TRIBAL SELF-DETERMINATION AND ENVIRONMENTAL FEDERALISM: CULTURAL VALUES AS A FORCE FOR SUSTAINABILITY

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> Coyote was going along and he saw a rock rolling down the hill. It rolled down toward some deer and they jumped. Coyote wondered who was rolling stones and looked up at the top of the hill. Another stone came rolling down past Coyote toward the deer and the deer jumped again. Then a third stone came down and the deer jumped only a little. They knew it was only a stone.[1]

Can the law transform the concept of "sustainable development" from a slogan regarded by many as an oxymoron into a real life strategy for reversing the global trends of environmental degradation and pollution? Is unsustainable development really the result of regulatory failure? Does environmental federalism really hold some of the keys, as Professor Daniel Esty argues,[2] for transforming sustainable development into the norm rather than the exception?

My assigned role in this symposium was to comment on Professor Esty's paper. While some who listened to my speech might have wondered if I had even read Professor Esty's paper, I was in fact commenting on it. I was talking about something very important that he omitted—the roles of Indian tribal governments in making environmental federalism work. The scope of this Article is limited to addressing that omission. While the territory of how Indian tribal governments and other indigenous peoples can contribute to the quest for sustainable development is much broader than the topic of how tribes fit into environmental federalism, and while I am tempted to do some hunting and gathering in that territory,[3] I have focused on my assigned task.

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1. BARRY LOPEZ, GIVING BIRTH TO THUNDER, SLEEPING WITH HIS DAUGHTER: COYOTE BUILDS NORTH AMERICA 116 (1977) (providing a collection of coyote stories, including "Coyote Imitates Mountain Lion," a story attributed to the Jicarilla Apache Tribe).

2. Daniel C. Esty, *Sustainable Development and Environmental Federalism*, 3 WIDENER L. SYMP. J. 213 (1998).

3. *See also* Dean B. Suagee, *Self-Determination for Indigenous Peoples at the Dawn of the Solar Age*, 25 U. MICH. J.L. REFORM 671, 743-47 (1992) (suggesting some options for the creative use of tribal sovereignty to promote the widespread use of solar energy and other appropriately scaled renewable energy systems). *See generally* DR. DARREL A. POSEY & GRAHAM DUTFIELD, INDIGENOUS PEOPLES AND SUSTAINABILITY: CASES AND ACTIONS (1997) (explaining the value and importance of indigenous peoples in national and other strategies for sustainable development). Advocates of sustainable development should be aware that chapter 26 of *Agenda 21* is captioned "Recognizing and Strengthening the Role of

In general, I agree with Professor Esty's assessment of the benefits that result from having "multiple levels of environmental authorities," such as the opportunity to make the scale of regulation fit the scale of the problem being addressed and the emergence of checks and balances against favoritism for powerful economic interests.[4] Within these "multiple levels," I think Indian tribal governments have extremely important work to do: performing leading roles, supporting roles, and character roles.

Professor Esty is joined by many who ignore the roles of tribal governments in making environmental federalism work. While the literature on tribal roles in protecting the environment is growing, much of what has been published is the work of scholars and practitioners whose primary expertise is in the field of federal Indian law.[5] The more generalized literature on environmental law provides numerous examples of ignorance or misunderstandings of the actual and potential roles of tribal governments.[6]

Indigenous People and their Communities." *United Nations Conference on Environment and Development, Agenda 21*, U.N. Doc. A/CONF.151/26 (1992), *reprinted in* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 204-07 (1996). *See also* Dean B. Suagee, *Renewable Energy in Indian Country: Options for Tribal Governments* (Renewable Energy Policy Project , Washington, D.C.), June 1998.

4. Esty, *supra* note 2, at 225-27. By expressing general agreement with Professor Esty on this point, which I think is the main thrust of his article, I do not mean to suggest that I agree with him on other points which I have not addressed in this article. For example, I do not agree with his statement: "*Unsustainability* should be defined as a circumstance in which the private and social costs of an activity (fully tabulated across space and over time) exceed the (comprehensively considered) benefits." *Id.* at 214. I believe that unsustainability should be defined with reference to the ecological concept of carrying capacity rather than with reference to the economic concept of cost-benefit analysis. I believe that some very important factors exist which are meaningless to express in quantities measured in monetary terms.

5. At least two symposium issues of law journals have been devoted to Indian Country environmental and natural resources law. *See* Symposium, *Indian Law Symposium*, 71 N.D. L. REV. 273 (1995); Symposium, *Stewards of the Land: Indian Tribes, the Environment, and the Law*, 21 VT. L. REV. 1 (1996). For most of the authors, Indian law is a primary focus of their teaching or practice.

6. The 1996 Annual Meeting of the American Association of Law Schools featured a panel on Environmental Law in Indian Country, for which I served as a panelist. 1996 Annual Meeting of the American Association of Law Schools, Panel discussion on Environmental Law in Indian Country, San Antonio, Tex. (Jan. 4-5, 1996). In preparing for this panel, I reviewed two of the leading reference works on environmental law, DANIEL R. MANDELKER, NEPA LAW AND LITIGATION (1992), and WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW (2d ed. 1994). As I said during the panel discussion, if I had the time to write a paper for that conference, it would have been entitled "Indian Law in the Literature of Environmental Law: Omissions, Ellipses and Misleading Parentheticals." Since the panel was focused on the Clean Water Act, I pointed out that the chapter on the Clean Water Act in the Rodgers hornbook mentions Indian tribes exactly twice and does not even mention the statutory authorization for tribes to become treated like states for purposes of administering regulatory programs. *See*

In the real world, many tribal governments are working hard to build environmental regulatory programs, but they are encountering a great deal of resistance. Their efforts are being undercut by the United States Supreme Court's result-oriented judicial activism[7] and by the always precarious relationship between tribes and Congress.[8] As Professor David Getches has noted, while the right of tribal self-government "has always been vulnerable to abrogation by acts of Congress. . . . [T]he courts have generally served as the conscience of federal Indian law, protecting tribal powers and rights at least against state action . . . ."[9] With the Supreme Court abandoning this traditional role, will one of the other branches of the federal government take it on? Can we realistically hope that Congress or the Executive Branch will be guided by their conscience in their dealings with Indian tribes?[10] I think the answer depends on the will of the American people.

RODGERS, *supra*, at ch. 4; *see also* Symposium, *Environmental Federalism*, 54 MD. L. REV. 1141 (1995). A computerized search of this symposium issue reveals that four of the 12 articles include at least one reference to Indian tribes, and that none of the articles discusses the potential roles of tribal governments in environmental federalism. *See* Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1517 n.4 (noting that Indian tribes have sovereignty but stating that the article focuses on the federal government's relationship with states rather than with tribes); *Id.* at 1547 n.124 (passing reference to tribal governments in footnote discussion of Unfunded Mandates Reform Act of 1995); Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1300 n.410 (quoting from federal regulations and a White House document, both of which mention tribal governments); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1176-77 n.168 (1995) (discussing in a footnote the Unfunded Mandates Reform Act of 1995 with passing reference to "state, local, or tribal law"); A. Dan Tarlock, *Biodiversity Federalism*, 54 MD. L. REV. 1315, 1335 (discussing role of Indian tribes in the Northwest Power Planning and Conservation Act of 1980).

7. *See infra* notes 61-63 and accompanying text.

8. Congress is said to have "plenary power" over Indian affairs. *See* FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 207-28 (Rennard Strickland et al. eds., 3d ed. 1982). Despite this power, Indian tribes have no structural representation in Congress. Throughout American history, the extent to which individual members of Congress have acted honorably toward Indian tribes has varied greatly. For a discussion of how tribal governments fit within the federalist system of the United States, *see* Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994).

9. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1573-74 (1996).

10. In the 104th Congress and the 105th Congress, we have seen many examples of proposed legislation that demonstrates a lack of commitment to tribal self-government and/or either a lack of understanding of basic principles of federal Indian law or a rejection of these basic principles. Many of my fellow partisans in the ongoing struggle for tribal self-determination probably would regard my posing this question to be an admission of irredeemable naiveté on my part.

In this article, I want to raise a few questions. First, why is it that this judicial assault on tribal self-determination has only received attention from tribal attorneys and a handful of legal scholars, and has been largely ignored by the larger American society? Second, does the legal education establishment bear some responsibility for this development? Third, does environmental federalism offer a way to hold off the assault and help us (the American people) move toward widespread acceptance of the permanence of tribal governments as the third type of sovereign in our federal system?

I will not attempt to answer the first question, but I hope readers find themselves reflecting on the problem. The answer to the second question is obviously "Yes," followed by a not so obvious question, "but what should be done about it?" I hope readers find themselves thinking about this one as well. Lastly, my answer to the third question is "I hope so." I will return to this question later in the article.

I. TRIBAL SOVEREIGNTY AND ENVIRONMENTAL FEDERALISM

> The next moment another stone came by Coyote. But this was a soft rock. It was Mountain Lion who had rolled himself up like a rock and was rolling down the hill. 'What a funny rock,' thought Coyote. 'It doesn't make any noise when it rolls.'[11]

The term "environmental federalism" is an apt description of environmental law as it has evolved in the United States.[12] Federal laws establish the basic framework for protecting and restoring the quality of air and water, managing wastes, dealing with hazardous materials, and a range of other subjects. While states are required to perform certain functions within the framework of these federal laws, they have the option to perform other functions pursuant to delegations of authority from the federal Environmental Protection Agency (EPA).[13] States also have the option, through the exercise of their sovereignty, to enact and implement laws that concentrate on aspects of environmental protection that are not covered by federal law.

In the 1970s, Congress enacted a host of environmental statutes, most of which either ignored Indian tribes altogether or barely mentioned them.[14] Anyone familiar with the basic principles of federal Indian law could have predicted that this lack of attention to Indian Country from a federalist approach would result in regulatory gaps. In 1984, the EPA acted to rectify

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11. LOPEZ, *supra* note 1, at 116.

12. *See generally* Percival, *supra* note 6 (analyzing how environmental protection responsibilities should be divided between federal, state, and local governments).

13. *Id.* at 1160-63.

14. *See* Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59, 79 (1994).

the omission of tribes from environmental federalism by adopting a "Policy for the Administration of Environmental Programs on Indian Reservations."[15] Through this policy, the EPA recognized tribal governments as sovereign entities that are "the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations."[16] Eventually, Congress began to incorporate tribes into the statutory framework by amending several of the main environmental statutes to authorize Indian tribes to be treated like states.[17] These statutes include the Safe Drinking Water Act,[18] Clean Water Act,[19] Comprehensive Environmental Response, Compensation and Liability Act,[20] Clean Air Act,[21] and National Historic Preservation Act.[22] Two of the main federal environmental statutes that have yet to include appropriate tribal provisions are the Resource Conservation and Recovery Act[23] and the Endangered Species Act.[24]

When tribal governments become engaged in environmental federalism, they do not act exactly like state governments. Perhaps the most significant distinction between the two is that tribal policy decisions tend to reflect tribal

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15. Environmental Protection Agency, *EPA Policy for the Administration of Environmental Programs on Indian Reservations* Nov. 8, 1984. Environmental Protection Agency, *EPA Policy for the Administration of Environmental Programs on Indian Reservations* <http://www.epa.gov/owindian/84ndn.html> (last modified June 9, 1997).

16. *Id.*

17. *See generally* David F. Coursen, *Tribes As States: Indian Tribal Authority to Regulate and Enforce Federal Environmental Law and Regulations*, 23 ENVTL. L. REP. 10579 (1993) (reviewing environmental statutes that treat tribes as states and the legal issues that arise when tribes are treated like states).

18. 42 U.S.C. § 300j-11 (1994).

19. 33 U.S.C. § 1377 (1994).

20. 42 U.S.C. § 9626 (1994).

21. 42 U.S.C. § 7601(d) (1994).

22. 16 U.S.C. § 470 a(d)(2) (1994).

23. 42 U.S.C. §§ 6901-6992(k) (1994). For a discussion of the regulatory gaps in the application of RCRA in Indian country, *see* Dean B. Suagee, *Turtle's War Party: An Indian Allegory on Environmental Justice*, 9 J. ENVTL. L. & LITIG. 461, 473-79 (1994) [hereinafter Suagee, *Turtle's War Party*].

24. 16 U.S.C. §§ 1531-1544 (1994). On June 5, 1997, the Secretary of the Interior and the Secretary of Commerce jointly issued a Secretarial Order. This Order outlines the Departments' responsibilities to tribes when acting under the authority of the Endangered Species Act. Secretary of the Interior and the Secretary of Commerce, Secretarial Order, *American Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997). *See also* Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 Wash. L. Rev. 1063, 1089-1107 (1997)(reprinting the text of the Secretarial Order as an addendum).

cultural values.[25] Tribal cultures are deeply rooted in the natural world; therefore, protecting the land and its biological communities tends to be a prerequisite for cultural survival. While tribal officials tend to have a wide range of reasons for developing environmental regulatory programs, the survival of tribal culture is usually one of the main reasons. From personal experience, I know that for a great many of the dedicated tribal members who work to build environmental programs as tribal employees, the survival of tribal cultures is a driving force in their work and their lives.

Much has been written about whether or not tribal cultures embody values that can be described as environmental ethics; or to frame the inquiry in the past tense, whether or not the cultural values and practices of tribal peoples enabled them to provide for human needs and wants without causing irreparable damage to their environments.[26] Professor Rebecca Tsosie recently reviewed a substantial amount of literature on this topic and concluded, after raising the usual cautions about generalizations, that for most indigenous cultures of North America, traditional Indian world views can be described as having several common aspects, which she describes as:

> A perception of the earth as an animate being; a belief that humans are in a kinship system with other living things; a perception of the land as essential to the identity of the people; and a concept of reciprocity and balance that extends to relationships among humans, including future generations, and between humans and the natural world.[27]

A flowering of environmental regulatory programs that reflect tribal cultural values could prove to be a very good thing for the American environment and for the American people. In my view, the idea that humans have responsibilities to future generations and to nonhuman living things is an idea that must gain wide acceptance if we are to have any hope of achieving sustainability. Among people whose values are rooted in tribal cultures, that humans have such responsibilities is axiomatic.

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25. *See generally* Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 275 (1996) (discussing tribal environmental decisionmaking in light of ethical, scientific, and economic forces).

26. *See generally* J. Baird Callicott, *American Indian Land Wisdom, in* THE STRUGGLE FOR THE LAND: INDIGENOUS INSIGHT AND INDUSTRIAL EMPIRE IN THE SEMIARID WORLD 255 (Paul A. Olson ed., 1990) (discussing several works, mainly in the academic literature, arguing that tribal cultures either did or did not practice what might be called environmental conservation).

27. Tsosie, *supra* note 25, at 276 (citing Ronald L. Trosper, *Traditional American Indian Economic Policy*, 19 AM. INDIAN CULTURE & RES. J. 65, 67 (1995)); *see also* Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 160-67 (1996) [hereinafter Suagee, *Tribal Voices*].

In addition to taking on roles like those of the states, tribal governments can also perform a range of roles that are uniquely appropriate for them, including some roles that are not circumscribed by the limits of their territorial jurisdiction. Some statutes establish tribal rights on federal public lands. Under other statutes, tribal rights can be brought into play because of federal agency action regardless of the ownership status of the land that may be affected. The best examples of such statutes are the cultural resource statutes: the National Historic Preservation Act (NHPA),[28] the Archaeological Resources Protection Act (ARPA),[29] and the Native American Graves Protection and Repatriation Act (NAGPRA).[30] Since I have discussed these statutes in detail in other publications, I offer only very brief comments here.[31] The NHPA provides a mechanism that can be used to provide a measure of protection for places that are sacred for tribal cultures. Under the NHPA, when a federal undertaking would affect a place that is eligible for, or listed on, the National Register of Historic Places and a tribe regards that place as holding religious and cultural importance, the tribe then has the right to participate in the consultation process established under NHPA Section 106.[32] Moreover, under the ARPA and the NAGPRA, a tribe has the right to be consulted before a permit is issued to excavate archaeological resources and/or human remains on federal public lands, and any culturally affiliated human remains or "cultural items" (as defined in NAGPRA) are treated as belonging to the tribe.[33]

These cultural resources statutes can be used by tribes to bring tribal cultural values into federal agency decision-making. Tribal representatives can do this in a direct way by using concepts that are familiar to agency staff, for example, by providing or helping to produce documentation on ethnobotanical practices or ethnography. Tribal representatives may also express their concerns in ways that are less familiar to people whose educations are based in western science or academic disciplines such as economics and public administration, for example, by sharing portions of stories that have been handed down for countless generations. Either way,

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28. 16 U.S.C. §§ 470-470x-6 (1994).

29. 16 U.S.C. §§ 470aa-470ll (1994).

30. 25 U.S.C. §§ 3001-3013 (1994).

31. *See* Suagee, *Tribal Voices*, *supra* note 27.

32. 16 U.S.C. §§ 470a(d)(6)(A), 470(f). The basic consultation process requires a federal agency to consult with any tribe that attaches religious and cultural significance to a property and to try to fashion ways to avoid or mitigate any adverse effects of the proposed undertaking. *Id.; see* Suagee, *Tribal Voices*, *supra* note 27, at 170-74, 185-86. As of the press deadline for this Article, regulations promulgated by the Advisory Council on Historic Preservation governing the section 106 consultation process, 36 C.F.R. pt. 800 (1996), had not yet been revised to carry out the 1992 amendments.

33. 16 U.S.C. § 470(cc) (1994); 25 U.S.C. § 3002(c) (1994); *see* Suagee, *Tribal Voices*, *supra* note 27, at 199-200, 206-09.

concerns raised by tribal representatives may present difficulties to federal agency staff who try to fit everything into a cost-benefit analysis. I think that having to face such difficulties is beneficial because in many cases unquantifiable value judgments matter more than the monetary values that are assigned to competing interests.

In addition to influencing federal agency decisions, federal statutory law also authorizes Indian tribes to administer federal programs on federal public lands that are also ancestral tribal lands. The Self-Governance Act of 1994[34] gives the Secretary of the Interior discretion to enter into annual funding agreements (AFAs) with Indian tribes to administer "programs, services, functions, and activities" (programs) currently performed by Department of Interior (DOI) agencies.[35] Under section 403(c) of the Act, a tribe may request AFA negotiation for any DOI programs that are of "special geographical, historical, or cultural significance" to the tribe.[36] The Act could result in tribal governments managing or performing major roles in the management of substantial areas of public lands. The Self-Governance Act is new; therefore, it is too soon to predict how extensive tribal roles in managing federal lands will be in the coming years.[37] The potential, however, for changes in federal land management resulting from infusions of tribal cultural values under the Self-Governance Act is profound.

II. TRIBAL ENVIRONMENTAL PROGRAMS AS SELF-DETERMINATION

> Mountain Lion rolled right up to the deer who were not suspicious of the rolling rocks by this time. Then Coyote saw Mountain Lion get up, jump on a big deer and kill it. Mountain Lion picked up the deer and carried it up to a cliff where he could eat it and see the country all around. The rest of the deer ran off around the hill.[38]

The tribes' efforts to use their governmental authority to protect the environment so that present and future generations can carry on tribal cultural traditions can be described as acts of self-determination. In the domestic law of the United States, the term "self-determination" has been used to describe the federal government's current policy toward Indian tribes, a

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34. The Tribal Self-Governance Act of 1994, Pub. L. 103-413, 108 Stat. 4250 (amending 25 U.S.C. §§ 450-458 (hh) (1994)).

35. 25 U.S.C. § 458 (cc)-(b)(1) (1994).

36. 25 U.S.C. § 458 (cc)-(c).

37. The Secretary of the Interior published a notice listing programs that are eligible. *See* List of Programs Eligible for Inclusion in Fiscal Year 1998 Annual Funding Agreements to be Negotiated with Self-Goverance Tribes by Interior Bureaus Other than the Bureau of Indian Affairs, 62 Fed. Reg. 23, 257-23, 261 (1997).

38. LOPEZ, *supra* note 1, at 116.

policy that has been in effect for about three decades.[39] This policy takes its name from the Indian Self-Determination and Education Assistance Act of 1975 (Self-Determination Act).[40] Under the Self-Determination Act, tribes have the right to take over programs that would otherwise be administered for their benefit by the Bureau of Indian Affairs (BIA) or the Indian Health Service (IHS). Tribes now have more than two decades of experience in running BIA and IHS programs. Congress has enacted amendments to the Act on several occasions that generally support tribal governments in their efforts to make federal programs for Indian communities more responsive to priorities set by the tribes themselves.[41] The tribal provisions in federal environmental statutes discussed earlier can be seen as giving the EPA an express mandate to carry out its programs in a way consistent with the policy of tribal self-determination.[42] The cultural resources statutes give a similar type of mandate to both the Advisory Council on Historic Preservation and the National Park Service.

As used in international law, the term self-determination means something more than it does in U.S. domestic law. In international law, the term describes a principle enshrined in the United Nations Charter[43] and other international legal instruments.[44] For example, the International Covenant on Civil and Political Rights proclaims that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[45] Although self-determination is widely acknowledged to be a "principle of the highest order within the contemporary international system,"[46] no consensus exists on what it means or which groups are entitled to exercise it, that is, which groups are "peoples." As described by Professor James Anaya, self-determination is "a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies."[47]

Over the last two decades, indigenous peoples from around the world have worked to gain recognition of their human rights under international law,

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39. *See* COHEN, *supra* note 8, at 180-206.

40. 25 U.S.C. §§ 450-450(n), 458-458(hh) (1994).

41. Pub. L. No. 100-472; Pub. L. No. 103-413.

42. *See* Tsosie, *supra* note 25, at 228-35.

43. U.N. CHARTER art. 1, para. 3.

44. *See* ANAYA, *supra* note 3, at 75-96.

45. *International Covenant on Civil and Political Rights*, Dec. 19, 1966, art. 1 (1), 999 U.N.T.S. 171, 173, 6 I.L.M. 368 (1967). Adopted by the General Assembly of the United Nations on December 19, 1966 and entered effective on March 23, 1976. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

46. ANAYA, *supra* note 3, at 75.

47. *Id.*

including the right of self-determination.[48] Within the United Nations' system, a draft Declaration of the Rights of Indigenous Peoples is now under consideration by the Human Rights Commission.[49] Article 3 of this draft Declaration proclaims: "[i]ndigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[50] Many national governments around the world, however, have resisted the recognition of a human rights norm that explicitly recognizes the concept that indigenous peoples have the right to self-determination, especially if self-determination is understood to include the right to become an independent country.[51] As Professor Anaya has explained, however, the right of self-determination does not necessarily include the right to become an independent country.[52] In his opinion, self-determination has both substantive aspects and remedial aspects. The substantive aspects can be further broken down into two component parts:

> First, in what may be called its *constitutive* aspect, self-determination requires that the governing institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed. Second, in what may be called its *ongoing* aspect, self-determination requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis.[53]

When a people has been deprived of the substantive aspects of self-determination, deprivation establishes the need for a remedy. In the context of decolonization, the remedy provided by the international community has generally included the right to become an independent country. In the context of indigenous peoples, however, this may not be the most appropriate remedy. Rather, an indigenous people might choose from a variety of

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48. *See id.* at 45-58.

49. *Id.* at 51-53. *See generally* Dean B. Suagee, *Human Rights of Indigenous Peoples: Will the United States Rise to the Occasion?*, 21 AM. INDIAN L. REV. 365 (1997) [hereinafter Suagee, *Human Rights of Indigenous Peoples*] (reflecting on recent developments in the rights of indigenous peoples).

50. *United Nations Declaration on the Rights of Indigenous Peoples*, U.N. Subcommission on the Prevention of Discrimination and Protections of Minorities, 11th Sess., at 105, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994), *reprinted in* ANAYA, *supra* note 3, at 207.

51. *See* Steven M. Tullberg, *Indigenous Peoples, Self-Determination and the Unfounded Fear of Secession*, INDIGENOUS AFFAIRS, Jan./Feb./Mar. 1995, at 11; *see also* Dr. Erica-Irene A. Daes, *Equality of Indigenous Peoples under the Auspices of the United Nations-Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493, 498 (1995); Suagee, *Human Rights of Indigenous Peoples*, *supra* note 49, at 380-81.

52. ANAYA, *supra* note 3, at 84-85.

53. *Id.* at 81.

arrangements other than independent statehood and, if the ongoing aspects of the arrangement work, it would be meaningful self-determination. There may well be cases in which independent statehood would be an appropriate remedy, but because this remedy is not a generally available right,[54] it would be far more productive for the states of the world to focus on the substantive aspects of self-determination for indigenous peoples than to take a hardline position opposing any regognition of the right at all.

The draft United Nations Declaration includes several articles that elaborate on the content of self-determination for indigenous peoples. One article that is particularly relevant for purposes of this paper is Article 31 which provides:

> Indigenous peoples, as a specific form of exercising their right of self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.[55]

Article 31 is cited to stress that, for indigenous peoples including Indian tribes, land and resource management and environmental protection have been recognized as part of the right of self-determination. This should be obvious because, as noted earlier, tribal cultures are rooted in the natural world.[56] Tribal cultures are dynamic and should not be expected to be locked in their historic manifestations, but to be able to maintain their identities as distinct peoples, these cultures still need their roots in the natural world.

III. REALITY CHECK

> Coyote thought this would be a good way to get deer. He rolled a stone down the hill to where the deer were and they jumped. He rolled another stone and they did not jump as far. When he rolled the third stone they only looked around to see that it was just another stone. Then Coyote rolled himself up in a ball like Mountain Lion and rolled down the hill. When he got there he jumped up and tried to get a deer but he couldn't. He was too dizzy. He just fell over and the deer ran away.[57]

Several tribes that have met the challenges of performing state-like roles have seen lawsuits filed by states and cities against the EPA challenging its

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54. *Id.* at 84-85.

55. *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 50, at art. 31, *reprinted in* ANAYA, *supra* note 3, at 214.

56. *See supra* notes 25-27 and accompanying text..

57. LOPEZ, *supra* note 1, at 116-17.

decisions to approve tribal programs.[58] In the context of water quality, opposition to tribal authority has included efforts to rewrite the Clean Water Act to limit the territorial authority of tribes.[59]

The opposition to tribal regulatory authority features a kind of argument unique to Indian country, an argument that does not seem to arise in any other environmental federalism context. Non-Indians who live within reservation boundaries (and states on behalf of such people) argue that because they have no right to representation in tribal government, they should not be subject to tribal law. This argument has some resonance. It is an argument that can be framed as a matter of human rights and not just an argument based on the fear of being treated unfairly by a government in which one has no voice.[60] One logical conclusion of this argument is that the state should have the authority to act on behalf of those reservation residents who have no right to participate in tribal government.

Those of us who are dedicated to preserving tribal sovereignty will surely oppose this conclusion and argue that other methods exist to deal with the underlying concerns. We cannot afford to ignore this line of reasoning though, because quite a few members of Congress have shown their receptiveness to this reasoning. In addition, the Supreme Court's Indian law jurisprudence of the last two decades has created some new law that can be used to serve the purposes of those who seek to restrict tribal sovereignty. The remainder of this article offers a few comments on the Supreme Court's recent Indian law jurisprudence.

Over the last two decades, several members of the U.S. Supreme Court have carried on a campaign of judicial activism in an effort to revive the assimilationist federal Indian policy that Congress repudiated in 1934.[61] As Professor Joseph William Singer has said, "the conquest of American Indian

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58. *See* City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996); Montana v. United States Environmental Protection Agency, 941 F. Supp. 945 (D. Mont. 1996), 137 F.3d 1135 (9th Cir. 1998).

59. *See* H.R. 961, 104th Cong. (1995). To review the proceedings and debates, see 141 Cong. Rec. H4959, 5012 (1995); Suagee, *Turtle's War Party*, *supra* note 23, at 488-89 n. 78.

60. *See* Dean B. Suagee, *Clean Water and Human Rights in Indian Country*, NAT. RESOURCES & ENV'T, Fall 1996, at 46 [hereinafter Suagee, *Clean Water and Human Rights in Indian Country*]. The right to participate in government is enshrined in Article 25 of the International Covenant on Civil and Political Rights. *See* International Covenant on Civil and Political Rights, *supra* note 45, at 179. One can also make a human rights counter argument. *See infra* note 81 and accompanying text.

61. *See generally* Getches, *supra* note 9, at 1573, 1630-54 (discussing and reviewing the individual Supreme Court Justices' policies toward Indian law); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (discussing recent Supreme Court decisions interpreting allotment era statutes); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991) (reflecting on the property rights of Indians and non-Indians in light of Supreme Court decisions involving property rights and sovereignty).

nations continues, waged by the Supreme Court of the United States."[62] Professor David Getches has explained how, over the course of the past two decades:

> Without explicitly overruling precedent, the current Court has failed to reconcile results with foundation principles [of federal Indian law] long adhered to by the Supreme Court itself, principles that generally require congressional action to limit tribal sovereignty. In at least seventeen decisions since 1980, the Supreme Court has marked out the boundaries of Indian self-government, arguably pursuing its own notion of what is desirable instead of being disciplined by established tests and rules. These cases have ignored guidelines for construing treaties, which were designed, after all, to make reservations permanent enclaves where Indians could exist relatively free of non-Indian control.[63]

One of the basic rules of the Court's new subjectivism provides that, based on the Court's readings of indicators of the understandings of the three branches of the federal government, Indian tribes may lose aspects of their original sovereignty through implicit divestiture.[64] This rule was announced in 1978 in Justice Rehnquist's opinion in *Oliphant v. Suquamish Indian Tribe*.[65] Prior to this decision, one of the foundation principles of federal Indian law provided that tribes could be divested of certain aspects of their original sovereignty through either treaties or acts of Congress.[66] Applying this principle, however, would have required the Court to affirm the Ninth Circuit decision in *Oliphant*,[67] which upheld tribal court misdemeanor criminal jurisdiction over non-Indians. In *Oliphant*, the Ninth Circuit exercised judicial restraint by upholding tribal jurisdiction and saying that the defendant's argument challenging the fairness of the trial in tribal court could be challenged pursuant to the Indian Civil Rights Act.[68] The Supreme Court created a new rule that enabled it to decide that the tribal court did not even have jurisdiction to put the defendants on trial.

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62. Singer, *supra* note 61, at 46.

63. Getches, *supra* note 9, at 1594-95 (footnotes omitted).

64. *See* Getches, *supra* note 9, at 1595-97. *See generally* N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994) [hereinafter Duthu, *Implicit Divesture of Tribal Powers*] (discussing the loss of inherent tribal sovereignty).

65. 435 U.S. 191 (1978).

66. Duthu, *Implicit Divesture of Tribal Powers*, *supra* note 64, at 366; Getches, *supra* note 9, at 1595-99.

67. Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976).

68. *Id.* at 1011-12; *see* Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1994). Under the Indian Civil Rights Act, tribal courts may not impose criminal penalties in excess of $5,000 and/or one year imprisonment. *Id.* Accordingly, felony criminal jurisdiction was not an issue in *Oliphant*. *See Oliphant*, 544 F.2d 1007.

Although originally applied to divest tribes of misdemeanor criminal jurisdiction over non-Indians, the implicit divestiture rule has been applied with a vengeance in the civil regulatory context. In 1981, in *Montana v. United States*,[69] the Supreme Court used the new implicit divestiture rule to hold that the Crow Tribe had been divested of its authority to regulate hunting and fishing by non-Indians on lands within the Crow Reservation owned in fee by non-Indians. In reaching this result, the Court stated a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[70] To reconcile this proposition with other decisions that upheld tribal jurisdiction over non-Indians, the Court acknowledged two exceptions, stating that tribes do retain some forms of civil jurisdiction over non-Indians, including activities on fee lands owned by non-Indians. In *Montana*, the Court stated the two exceptions as follows: "A tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members . . . . A tribe may also retain inherent power . . . when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[71]

As other writers have explained, in declaring this new proposition, the Court resurrected the policy of the allotment era in federal relations with tribes.[72] This policy sought to force Indians to give up their distinct cultures and become assimilated into the larger American society. As I have explained in other publications,[73] the federal policy of the allotment era should be frankly acknowledged as cultural genocide, in part because the principal mechanism of that era—taking tribal landholdings from tribal ownership and dividing the land among individual tribal members—attacked a core tribal cultural value.

As other writers have shown, when the Court has applied the *Montana* general proposition and exceptions, it has shown great solicitude for the expectations of non-Indians who acquired land within reservation boundaries through the workings of allotment era laws.[74] Meanwhile, the Court has shown virtually no consideration at all for the expectations of tribal leaders

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69. 450 U.S. 544 (1981).

70. *Id.* at 565.

71. *Id.* at 565-66.

72. Getches, *supra* note 9, at 1622-26; Royster, *supra* note 61, at 20.

73. *See* Suagee, *Tribal Voices*, *supra* note 27, at 153-57.

74. For other writers, discussions on the *Montana* decision, see N. Bruce Duthu, *The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict*, 21 VT. L. REV. 47 (1996) [hereinafter Duthu, *The Thurgood Marshall Papers*]; Getches, *supra* note 9; Richard A. Monette, *Treating Tribes As States under Federal Statutes in the Environmental Arena: Where Laws of Nature and Natural Law Collide*, 21 VT. L. REV. 111 (1996); Royster, *supra* note 61.

from a few decades before the allotment era began, tribal leaders who entered into treaties with the federal government in which the federal government promised it would protect forever their exclusive possession of the lands that they had reserved for their tribes.[75] In this article, I do not seek to review the work of others who have addressed this issue or to speculate as to whether there is any hope that the Supreme Court will stop engaging in judicial activism in its Indian law decisions and return to what Professor Getches has called the "foundation" principles.[76]

Since the topic of this article is environmental federalism, I must point out that the EPA's policy for carrying out the tribal provisions of the Clean Water Act rests on a case-by-case showing of any tribe seeking authorization for treatment as a state. If the tribe seeks to exercise regulatory authority over fee lands within its reservation, the tribe does retain its inherent authority over this subject matter by virtue of the second exception to the *Montana* general proposition.[77] In current litigation, Montana and Wisconsin have challenged the EPA's application of federal Indian law in its implementation of the tribal provisions of the Clean Water Act.[78] But, I do not want to dwell on this issue either.

Rather, I want to point out that the laws of the allotment era constituted a violation of self-determination. Tribes that entered into treaties exercised self-determination. They entered into agreements which determined their

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75. As noted by Professor Duthu, the Ninth Circuit Court of Appeals addressed this issue and struck the balance in favor of vindicating the expectations of ancestral tribal leaders whose expectations were based on "explicit guarantees of a treaty signed by the President and Secretary of State and ratified by the Senate." Duthu, *The Thurgood Marshall Papers*, *supra* note 74, at 108-09 (quoting Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951, 963-64 n.30 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (1982)).

76. Getches, *supra* note 9, at 1630-55; *see also* Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997). The Court's dicta in the unanimous decision in *Strate v. A-1 Contractors*, handed down in April 1997 does not give us much reason to hope for a return to foundation principles from this Court. *See generally* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990) (showing that even the doctrine of federal court review after exhaustion of tribal remedies is based on the implicit divestiture rule, i.e., the federal question is whether the tribe has been implicitly divested of its inherent sovereignty). Professor Clinton argues that it would be more appropriate to amend the federal question jurisdiction statute, Judiciary and Judicial Procedure, 28 U.S.C. §§ 1257-1258, to authorize review by the Supreme Court on petition for *certiorari*. Clinton, *supra* at 936 n.113.

77. *See* 40 C.F.R. pt. 131 (1996). *See generally* James Grijalva, *Tribal Governmental Regulation of Non-Indian Polluters of Reservation Waters*, 71 N.D. L. REV. 433 (1995) (discussing the tribal government's control over regulation of water quality through the Clean Water Act); Monette, *supra* note 74, at 111.

78. Montana v. United States Environmental Protection Agency, 941 F. Supp. 945 (D. Mont. 1996), *aff'd* 137 F.3d 1155 (9th Cir. 1998).

political status. Leaving aside the issue of the extent to which these agreements were entered into freely, allotment changed the terms of these agreements on a unilateral basis. This is a violation of the right of self-determination for which tribes are now entitled to a remedy.[79] The remedy must be crafted to take into account not only the legitimate interests of non-Indians who live and do business in Indian country, but it must also be crafted to vindicate the expectations of ancestral tribal leaders who entered into agreements with the federal government on behalf of future generations of tribal citizens, so that future generations would have the opportunity to live in a tribal community. Environmental federalism presents the larger American society with the opportunity to honor the human rights of Indian peoples, especially the right of self-determination.

IV. CONCLUSION

So what is the significance of the Coyote story? As American Indians work to build regulatory programs pursuant to the "treatment as a state" provisions of the federal environmental statutes, will tribal governments actually benefit from real support from the federal government and the general population? Does the Coyote story suggest that the very notion that tribes will receive such support is—as the deer scamper off—an illusion, a futile exercise in wishful thinking?

I hope not. Rather, my point in using this story is twofold. First, tribal governments should not try to imitate the actions of the states unless they believe that a state model will work for them. Second, tribes are different. The whole point of self-determination is the right to remain culturally distinct. In my view, the diversity of tribal cultures benefits the larger society in a variety of ways, but as a matter of human rights, that should be beside the point. The point is that tribal peoples have the right to make their own decisions.

What does all of this mean in late twentieth century America? Should we hope that the Supreme Court somehow will find its way back to foundation principles of federal Indian law? Should we focus on Congress? We could avoid litigation and devote our limited resources to protecting environmental quality if Congress were to make clear its intent to both affirm inherent tribal sovereignty in this subject matter and to delegate authority to tribes to carry

79. Although international law recognizes a principle of intertemporality, under which the law in effect at the time the events occurred governs, Professor Anaya has demonstrated that, in the context of historic violations of the right of self-determination, providing a remedy may trump otherwise applicable legal principles, including the principle of intertemporality. ANAYA, *supra* note 3, at 83-84.

out federal programs.[80] I, for one, would like to see Congress do this, but I think that it is unrealistic to expect this from Congress—unless the implementation of environmental federalism in a way consistent with the tribal right of self-determination becomes something that matters to a large number of non-Indian Americans.

Why should it matter? Beyond the moral righteousness of upholding the right of self-determination, I can think of several more pragmatic reasons, but I will mention only two. First, working to make tribal governments effective partners in environmental federalism can help make environmental federalism work better. Governmental action to protect the environment does not work well unless people believe that it serves their interests. The further removed government decision-making is from the real world effects of those decisions, the harder it is to motivate allegiance on the part of citizens.[81] Yet, some problems are just too immense to deal with at the local or regional level. Faced with this situation, many individuals feel alienated. I believe that most people have a need to be a part of something bigger than the individual. For a great many people, this need is not fulfilled by being a citizen of a country, even a great country, or by being a part of a state within the federal union. The government is just too far removed from everyday life. People need to be a part of a community.[82] Indian tribes have this sense of community, and it provides a source of personal strength and inspiration for tribal members all across this land. The larger American society could benefit from the examples that tribal communities offer.

My second reason for suggesting that people in the larger American society should support tribal self-determination is that the environmental stewardship reflected in tribal cultural values could help all levels of governmental entities reach decisions that are more environmentally sustainable. Effective environmental regulation must take into account many kinds of factors that really cannot be adequately expressed as quantifiable costs and benefits. Sometimes the best reason to act, or to try to prevent an act, can be found in a story told by an elder. The elders of indigenous tribal cultures know many of the stories that are important for the land that we now call America. If the rest of us can learn to listen respectfully to these elders, we may find that what they have to say helps us to fashion a sustainable way of living in this wonderful land.

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80. The EPA has interpreted the tribal provisions of the Clean Air Act in this fashion. 63 Fed. Reg. 7254-58 (1998).

81. *See* Michael J. Sandel, *America's Search for a New Public Philosophy*, ATLANTIC MONTHLY, Mar. 1996, at 57, 74.

82. This is one of the essential points made by Herman E. Daly and John B. Cobb, Jr., in their leading work on sustainability. *See generally* Herman E. Daly & John B. Cobb, Jr., FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE (1989).