Reflections on the Quincentenary

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Few events have had as major an impact on world history as Columbus's 1492 voyage of discovery to the "New World." The 1992 quincentenary of this climacterical clash of cultures serves as a pivotal point from which to review the relationship between Indian tribes and the intruding culture that eventually formed the United States, and to look forward to a new era of understanding and cooperation.

For many people around the world, this will be a year to celebrate the accomplishments of a man who was a product of an emerging industrial society, and his discovery of what was to him an unknown hemisphere. This land, however, was not only inhab-
ited when Columbus arrived, but also shared and cultivated by ethnically diverse peoples who had prospered in every region of these vast "new" lands for many thousands of years.

The great cities of Machu Picchu, Tenoshtitlan, Kahokia, and the village cities of the Anasazi reflect industrious and prosperous societies that lived in harmony with Mother Nature, possessing an understanding that humans exist together with, not separate from, the natural world that ensures survival.

It is estimated that more than ten million people, the ancestors of present-day Indian tribes, inhabited North America when Columbus arrived.\(^1\) It is difficult to comprehend the magnitude of the atrocities—intentional, neglectful, or accidental—perpetrated on Indian people by the conquering culture, and later by the very government that assumed responsibility for their protection.

By 1900, the Indian population had dwindled because of imported disease, slavery, forced relocation, and outright genocide, to an estimated 100,000.\(^2\) Today, about two million people are enrolled members of recognized tribes and another ten million Americans claim some Indian ancestry.\(^3\) This revival of our people and traditions gives us cause to rejoice in 1992.

The tidal wave of people and goods that poured into the "new" land during the past five centuries brought a host of ideas and beliefs that were the basis for the way native peoples were perceived and treated by the newcomers. The invading culture viewed the native people as uncivilized innocents in need of religion, strange curiosities suitable for study, or murderous savages threatening settlements and westward expansion.

With the establishment of the federal government a little more than 200 years ago, these perceptions were translated into official policies toward the tribes. From the first, treaties and agreements

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1 See Russell Thornton, American Indian Holocaust and Survival: A Population History Since 1492, at 15-18 (1987). Mr. Thornton has suggested that the pre-Columbus population of the Western Hemisphere may have exceeded 72 million persons, with perhaps more than 2 million of them living in North America. Id. at 42; see also Sharon O'Brien, American Indian Tribal Governments 38 (1989). Ms. O'Brien contends that the population approximated 90 million persons. Id.

2 Thornton, supra note 1, at 42. Mr. Thornton placed the total Native American population in North America at between 125,000 to 150,000 at the turn of the century. Id.

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were negotiated with Indian people, based on earlier British ideas that Indians were "sovereign" peoples who "owned" the lands they used, and that the centralized non-Indian government had both the authority to manage Indian affairs and the power to revoke "title" to those lands under Indian control.

With the ratification of the United States Constitution, the notion that Indian affairs were solely within the jurisdiction of the federal government was adopted. Article I outlined the responsibility of Congress to regulate trade, including that with the Indian tribes. Article II gave authority to the executive branch to negotiate treaties and command troops. United States Presidents exercised both powers in dealing with Indians over the next 100 years.

In 1831, Chief Justice John Marshall defined the unique position of Indian tribes within United States' boundaries, which was not quite the same as that of foreign sovereign nations, but certainly not like that of the states either. Marshall termed the tribes "denominated domestic dependent nations," laying the groundwork for what has come to be known as the "trust relationship" between tribes and the federal government.

Nevertheless, despite some protection granted and maintained under the law, Indian people were generally at the mercy of vague and evolving Indian policies, forced to be bystanders or vic-

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4 U.S. Const. art. I, § 8. "Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes . . . ." Id.
5 U.S. Const. art. II, § 2. The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ." Id.
6 U.S. Const. art. II, § 2. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States . . . ." Id.
7 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Although Chief Justice Marshall opted to recognize Indian sovereignty, he also accepted a dependency relationship: "[T]hey are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." Id.
8 See ROBERT N. CLINTON ET AL., CASES AND MATERIALS ON AMERICAN INDIAN LAW 15 (1991) ("While Chief Justice Marshall's opinion . . . never uses the term, that opinion is the origin in the Supreme Court of an important and controversial notion in Federal Indian law, the federal trusteeship over Indian affairs."); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220-221 (Rennard Strickland et al. eds., 1982) (describing evolution of concept of federal trust responsibility); DAVID H. GETCHES & CHARLES F. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 42-45 (2d ed. 1986) (noting conflicts in early American courts regarding relationship between Indian tribes and federal government).
tims. It is revealing that the first federal agency solely responsible for Indian affairs was established within the War Department.9

During the ensuing years, various administrations promulgated a range of disastrous and ineffective policies upon Indian people. Policies with names like "relocation," "assimilation," "reorganization," and "termination" give credence to the argument that the federal government has not yet developed a consistent, cohesive Indian policy.10 Generally, it cannot even be described as sympathetic or even cognizant of the needs of Indian people and tribes.

Just four years ago, in fact, muddled Indian policy was expressed by the bewildering statements of President Ronald Reagan, who said at a press conference in the Soviet Union that Indians "should come join us and be citizens along with the rest of us,"11 not knowing, apparently, that the Citizenship Act of 1924 made "all non-citizen Indians born within the territorial limits of the United States" citizens.12 Reagan also told inquiring Soviets that "maybe we shouldn't have humored [Indians] by letting them stay in that primitive lifestyle,"13 referring to the reservations to which Indian people were forcibly removed in the nineteenth century.

It was only after much debate that the Indian people finally won citizenship. The forced assimilation policies of the preceding 50 years, which had resulted in more than 100 million acres of Indian lands losing their federal trust status, were terminated and replaced with the Indian Reorganization Act of 1934.14 This Act finally provided for the establishment of democratic tribal governments and authorized new reservations.

Only in the past thirty years has the federal government come

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9 Clinton et al., supra note 8, at 205. "The Bureau of Indian Affairs began as part of the War Department in 1824. In 1849 Congress transferred the Bureau to the Department of the Interior." Id. The annual budget of the Bureau is approximately one billion dollars. Id.

10 Getches & Wilkinson, supra note 8, at 148.


12 8 U.S.C. § 1401(b) (1987). This act conferred citizenship on Indians who had not become citizens under prior acts, such as the Dawes Act or the General Allotment Act. By virtue of the Fourteenth Amendment, this grant of federal citizenship also made Indians citizens of their states of residence.

13 Press Conference, supra note 11.

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around to recognizing the sovereignty that Indian tribes inherently possess. Now, we are using the term "Indian nation," which implies a separate, independent, and autonomous entity.

It is my belief that the Civil Rights movement of the 1960s allowed Indian tribes to get their foot in the door and establish aspects of sovereignty. In 1968, President Johnson delivered a special message to Congress entitled *The Forgotten Americans*. This was the first special message any President presented to Congress solely on Indian affairs. In 1970, continuing this trend, President Nixon, in his State of the Union Address, issued a statement now regarded as the foundation of the current federal Indian policy of "self-determination."16

During that time, with the help of the Supreme Court of the United States, Indian tribes were able to establish precedent-setting cases that provided them with greater sovereignty.17 In the past, the Supreme Court delivered opinions in favor of Indian tribes, but I fear this was a reflection of the lack of statutory provisions allowing tribes to continue their quest for sovereignty, leaving the judicial system as their only alternative. The effect of an increasingly conservative Court on future cases can only be guessed at, but it is expected to bode ill for tribes.

Self-determination for tribes—in terms of economic and resource development directed by and for the tribes—continues to be the agenda pursued by Indian tribes and the federal government. The trustee relationship of the federal government and the tribes must continue as well, but with greater diligence and sincerity than past administrations have exhibited. The key is good faith moral conviction and a desire to negotiate equitably with Indian tribes.

Tribes such as the Utes in my district in Colorado and their recent settlement of water rights claims provide a good example. Having been given the rights to a huge land area and dozens of

16 See *Getches & Wilkinson*, *supra* note 8, at 151.
17 Id. at 151-153.
streams and rivers in Western Colorado in an 1868 treaty, the Utes would have had good standing in court to claim much land and water that is presently being used to support agriculture, mining, ranching, and a large tourist trade of their non-Indian neighbors.18

In the arid Southwest, water is like gold. Nevertheless, the Utes chose to negotiate—with the states, water districts, the federal land managers, and municipalities. They decided to give up their legitimate water claims in exchange for getting real, wet, water delivered to reservations where the tribe has been hauling water in wagons and trucks to the people for more than 100 years.

Tribal leaders struck a deal, and some people criticized them for giving up too much. But these criticisms smack of the old paternalistic attitude that Indian people are too unsophisticated and ignorant to make decisions for themselves. I do not buy that.

On the other hand, so-called “self-determination” cannot work as intended as long as some tribes are so desperate—for jobs, for social programs, for any crumb from a prosperous nation—that they negotiate from a position of weakness. I am angered, for example, when I see the Department of Energy decide that of nineteen potential sites for nuclear waste disposal, seventeen are on Indian lands.

The federal government should redouble its efforts to settle outstanding aboriginal land and water claims in the spirit of cooperation and trust shown by the Utes. In that way, the tribes and the government can proceed with the pressing domestic ills which continue to plague Indian people to a much greater degree than society as a whole.

“They say they know what is good for us . . . but they know not what they do.” Chief Seattle, eloquent leader of the Suquamish and Duwamish Tribes of the Pacific Northwest, provides sage advice as we encourage tribes to pursue self-determination while avoiding paternalistic tendencies and maintaining the special trust relationship between the tribes and the government.