "right to search for, and carry away, any metals or minerals from any part of their country."[82] While the article goes on to acknowledge the continued Indian title to the land, the treaty did not provide for any compensation, be it purchasing or royalty payments, for the coveted mineral wealth.[83] In fact, the Chippewa were not informed at all of how much copper meant to the American economy. Deloria did not hesitate to call this an act of fraud, which was not only repeated throughout Indian affairs, but was perpetrated under the obnoxious assumption that the proponents of federal Indian policy had a paternal obligation to the betterment of their Indian "wards," complete with disposing their resources and handling their affairs with little, if any, consent from the tribes.[84]

In turn, the 1834 Indian Trade and Intercourse Act was largely focused on the federal licensing and regulation of traders conducting business with Indian tribes for the explicit purpose of preserving "peace on the frontiers."[85] Complementing the Indian trade act, Congress passed "An Act to provide for the organization of the department of Indian affairs," which established, "That there shall be a superintendency of Indian affairs for all the Indian country not within the bounds of any state or territory west of the Mississippi river." In addition to the various duties of the superintendents, namely supervising the bureau employees under their respective charge, section 7 further enacted:

> That the limits of each agency and sub-agency shall be established by the Secretary of War, either by tribes or by geographical boundaries. And it shall be the general duty of Indian agents and sub-agents to manage and superintend the intercourse with the Indians within their respective agencies, agreeably to law; to obey all legal instructions given to them by the Secretary of War, the commissioner of Indian affairs, and to carry into effect such regulations as may prescribed by the President.[86]

Ultimately, the bureau that would be transferred to the Department of Interior in 1849 became, in 1834, a fully articulated and comprehensive bureaucracy exhibiting "immense power . . . over the lives and property of the Indian people."[87] Thus, the colonization of Indigenous nations had

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reached a climactic period in its history, establishing hegemonic control over tribes for decades to come.

By 1887 Indian affairs had become, at least in the eyes of the federal government, a completely domestic issue. Congress had terminated treaty making nearly two decades earlier (1871)[88] and had since turned its attention to Indians as a social engineering problem, in which the objective was to "raise the Indian into civilization." Based on a notion, corroborated by social scientists and historians, from Lewis Henry Morgan to Karl Marx, that all humans were on the same ladder of development—an ascent from illiterate primitivism to modern western civilization—the 1887 General Allotment Act postulated that the so-called Indian problem could be resolved by compelling Indians into the next stage of their "natural development." More specifically, the statute—titled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"—stated in its preamble:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon[emphasis in original].[89]

The target of this statute was the roughly ninety million acres still under collective tribal control, as validated by custom, treaty, executive orders, and previous statutes. As the allotments proceeded, according to the guidelines articulated in the statute's provisions, the aggregate lands held by the tribes began to shrink, generating "surplus lands" that were placed on the open market, which were quickly acquired by non-Indian

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purchasers. As for the allotted land, a patent was issued to the Indian head of family that placed the allotment in the trust of the United States for twenty-five years. At the end of the trust period, assuming the allottee was deemed, according to the 1906 Burke Act, which amended the 1887 statute, competent and had made sufficient agriculturally oriented improvements to the land, said allottee presumably possessed the land in fee simple title.[90] Moreover, the allotment process purported to lead Indian families into becoming fit for American civilization, i.e., citizenship. Unfortunately, not to mention outrageously, as Deloria was quick to point out, "nothing was done to encourage [Indians] to acquire the [necessary agricultural] skills and consequently much land was immediately leased to non-Indians who swarmed into the former reservation areas." In the end, "by 1934, Indians had lost nearly 90 million acres through land sales, many of them fraudulent."[91]

Endorsed by an array of notables in the Indian rights movement of the latter nineteenth century, including Sen. Henry L. Dawes (R-MA),[92] who sponsored the bill, and a number of Christian progressive leaders, the most noteworthy among whom was Episcopalian bishop William H. Hare,[93] the 1887 Dawes Act (as the Allotment Act was otherwise known) was one of the biggest land swindles in the history of the world. While there was certainly much more that can be added to this centuries-long travesty, the point that Indian nations have undergone a massive amount of government malfeasance, corporate greed, and religious hypocrisy, which informed their status today had been made. Indeed, with respect to the nadir reached at the end of the nineteenth century, Deloria commented:

> Gone apparently was any concern to fulfill the articles of hundreds of treaties guaranteeing the tribes free and undisturbed use of their remaining lands. Some of the treaties had been assured by the missionaries [like Bishop Hare]. The Indians had not, however, been given lifetime guarantees.[94]

As a way of underscoring the deliberately dishonest and inhumane way in which the United States, in particular Congress, treated tribes since violating the terms of the 1794 Pickering Treaty, Deloria pointed out that the only positive highlight in Indian affairs did not occur until 150

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years later when the 1934 Indian Reorganization Act was passed. While it did not retain all of the radical reforms that its main proponent John Collier wanted, it did unequivocally end land allotment, enabling tribes to instead recover land either through purchase or having unsold "surplus" lands restored. Equally important was the opportunity to "organize for its [the tribes'] common welfare" by means of establishing for each a "constitution and bylaws."[95] Although, Deloria, along with a number of other critics, pinpointed a range of flaws and limitations throughout this groundbreaking statute, during the climactic years of the Indian protest movement, the 1934 IRA was touted as a seminal change in federal Indian policy. With that in mind, compared to other congressional initiatives, Deloria acknowledged: "Overall the IRA was a comprehensive piece of legislation which went far beyond previous efforts to develop tribal initiative and responsibility."[96] If nothing else, the 1934 IRA was the first major legislation that did not ostensibly seek to alienate Indians from their land.

As for how the 1934 IRA set the stage for the 1973 Wounded Knee conflict recounted in *Broken Treaties*, after going over the now familiar highlights of late nineteenth-century Indian affairs, complete with the ravages of the 1887 Allotment Act, Deloria evoked the name of Hubert Work, a former physician and secretary of interior, who organized the Committee of One Hundred, which ushered in a long sought-after period of Indian Bureau reform. What resulted was a book-length report titled *The Problem of Indian Administration*, which soon became popularized as the 1928 Meriam Report, in honor of Lewis Meriam, who led the research that included nearly a hundred tribes in nearly two dozen states. Unfortunately, as Deloria noted: "Most of the recommendations were disregarded when President Hoover timidly appointed Charles Rhoads to supervise the suggested reforms," who did little to nothing, which was a disappointment exacerbated by the devastation of the Great Depression.[97] Nonetheless, the scene had been set for a new era in Indian affairs.[98] It was at this point, that Deloria highlighted Rhoads's successor, John Collier, a sociologist who earlier distinguished himself when he spearheaded the American Indian Defense Association to combat the infamous 1922 Bursum Bill, which would have legalized an array of land seizures committed by white

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settlers against multiple Pueblo communities. Ultimately, the "Bursum Bill was defeated, and in its place the [1924] Pueblo Lands Act was passed. This statute reversed the procedure for proving title to lands; white men had to prove how they had obtained their titles, not the Indians."[99] Indeed, Collier continued to excel as an advocate for Indian rights, from land disputes to religious freedom, along with promoting the suggested reforms outlined in the Meriam Report. In fact, one of Collier's pre-1934 accomplishments was getting the Senate Indian Committee to leave its perch in Washington DC and see for themselves the reservations over which they had so much influence.

> On many reservations the Indians' stories shocked even the most hardened Senator. The abstractly phrased suggestions of the Meriam Report began to take on flesh as the committee saw instance after instance of deprivation in their investigation of allotments, competency commissions, and arbitrary actions of the government.[100]

If, then, the original fifty-page bill introduced to Congress had passed as is, the way Collier wanted it, it would have nearly restored tribes to their original status as independent sovereign nations. In addition to providing for self-governing organizations, the drafted version of the bill even validated and supported the teaching of traditional Indian culture as part of the tribal school curriculum, not to mention a much-needed Court of Indian Affairs. For all of its idealism, though, Deloria did see one major flaw, namely "the provision that there would be no more inheritance of lands by individual Indians." While the provision was stipulated for the purpose of consolidating fractionated lands, which was (and still is) a major obstacle to tribal economic development, its effect on Indian communities was one of resistance, particularly in Oklahoma, which, despite being exempted from the bill, nonetheless criticized the provision as depriving "them of their rights to property."[101] As for the Court of Indian Claims, if it had been endorsed by Congress, "The court would have eliminated the perennial problems of the tribes' having to litigate their treaty rights in state courts with appeal to the federal court system."[102]

For the federal government, not to mention the society it represented—which had long regarded Indians as children in need of its civilized

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guidance—Collier's revolutionary approach to tribal self-governance was too much for many in Congress. Even Christian missionaries were opposed to Collier's alleged revival of "paganism," which they feared would undo their years of work at controlling Indian minds. "Incorporated in the Indian Reorganization Act was a provision allowing the practice of native religions on an equal basis with the Christian religions that had been superimposed on the different tribes half a century before when the respective reservations were allotted to the various missionary societies."[103] Reaction from others, including tribal leaders and BIA employees, was mixed, depending on what they had at stake in the status quo. While many whites involved in Indian affairs were anxious to hand over governance issues to tribes, they were nonetheless apprehensive about the consequences of the Indian-preference hiring in the proposed legislation. "The Indian Bureau had been the exclusive domain of non-Indians for nearly a century. With the exception of a handful of well-educated Indians such as Carlos Montezuma, an Apache, and Charles Eastman, a Sioux, both doctors, few Indians had been employed in government service."[104] In the case of tribal leaders, while they were excited at the prospect of recovering and consolidating the tribes' land bases, they balked at that part of the bill that forestalled further individual land inheritances, in particular those who were anticipating title to lucrative pieces of real estate. Undaunted, Collier, true to his visionary principles, took it upon himself to break free of the tradition of unilateral decision making: "He decided to consult the Indian people on the legislation, and called a series of Indian congresses around the nation."[105]

Similar to the experiences of the senators on the Senate Committee on Indian Affairs, whom Collier convinced to tour Indian Country, the congresses were a concrete lesson in United States–Indian relations. As examples of the deeply entrenched attitudes toward any Indian initiative sponsored by the federal government, even one purporting to be dramatically different from its predecessors, Deloria referred to the opposition to Collier's plan displayed at the Northern Plains congress in Rapid City, South Dakota, on March 2, 1934, and from the Navajo in the Southwest, later that same year. Whereas the Sioux were concerned by a tribal government "dominated by mixed bloods who had already sold

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their lands and simply hung around the agencies looking for a handout," the Navajos were still reeling from the desolation their nation endured in the aftermath of Collier's sheep stock reduction, which presumably was to preserve the environment from overgrazing, but which instead had a profoundly negative impact on the Navajo economy. By the time his bill was ready for consideration, Collier's plans were "gutted." Gone was the Court of Indian Claims, as was the ban on individual land inheritances. Moreover, the state and territory, Oklahoma and Alaska, with the largest number of communities were "ineligible for the legislation."[106] Nevertheless, the 1934 Wheeler-Howard Act, as the Indian Reorganization Act was also known, was passed into law on June 18.

Tribes were compelled to accept or reject the proposition, articulated in section 16 for creating a constitutionally based tribal government within a one-year period. The confusion that ensued was due to the murky legal status that had been burdening tribes since the Marshall Trilogy. A mere decade after being catapulted into becoming U.S. citizens, these same Indians were now being challenged to conceive of something that had never existed before, namely a constitution-based tribal government. More to the point, uncertainty arose when tribes, which had for countless generations maintained Indigenous governance customs based on kinship relations, had to somehow adopt a social contract type of organization grounded on a hierarchical distribution of power. That and the fact that many tribes had muddled enrollment rosters, if they had any at all, added to the hesitation about how to even carry out the vote, which was a predicament that the BIA worsened when it arbitrarily decided that those who refrained from voting would nonetheless count as positive votes for accepting the measure. To put things simply, "There was no rhyme nor reason to the sequence of the law as written."[107]

So, then, why did Deloria have such admiration for what Collier achieved? As was often the case when evaluating the impact of federal Indian law, one has to look for the silver lining. More to the point, the 1934 IRA revived the notion that tribes have a right to self-governance, which had been obfuscated under years of assimilation policy. Furthermore, the act stopped the land-allotment process—a point that deserves reiteration—even if it did little to resolve ongoing land disputes. "Not

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only was allotment stopped but the constant necessity of petitioning the Secretary of the Interior to extend the period of trust was remedied by making all lands of IRA tribes, as those who accepted the Act came to be called, indefinite trust lands until changed by Congressional directive."[108] Also important was the fact that the BIA, under Collier's supervision, was supportive of maintaining traditional tribal values, be it in the form of sacred ritual or governing principles, which was a meaningful step away from the previous efforts at demonizing tribal culture in the name of white Christian civilization. "More important, perhaps, for the long-term effect on Indians was the provision legalizing Indian religions on the reservations."[109] Having said that, Deloria was still forced to acknowledge the anemic response from the bureau, which did not show much interest, particularly after Collier was gone, at fulfilling its obligations to tribes. Also, when it came to the Democratic Congress that voted for the legislation, even "Senator [Burton K.] Wheeler [D-MT] had rejected it by 1937 and sought its repeal," which was a development that would turn into a crisis once the Republicans became the majority party in 1947.[110] Wheeler, it should be noted, was one of the principal sponsors of the 1934 IRA—along with Rep. Edgard Howard (D-NE)—that he introduced into the Senate as chair of the Senate Indian Affairs Committee.

In retrospect, Collier's legacy in the struggle for tribal self-determination was seen less in the legislation that passed and more in the bill that did not. More exactly, Deloria argued that Collier's original bill, which was an expression of the Indian commissioner's belief in "ancient Indian values and beliefs," anticipated the Trail of Broken Treaties' "Twenty-Point Position Paper," which was a clear indication to Deloria that the BIA was capable of the kind of reform that Indian protest leaders sought a generation later. Of particular interest to Deloria in this regard was Collier's proposition of a Court of Indian Claims, which, as conceived, addressed the source of much of the conflict between tribes and the federal government, namely treaty disputes over land claims. As for the powers invested in tribes, Deloria responded to the IRA's critics, particularly among Indian activists, who asserted that the statute entailed a lessening of aboriginal sovereignty in exchange for a tribal constitution and government, by pointing out section 16, which affirmed that tribes

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shall continue to possess powers accorded them through existing law, in addition to which a tribal constitution enabled a given tribe to acquire further powers, namely: "To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments." Of course, section 16 was also the same section that directed the secretary of the interior to consult with tribes about the "appropriation estimates" that the Department of the Interior presented to Congress, which included "federal projects" pertinent to tribes.[111]

Although, as Deloria pointed out, the consultation provision was not adequately fulfilled, the principle of self-governance had an effect on subsequent law and policy. As a sign of changing times, Deloria referred once again to the *Toledo* case, in which the Supreme Court determined that Jemez Pueblo had the sovereign power to "forbade Protestant missionaries" from entering the Pueblo. As an example of the exercise of aboriginal sovereignty, coupled with the court's affirmation of this right, Deloria saw this as an endorsement of such rights among all tribes. Even when the federal trust relation was under serious assault during the years 1954 to 1961, "the policy of the government had been supportive of tribal sovereignty and self-government." At the same time, while it was critical that the federal government acknowledged its own laws, such as the IRA, it was not up to either Congress or the Bureau of Indian Affairs to take full advantage of the law with respect to revitalizing Indigenous governance. At this point, tribes had to take charge of their own destiny. Foregoing the opportunity for nation building based on innovative adaptations of traditional customs and values into modern tribal life was an issue with the obsolete attitudes of certain tribal leaders, whose concepts of nationhood were handicapped by hanging on to the past. As Deloria summarized the situation:

> That the fullblood Indians would be unable to take advantage of the provisions of the act was probably a foregone conclusion. Too many of them sought to return to the days of Fort Laramie, forgetting that in

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> the intervening decades the world had changed. *If they believed, with Collier, that customs could be preserved, they should also have realized that new customs had to be devised so that the tribes could survive their encounter with the modern world* [emphasis added].[112]

Indeed, the objective of Deloria's discourse on the Indian Reorganization Act was that it was still as relevant in 1974 as it was in 1934, in particular as a statement of the validity of tribal self-governance, which was now ripe for reform along the lines that Collier drew up in his original draft. On the one hand, Deloria's assertion that Indian affairs was ripe for Collier-like reform was an affirmation that tribal self-determination was an idea whose time had arrived. On the other hand, because of the effects of termination on the Indian collective psyche, it also felt like the federal attitude toward Indians was jarringly returned to pre-Collier years when Indians were systematically treated like indigents. Such are the unpredictable currents of Indian affairs. With regard to the latter, when Helen L. Peterson (Cheyenne/Lakota) took a historical look at assessing the current state of Indian affairs in a 1957 article for the *Annals of the American Academy of Political and Social Science*, she observed: "In 1950, approximately fifteen years after the passage of the [1934] IRA, a general reversal of philosophy, harking back to the days of the [1887] General Allotment Act, began to emerge in the policies and procedures of the Indian Bureau. This is clearly seen in recent efforts to reorient federal responsibility in several ways."[113]

The United States, alas, has never been a nation in which Indians could expect to be treated equally under the law, nor allowed the freedom to live and worship as they pleased, let alone prosper according to their traditional values. On the contrary, despite the 1924 Indian Citizenship Act and the 1934 Indian Reorganization Act, the political status of tribes has been perpetually caught in a federal system that has schizophrenically regarded tribes as simultaneously "wards" and "domestic dependent nations." Consequently, tribes have been constantly either ignored or categorically blocked from pursuing their rights and claims to a duly processed settlement. Was it any surprise that America was abruptly confronted, as of 1969, with droves of angry Indians? Given the United States' megalomaniacal foreign policy, which rationalized its intervention

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into Southeast Asia, not to mention being appalled that any other nation—namely, the Soviet Union—would presume to challenge it for superpower status, it was not shocking that the United States perceived the Indian protest movement as an offence to American hegemony, rather than as a political crisis for which it was responsible to see settled peacefully and justly. How America mistreated Indians has always been an indication of the values at work in its treatment of others, be it domestically or internationally.[114] In light of which, Vietnam was simply the latest chapter in America's history of imperialistic ambitions:

> The Indian wars of the past should rightly be regarded as the first foreign wars of American history. As the United States marched across this continent, it was creating an empire by wars of foreign conquest just as England and France were doing in India and Africa. Certainly the war with Mexico was imperialistic, no more or less than the wars against the Sioux, Apache, Utes, and Yakimas. In every case the goal was identical: land.[115]

Suffice it to say, America has a lot of blood on its hands. With this in mind, if the United States was at all interested in redeeming itself, then it needed to start honoring its commitments, beginning with the hundreds of treaties its own Senate ratified as the law of the land. Additionally, Deloria proposed, Indian land could be restored by transferring control from federal agencies within reservation boundaries, as well as adjacent lands in the public domain.[116] In turn, dozens of unrecognized tribes, many of which were in areas east of the Mississippi, should be recognized by statute, complete with permitting them access to the rights and resources of the 1934 IRA.[117] With regard to land claims, the United States should have considered building upon the principle established with the 1946 Indian Claims Commission.[118] "Perhaps the last reform made by the New Deal philosophy was the Indian Claims Commission. . . . Since the pre–Civil War era Indian tribes had not been given standing to sue the government for violation of treaties and agreements. If a tribe desired to go to court . . . it had to seek Congressional authorization."[119] A mere twelve years after the IRA, Karl E. Mundt (R-SD)[120] stated: "If any Indian tribe can prove that it has been unfairly and dishonorably dealt with by

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the United States it is entitled to recover. This ought to be an example for all the world to follow in its treatment of minorities."[121] Unfortunately, the Indian Claims Commission, similar to the Indian Reorganization Act, was hampered by sectarian politics and the intractable prejudice against tribal rights and sovereignty. Yet, Deloria touted it as a first step—once endorsed by Congress, which it had the power to reaffirm—that needed to be rehabilitated in the next generation, the 1970s, of Indian affairs. Ultimately, as Deloria emphatically argued:

> Cultural and economic imperialism must be relinquished. A new sense of moral values must be inculcated into the American blood stream. American society and the policies of the government must realistically face the moral problems created by the roughshod treatment of various segments of that society. The poverty program[122] only begins to speak of this necessity, the Employment Act of 1946[123] only hinted in this direction. It is now time to jump fully into the problem and solve it once and for all.[124]

Deloria's passionate call for a moral equivalent to war—resolving the problems generated by racism, inequality, and poverty—was a stark counterpoint to the chapter in federal Indian law and policy that followed, which generated the most distressing period in Indian history since the infamous Trail of Tears: termination. As for Deloria's contribution to the discourse on tribal self-determination, his critique of federal Indian law and policy initiated in *Custer* and *Broken Treaties* was more than an enumeration of injustices perpetrated by the United States in its relations with tribes, it demonstrated that what tribes were demanding for themselves, namely to be regarded as sovereign nations, was not only possible within the federal system, but also based on historical precedent, as endorsed by a bevy of statutes and case law. In the end, the claim that tribes are sovereign powers within the definition of the U.S. Constitution and international law was not a pipe dream but an accurate and legal definition of tribes, which, if the federal government was sincere about assisting in its trust obligations, it would be wise to recognize if it does not want its negligence to spark a belligerent response. In that sense, the termination policy that defined nearly two decades of the post–World War II era was a lesson in how not to manage Indian affairs.

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