

# Reconsidering the Original Founding of Indian and Non-Indian America: Why a Second American Founding Based on Principles of Deep Diversity is Needed

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**Reconsidering the Original Founding of Indian and Non-Indian  
America: Why a Second American Founding Based on Principles  
of Deep Diversity is Needed**

**Raymond Cross\*\***

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\* Former Professor, University of Montana School of Law.

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*“As man advances in civilization, and small tribes are united into larger communities, the simplest reason would tell each individual that he ought to extend his social instincts and sympathies to all the members of the same nation, though personally unknown to him. This point being once reached, there is only an artificial barrier to prevent his sympathies extending to men of all nations and races.”*

— Charles Darwin<sup>1</sup>

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1. Robin Wright, Nonzero: *The Logic of Human Destiny* iii (Pantheon Books 2000).

“The whole world is coming,  
 A nation is coming, a nation is coming,  
 The eagle has brought the message to the tribe.  
 The father says so, the father says so.  
 Over the whole earth they are coming.  
 The buffalo are coming, the buffalo are coming,  
 The Crow has brought the message to the tribe,  
 The father says so, the father says so.”

—Sioux Ghost Dance Chant<sup>2</sup>

## INTRODUCTION

### *A. The Twin Founding of Indian and Non-Indian America*

Two Americas—one Indian and one non-Indian—were simultaneously created in what constitutional scholar Martin Becker calls that “privileged moment” which witnessed, in the late eighteenth century, the founding of the world’s first constitutional republic—the United States of America.<sup>3</sup> That privileged moment also postulated the future co-existence of two radically differing future visions—one non-Indian and one Indian—of American civil society. The non-Indian version of American civil society was consciously constructed as “a merely rationalistic instrumental entity.”<sup>4</sup> As renowned constitutional scholar David Epstein puts it, the American constitutional republic was founded as the practical answer to the long-standing Lockean riddle that asked why inherently free and sovereign individuals would act in concert to “secure . . . this end that individuals out of fear and prudence, [would] join together to form a civil society in the first place.” Constitutional scholar Steven Conrad likewise views the American

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2. Frederick Turner, *Beyond Geography: The Western Spirit Against Wilderness* 290 (Viking Press 1980).

3. Stephen A. Conrad, *The Rhetorical Constitution of “Civil Society” at the Founding: One Lawyer’s Anxious Vision*, 72 IND. L. J. 335, 335-36 (1997).

4. *Id.* at 339.

republic “as an agen[t] of libertarian revolution,” given that it was consciously born of non-Indians’ “self interest, prudence or fear.”<sup>5</sup> It was, in Conrad’s assessment, a deliberately adopted political recourse to those known and failed historical examples of civil society that the non-Indian settlers of America had purposely left behind in the Old World.<sup>6</sup>

A competing Indian version of American civil society was simultaneously established by the founding of the American constitutional republic in the late eighteenth century. While Indians are briefly mentioned in the American constitution,<sup>7</sup> it was left to Chief Justice John Marshall to develop federal common law principles that, based on his socio-legal analysis regarding the nature and character of Indian civil society at the time of the founding of the American republic, would lay the foundation for future legal and political intercourse between the non-Indian and Indian peoples of America.<sup>8</sup> Marshall’s assessment of the Indian people’s inherent character as “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest,”<sup>9</sup> demanded the establishment of a politically and geographically separate “Indian America.” What was the practical political and legal result, at least from the non-Indians’ viewpoint,

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5. *Id.*

6. *Id.*

7. “Indians not taxed” are excluded, by Article I sec. 2 of the Constitution, from being counted for legislative apportionment purposes. Congress is specifically empowered, by Article I sec. 8 of the Constitution, to “regulate Commerce... with the Indian tribes.” U.S. Const. art. I, §§ 2, 8.

8. Chief Justice John Marshall’s process of incorporating the Indian peoples and their lands with the America domestic sphere of control was accomplished over the course his opinions in what is popularly called Marshall’s Indian Law Trilogy: *Johnson v. McIntosh*, 21 U.S. 543 (1823) (incorporating aboriginal Indian land titles into federal ownership); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (denominating Indian tribes as “domestic, dependent nations”); *Worcester v. Georgia*, 31 U.S. 51 (1832) (establishing an exclusive, bilateral relationship between the federal government and the Indian peoples).

9. 21 U.S. at 590.

that followed from Marshall's judicially perceived "actual state of things?"<sup>10</sup>

*B. Why Chief Justice John Marshall Excluded Indian Peoples from the Future Civic Life of the American Republic*

Marshall's Indian law opinions justified the Founders' "politically re-imagined"<sup>11</sup> American civil society, consciously excluding Indians from any role within the future civic life of the new American republic. He gave this answer to his own rhetorical question: "[w]hat was the inevitable consequence of this actual state of things?" in the following manner "[t]he Europeans were under the necessity of either abandoning the country, and relinquishing their pompous claims to it, or enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a peoples with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighborhood, and exposing themselves and their families to the perpetual hazard of being massacred."<sup>12</sup> The non-Indian Founders' rationally-based "prudence and fear" therefore justified, as Marshall's Trilogy<sup>13</sup> expressly declared, the intentional exclusion of Indian peoples from any role in the civic life of the newly founded American constitutional republic. My essay argues for a new dialogue between the Indian and non-Indian peoples that will lead to the re-negotiation of their contemporary legal and political relationship, free of the overweening climate of non-Indian "fear and prudence" that doomed the hope for any such reasonable dialogue between these two peoples in the late eighteenth century.<sup>14</sup>

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10. *Id.*

11. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (rev. ed. 1991).

12. 21 U.S. at 590 (emphasis added).

13. *See supra* note 7 and accompanying text.

14. Conrad, *supra* note 3, at 339-40.

*C. Can “Real” and “Artificial” Political Communities Speak  
To One Another?*

Some contemporary moral and legal scholars would question whether such a dialogue between the Indian and non-Indian peoples is any more possible today than it was some two hundred years ago. Professor Paul S. Berman characterizes America’s Indian peoples as living in real communities while America’s non-Indian peoples reside in artificial communities.<sup>15</sup> Real communities, in Berman’s terms, are based on their members’ tangible and palpable relationships that arise directly from their interlaced and intertwined blood and kinship ties. Artificial communities, in Berman’s assessment, are based on their members’ voluntary agreement to organize a society based on rational concepts so as to realize rational goals.<sup>16</sup> The famed American pragmatist philosopher, Richard Rorty, seemingly agrees with Berman when he concludes that legitimate legal and social communication between real and artificial societies is practicably impossible.<sup>17</sup> According to Rorty, the members of a given discourse community are imprisoned by their community’s ruling assumptions and dominant informational systems.

The individual members’ behavior and conduct are governed by what Rorty calls “a logic of action,” accessible to, and understood by, only those who are bona fide members of that community.<sup>18</sup>

*D. How the Indian Peoples May Re-Negotiate Their Compact  
with the Non-Indian Peoples of America*

But my renegotiated civil compact between the Indian and non-Indian peoples does not demand that either party fully

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15. Paul S. Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2003).

16. *Id.* at 461.

17. Donald G. Ellis, *Crafting Society: Ethnicity, Class and Communication Theory* 141 (1999).

18. *Id.*



appreciate or understand, much less embrace and practice, the more exotic or troubling customs or traditions of their respective societies. My far less demanding, re-imagined, new civil compact between the Indian and non-Indian peoples requires only—in its first iteration, at least—that they accord mutual and reciprocal legal and political respect to the underlying values and practices that define the character of their respective societies.

Instilling and enforcing such mutual and reciprocal respect, as among the diverse ethnic and cultural groups inhabiting multi-ethnic America, is viewed by contemporary political philosophers John Rawls and Michael Walzer as the *sine qua non* for the political maintenance and moral development of that civil society.<sup>19</sup> Whether my re-imagined civil compact between the Indian and non-Indian peoples will mature into its final, and far more demanding, political and legal state, will depend on the success enjoyed by my hypothesized agential revolution in the re-founded American civil society.<sup>20</sup>

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19. Michael Walzer, *Thick And Thin: Moral Arguments at Home and Abroad* (1994); John Rawls, *A Theory of Justice* (1971).

20. Victoria McGeer, *Hope, Power and Governance: Why Institutionalize Hope?* 592 *Annals* 100, 105 (March 2004). Professor McGeer takes a poetic approach to her description of human agential development: “[H]uman agency is about imaginatively exploring our own powers, as much as it is about using them. Hence, it is about imaginatively exploring what can and cannot do in the world. To be effective agents, we must of course learn to negotiate this world within certain constraints. But equally, it seems we must learn to experience our own limitations... [H]ope is the energy and direction we are able to give, not just toward making the world as we want it to be but also toward the regulation and development of our own agency. In hoping, we create a kind of imaginative scaffolding that calls for the creative exercise of our capacities and so, often, for their development... It is crucial to take a reflective and developmental stance toward our own capacities as agents—hence, it is to experience ourselves as agents of potential as well as agents in fact.”

*E. Why the Second Founding Of American Civil Society Must  
Be Based On Principles of Deep Diversity*

While my short-term goal is to merely improve, through a newly established reciprocal and mutually respectful dialogue, the present legal and social relations between the Indian and non-Indian peoples, my long-term goal is more ambitious in its scope and reach. By renegotiating, per my proposed agential terms, the existing civil compact between the Indian and non-Indian peoples, I hope to foster the authentic development of what social anthropologist, Clifford Geertz, calls “deep diversity.”<sup>21</sup> Professor Geertz calls for a new political and legal dialogue as among the world’s differing and plural, ethnic and cultural minorities and majorities.<sup>22</sup> He believes such a new and broad gauged dialogue will engender new political and legal understandings as among today’s rival ethnic and religious groups. Only such a dialogue, in Geertz’s estimation, will produce those new legal and political institutions essential for the peaceful mediation of those ethnic and cultural tensions inherent in our increasingly diverse, but, nonetheless, inexorably interconnected world.<sup>23</sup>

Rather than accept the future globalized “clashes of cultures,” that some political pessimists forecast as both inevitable and necessary so as to establish the dominance of the Western world’s way of life, he calls for alternative dialogic action that will hopefully result in new specific, localized legal and political institutions and practices. Only these new practices and institutions will enable differing political and social cultures to navigate in what has become a “splintered and disassembled” modern world.<sup>24</sup>

But Geertz requires the interlocutors who participate in this new dialogue to meet a high standard. Their dialogue must embody “[n]ew ways [of thinking] that are responsive to particularities, to individualities, oddities, contrasts, and singularities, responsive to

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21. Clifford Geertz, *Available Light: Anthropological Reflections on Philosophical Topics* 218-63 (2000).

22. *Id.* at 224.

23. *Id.* at 222.

24. *Id.* at 227-31.

what Charles Taylor has called ‘deep diversity,’ a plurality of ways of belonging and being, and that yet can draw from them—from it—sense of connectedness that is neither uniform nor comprehensive, primal nor changeless, but nonetheless real.”<sup>25</sup> My short-term goal in my essay is to set the terms of new “specific and localized” dialogues as between the Indian and non-Indian peoples of America. My long-term goal is to encourage the growth and development of an authentic “deep diversity” that will, in its mature state, hopefully embrace all of America’s present and emerging ethnic and cultural minorities within the terms and tenor of my proposed new civil compact.<sup>26</sup>

*F. Can The Indian Peoples Foster The Agential Revolution?*

How do I propose to achieve my envisioned short and long term goals? By up-dating and re-negotiating, in agentialist terms, the original Indian civil compact that was declared by Chief Justice Marshall in his famed Trilogy of Indian Law Opinions. Three key agential factors will play a major role in the development of this new compact between the Indian and non-Indian peoples: educational agency, political agency and legal agency. If these three agential factors are accorded due regard and weight in the renegotiation of the Indian people’s compact with America, then, I believe, new and re-imagined American civic institutions, ones that are based on the principles of authentic deep diversity, can emerge.<sup>27</sup>

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25. *Id.* at 224.

26. *Id.* at 246.

27. McGeer, *supra* note 20, at 123. Professor McGeer again offers an evocative image of such a political community: “How is such a community to be achieved? Practically speaking, the most effective course may be to cultivate in oneself an interpersonal capacity for attending to the cares and concerns of others, thus seeing them as struggling hopeful agents in their own right who require support from others if their own hopeful energy is not to flag and die ...Hoping well thus involves cultivating a meta-disposition in which some of one’s hopeful energy becomes directed towards supporting the hopeful agency of others...”

In Part two of my essay I describe the terms and conditions of the original Indian compact that historically defined the legal and political relations between the Indian and non-Indian peoples of America. In Part three of my essay I articulate the new agential terms of relationship that will form the basis of my re-negotiated civil compact between the Indian and non-Indian peoples of America. In Part four of my essay I extend the agential principles embodied in this new civil compact so as to embrace the human needs and group aspirations of America's other existing and emerging ethnic groups and other cultural minorities. In my conclusion, I reflect on the past two hundred years of political and legal relations between the Indian and non-Indian peoples of America and I look forward to the next two hundred years of civic relationship, hopefully based on the agential principles that I have articulated in my essay.

## I. WHY "BELONGING" TO AMERICA MATTERS TO THE INDIAN AND NON-INDIAN PEOPLE

### *A. Why the Political Mythology of "Belonging" Is So Important To Both the Indian and Non-Indian Peoples of America*

That "privileged moment" which witnessed the founding of the American constitutional republic in the late eighteenth century also established two fundamentally distinct civil compacts that define how the Indian peoples, on the one hand, and non-Indian people, on the other hand, belong to America. This twin founding of Indian and non-Indian America is most appropriately told—not in the dreary tomes written by constitutional law scholars or the drab scientific texts written by Indian anthropologists or ethnographers—but by the respective "creation myths" these people offer to justify the great individual and collective sacrifices demanded by the founding of the shared America we know and love today.

Such grievous sacrifices as were necessitated by this twin founding of America can only be fully portrayed, as well as accepted by the human heart, when they are elevated to the mythic

level of a common and shared American destiny. I strive to tell these two people's "myth of American belonging" so that we can perhaps finally understand, and thus accept, the sacrifice of blood and life that accompanied the twin founding of America.<sup>28</sup>

*B. How the Restoration of the "Thunderbirds" To the Hidatsa Indians' Rightful Custody Brought Back the Rain to Drought Stricken North Dakota*

Some seventy years ago the tribal elders of the Hidatsa water buster clan agitated for the Heye Museum in New York City to return their sacred thunderbirds to their custody on the Fort Berthold Reservation in western North Dakota. The thunderbirds are the skulls of the water-busters clan's tribal ancestors. Along with their associated funerary items and medicine bundles the thunderbirds balanced the seasons and connected the Hidatsa people to their surrounding physical and cultural landscapes within their traditional homelands along the bottomlands of the Missouri River.

Coincident with the tribal elders' latest campaign for the thunderbirds' return, the worst drought and dust bowl on record had enveloped the farms and ranches of 1930s western North Dakota. It was the theft of the thunderbirds that brought this situation to pass, the Hidatsa elders told an incredulous non-Indian public. Only their safe return would end this state of affairs and bring the rains back to the parched farm and ranch lands of western North Dakota. The Heye Museum in New York City, stung by the mounting congressional and public criticism, finally relented and agreed to return the thunderbirds to the water buster clan on the Fort Berthold Reservation.

The "rest of the story," as radio commentator Paul Harvey would put it, was told in a full page Sunday comics spread in the Bismarck Tribune. "Ripley's Believe It Or Not" told its readers

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28. I rely on my personal knowledge of Mandan-Hidatsa creation myths and my youthful cinematic experience watching a wide variety of vintage American westerns as the composite source for telling my American creation stories.

that the same day the thunderbirds arrived on the Great Northern Railroad, the rains returned to western North Dakota.

The lesson learned from my story is not that the traditional Indian world is suffused by ritual and magical belief, though it well maybe. Nor is the lesson taught that non-Indians, too, yearn for an encompassing meaning that renders nature's arbitrary treatment of them understandable, though they probably do. No, my story shows that the Hidatsa peoples, like other Indian peoples, belong to America in a manner fundamentally different from those European and other immigrants who came later to settle, what was to them, a new land.

*C. How the Indian People's Original Compact with America Served Their Historic Needs and Aspirations*

The pragmatic legal and political difference in how the Indian peoples belong to America is the practical result of Chief Justice John Marshall's three famous Indian law opinions dating from 1823 to 1832. His trilogy of foundational Indian law opinions<sup>29</sup> introduced the "aboriginality doctrine" into the American common law. In this doctrine, Marshall established the Indian people's distinctive mode of belonging to America in three legal principles. First, he recognized the Indian people's inherent ownership of their aboriginally occupied lands.<sup>30</sup> Second, he confirmed the Indian people's retained right of self-governance over their lands as "domestic, dependent nations."<sup>31</sup> Third, he pledged the federal government's honor to protect the Indian people's inherent and retained rights from outside interference.<sup>32</sup> Marshall's three Indian law opinions—implemented by later federal treaties, statutes and executive orders—set the terms for the original political and legal compact between the Indian and non-Indian peoples.<sup>33</sup>

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29. *See supra* note 8.

30. *See* *Johnson v. McIntosh*, 21 U.S. 543 (1823).

31. *See* *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

32. *See* *Worcester v. Georgia*, 31 U.S. 515 (1832).

33. Marshall created this dialogic basis by "contradistinguish[ing] [the Indian peoples] by a [political] name appropriate

While this original compact may have served the historic needs and aspirations of the Indian peoples, I contend that it must be re-negotiated today, in agential terms, so as to foster the growth of a second American civil society, one founded on authentic principles of deep diversity. The new compact will serve as the starting point for new dialogues that focuses on three agential factors of development that I believe can lead, ultimately, to a new American civic order. These three agential factors are: educational agency, political agency and legal agency. If they are given their due regard and weight within the new legal and political dialogue between these two peoples, then a re-founded American civic order will hopefully emerge, one founded on Geertz's "deep diversity" principles.

*D. The Nature and Scope of the Indian People's Compact with America*

Due to their unique compact with America, sociologists and political theorists attribute a "thick" social and political identity to the Indian peoples. Indian identity can therefore only be adequately comprehended by the deep description of a given Indian person's specific tribal life ways that link him to America via his belonging to a particular tribe, clan, and aboriginal territory.<sup>34</sup> America's non-Indian peoples, by contrast, possess a "thin"

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to themselves" and that name is "tribe." 30 U.S. at 18. Professor Stephen Cornell suggests that by "tribalizing" the Indian peoples, Marshall may have been promoting their political maturation: "[T]ribalization could have advantages for Indians. They, too, had political agendas; they also were in pursuit of peace, secure borders, access to resources only available from their adversaries. Centralized political structures, often including new leadership positions, had advantages in dealing with European and American governments and their representatives. As such, dealing came to play a larger role in Indian life; specialized political organization became increasingly advantageous. It offered opportunities to ambitious individuals or factions seeking to extend their influence or power." Stephen Cornell, *The Return of the Native: American Indian Political Resurgence* 79 (1988).

34. Michael Walzer, *Thick And Thin: Moral Arguments at Home and Abroad* (1994).

political and legal identity arising out of their very different legal and historical relationship to America.<sup>35</sup>

*E. The Nature and Scope of the Non-Indian People's Compact with America*

Two very different views of how the non-Indian peoples came to belong to America may help illustrate the vast differences between them and the Indian peoples of America. First, a scholarly view of how non-Indians came to belong to America. Sociologist Brackette F. Williams contrasts America's Indian peoples with what she calls America's "voluntary minorities."<sup>36</sup> She is referring to all those many Northern and Southern European ethnic groups who immigrated to America from the mid-nineteenth to early twentieth centuries. These ethnic groups voluntarily shed their "Old World" identities and adapted to the prevailing American norms and values as the price of their admission to the New World. Through a generations long adaptive process that Williams calls "ethnic succession," these former European ethnics moved from America's service class, to the crafts and trades and ultimately, to the "top rung" American professions as lawyers, doctors, academics and political leaders.<sup>37</sup>

In becoming what Professor Williams calls "honorary white Americans," these erstwhile European ethnics relinquished their "thick" Old World identities that had tied them to their local village-based customs and dialects, their traditional colorful costumes of dress, as well their local myths, superstitions and oral histories. In exchange, they received the "thin" identity of American citizenship that, of practical necessity, suppressed these ethnic groups' idiosyncratic and multifarious Old World identities

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35. *Id.*

36. Brackette F. Williams, *A Class Act: Anthropology and the Race to Nation Across Ethnic Terrain*, 18 ANN. REV. ANTHROPOLOGY 401-44 (1989).

37. *Id.*



in service of a common, but severely limited, set of American civic freedoms and rights.<sup>38</sup>

Second, a contemporary filmmaker's view of how non-Indians came to belong to America. Martin Scorsese's visually sumptuous, but extraordinarily violent, film, *The Gangs of New York*, essays the same ethnic terrain as did Williams.<sup>39</sup> He tells the story of the warring, rival immigrant groups who contested for control of the back alleys and water fronts of mid-nineteenth century New York City. These rival ethnic groups, or "tribes" as the film's narrator calls them, bear distinctive names such as the Dead Rabbits, the Plug Uglies and the Native Americans, each name evocative of some ethnic characteristic that set one ethnic gang apart from another. The film's hero, played by Leonardo Di Caprio, witnesses, as a young child, his father's vicious murder at the hands of a rival gang lord, played by Daniel Day-Lewis. Di Caprio's father, a priest of sorts, was the leader of the Dead Rabbits, an Irish tribe that recently immigrated to America from County Kerry, Ireland.<sup>40</sup>

Di Caprio's character swears an "old world blood oath" of revenge against his father's murderer. He plots throughout the movie to fulfill his oath at the opportune time. Bloody confrontation after confrontation chronicles these rival immigrant tribes struggles for primacy within Scorsese's version of "ethnic succession" in New York City. These groups battled first for control of New York's streets and later for political control of New York's electoral machinery. Scorsese's film ends with these rival ethnic gangs swallowed up in an even larger conflagration-the American

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38.     *Id.*

39.     *Gangs of New York* (Miramax Studios 2002) (motion picture). Movie critic, Jeff Shannon, writes director Scorsese's film tells a "tale of primal vengeance between Irish American son Amsterdam Vallon (Leonardo Di Caprio) and his father's ruthless killer and 'Nativist' gang leader Bill 'the Butcher' Cutting (Daniel Day-Lewis, brutally inspired), so named for his lethal talent with knives." Scorsese's film "erases the decorum of text books" to tell "American history written in blood, unflinching, authentic, and utterly spectacular." Editorial Reviews, Amazon.com.

40.     *Id.*

Civil War. Because these ethnic groups' alternative and idiosyncratic values and loyalties ultimately conflicted with the new American nation's ability to coercively draft sufficient immigrant manpower to prosecute its war against the break-away Confederate states, Scorsese graphically depicts their gruesome destruction by American military might.<sup>41</sup>

In the film's climactic scene the American naval bombardment of the gangs' Five Points stronghold liquidates most of their members. Daniel Day-Lewis' character, now dead and buried in Potter's Field on the Brooklyn side of the East River, bears silent witness to the rise of world's greatest city, modern New York City. We, too, as filmgoers, see in the blink of an eye, through the magic of time-lapse photography, the rise of Manhattan's distinctive skyline of towering, perpendicular, literally gleaming shafts of steel and glass.<sup>42</sup>

Scorsese's film and Williams' essay tell the same story: the necessary breaking of Old World ethnic loyalties and idiosyncratic value systems so as to release their immigrant captives into a common American civic identity. Simplification of the American political order, by constitutional interpretation where possible and by coercion when necessary, came at the expense, as Scorsese and Williams maintain, of rival ethnic groups' identities and values. Well known examples of this "Americanization" process range from the state's outlawing of the Mormon practice of polygamy, the state's confrontation with the Amish over that religious sect's refusal to send their children to high school, to America's ghastly decision to imprison Japanese-Americans during WWII out of its ostensible fear of that ethnic group's divided loyalties and their possible propensity for sabotage of American war interests.<sup>43</sup>

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41. *Id.*

42. An anonymous reviewer ("Marc My Words") writes that Scorsese's film tells the story of "America as the great melting pot or a country fought and died for by those feeling worthy of the term natives." *Id.*

43. See *Reynolds v. United States*, 98 U.S. 145 (1878); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Korematsu v. United States*, 323 U.S. 214 (1944).

*F. How the Contemporary Supreme Court Has Seemingly  
“Misread” The Indian Peoples’ Original Compact with  
America*

Given the American state’s drive over the past two hundred years to craft a common American civic identity, seemingly at the expense of its ethnic and cultural minorities, it may come as a surprise that the contemporary Supreme Court’s Indian law opinions have seemingly re-affirmed the Indian peoples’ original compact with America. Indian law scholars have appropriately applauded these opinions as “keeping faith” with Marshall’s “aboriginality doctrine.”<sup>44</sup> Unfortunately, this seeming judicial affirmation of Marshall’s tribal sovereignty and autonomy principles comes with what, I believe, is an unacceptably high price tag: the deepened exclusion of the Indian peoples from any meaningful legal or political role within contemporary American civic life.

The Supreme Court’s recent Indian jurisdictional decisions have explicated this deepened exclusion of the Indian peoples from American civic life in terms of the Indian peoples’ presumptive lack of inherent criminal jurisdiction,<sup>45</sup> inherent regulatory jurisdiction,<sup>46</sup> and adjudicatory jurisdiction<sup>47</sup> over non-Indians who commit crimes or civil wrongs within Indian Country. Libertarian legal scholars, such as Paul S. Berman, seemingly approve of these Indian jurisdictional decisions that reduce Indian tribes to “non-territorial entities” that may legitimately exercise jurisdiction only over those individuals who expressly subject themselves to Indian jurisdiction.<sup>48</sup>

The Supreme Court has candidly acknowledged that its opinions will likely make it more difficult for the Indian peoples to maintain basic civil or criminal order within Indian Country.

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44. Charles Wilkinson, *American Indians, Time and the Law* (1988).

45. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

46. *Montana v. U.S.*, 450 U.S. 544 (1981).

47. *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997).

48. *See* Berman, *supra* note 15, at 461.

However, the Court has left open the possibility of future congressional remedial action<sup>49</sup> or of tribal civil regulatory jurisdiction over a particular non-Indian defendant, if his actions pose a demonstrable “direct and substantial” threat to a protected tribal interest.<sup>50</sup> Although the Court did not repudiate the Indian peoples’ original compact with America, it substantially re-wrote it.<sup>51</sup> Justice Rehnquist’s *Oliphant*<sup>52</sup> opinion extended Chief Justice Marshall’s extremely circumspect and externally focused “implicit divestiture” doctrine deep into the geographic confines of Indian Country.<sup>53</sup> As a result, today’s Indian peoples have been judicially deprived of their inherent sovereign jurisdiction over non-members, even within the geographic confines of their own federally recognized tribal homelands, popularly known as Indian Country.<sup>54</sup>

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49. While Rehnquist recognizes that the “prevalence of non-Indian crime on today’s reservations” may “forcefully argue... [in favor of Indian people’s] ability to try non-Indians...” he concludes that “these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians.” *See* 435 U.S. 191, 212 (1978).

50. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Reservation*, 492 U.S. 408 (1989).

51. Professor Joe Singer criticized the *Brendale* decision re-characterizing the Indian peoples as a legally disfavored racial caste: “The Supreme Court has assumed in recent years that although non-Indians have the right to be free from the political control by Indian nations, American Indians can and should be subject to the political sovereignty of non-Indians. This disparate treatment of both property and political rights is not the result of neutral rules being applied in a manner that has disparate impact. Rather, it is the result of formally unequal rules. Moreover, it can be explained only by reference to perhaps unconscious racist assumptions about the distribution of both nature and power. This fact implies an uncomfortable truth: both property rights and political power are associated with a system of racial caste.” Joseph Singer, *Sovereignty and Property*, 86 *Nw. U. L. Rev.* 1, 4-5 (1991).

52. *See* 435 U.S. 191 (1978).

53. *See* Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 *WASH. L. REV.* 479 (1979).

54. *Id.*

*G. Why Did The “Sick Chicken” Cross the Jurisdictional Road into Indian Country? Because Tribal Governments Are Not Constitutionally Obligated to Accord Due Process to Non-Member Defendants*

The Supreme Court arguably foreswore, in the aftermath of its notorious 1935 *Schechter*<sup>55</sup> decision—more popularly known as the “sick chicken” decision—any overt usurpation of Congress’ legislative functions under the interpretive guise of its ill-fated “substantive due process” doctrine.<sup>56</sup> While it may have foresworn its role as “judicial legislator” in other areas of the law, its role, in that regard, seems to be alive and well in the Indian law arena. Some Indian law scholars attribute the Court’s revived “legislative” role in federal Indian law to its 1978 decision in *Santa Clara Pueblo v. Martinez*.<sup>57</sup>

There, an Indian tribe, Santa Clara Pueblo, imposed a membership rule that admittedly discriminated against the offspring of female members of the tribe, while it materially advantaged the offspring of male members of that tribe. The Santa Clara Pueblo, a federally recognized Indian tribe, denied tribal membership to the children of a female tribal member who had married outside the tribe. But that same tribal government enrolled the children of any male tribal member who had similarly married outside the tribe.<sup>58</sup>

The lower federal courts had no difficulty in holding this tribal membership rule invalid as invidiously discriminatory governmental action that singled out and unfairly burdened female tribal members. Because the tribal government failed to demonstrate a “compelling governmental interest” justifying such discrimination, the lower courts held the tribal enrollment

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55. *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935).

56. See Dawn E. Johnson, *Ronald Reagan and the Rehnquist Court: Presidential Influences on Congressional Change*, 78 IND. L. J. 363, 368-371 (2003).

57. 436 U.S. 49 (1978).

58. *Id.* at 60.

ordinance violated the equal protection and due process guarantees of governing federal law.<sup>59</sup>

But the Supreme Court resoundingly reversed the lower federal courts' holdings in this regard—why? Although its opinion was couched in procedural and jurisdictional terms, the underlying logic of the Court's opinion harkened back to its earlier, unapologetically substantive judicial decisions such as *Talton v. Mayes*<sup>60</sup> and *Ex Parte Crow Dog*.<sup>61</sup>

Extending America's equal protection and due process norms into Indian Country threatened, in the Supreme Court's estimation, the nation's longstanding compact with the Indian peoples. That compact, among other things, guaranteed the right of Indian self-governance over peculiarly Indian matters, such as the issue of who is eligible for tribal membership.<sup>62</sup> Because the lower federal courts had failed to evince "proper judicial respect" for tribal sovereignty, the Supreme Court reversed their holdings regarding the enrollment status of Mrs. Martinez's children.<sup>63</sup>

In language evocative of language from its much earlier opinion in an Indian criminal jurisdiction case, *Ex Parte Crow Dog*,<sup>64</sup> the Court upheld the Santa Clara Pueblo's exclusive authority to determine issues of tribal membership. In *Crow Dog*, the Court struck down the federal government's effort to extend federal criminal jurisdiction over Indians who wrongfully killed their fellow tribal members. In rejecting federal criminal jurisdiction over Indian criminal conduct the Court said:

[Such federal action] seeks to impose on the [Indians] the restraint of an external and unknown code . . . which judges them by standards made by others and not for them . . . It tries them, not by their peers, nor by the customs of their peoples, nor

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59. *Id.*

60. 163 U.S. 376 (1896).

61. 109 U.S. 556 (1883).

62. *See supra* notes 57-59 and accompanying text.

63. *Id.*

64. 109 U.S. 556 (1883).

the law of their land, but by superiors of a different race according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of white man's morality.<sup>65</sup>

Indian law scholars resoundingly praised the Martinez decision as “keeping faith” with the historic Indian compact with America. Only a few Indian law scholars recognized the potential downside of a judicial decision that seemingly relieved the Indian peoples of the very costly, and arguably normatively intrusive, necessity of according equal protection or procedural due process rights to all defendants who were potentially subject to tribal governmental jurisdiction. Even fewer Indian law scholars intuited the *Schechter* type confrontation that would arise if Congress sought to authorize the Indian peoples to exercise criminal or civil jurisdiction over non-tribal members in an instance wherein the Supreme Court, via its application of its modern judicial divestment doctrine, had held the Indian peoples had “lost” that particular sovereign prerogative of jurisdictional authority.<sup>66</sup>

*H. Can The Indian Peoples Realize Meaningful Self  
Determination Via The Judicial And Legislative Fulfillment  
Of Their Original Compact?*

The Indian peoples have taken important, but limited, strides towards self-determination within the confines of their original compact with America. Given that Congress has endorsed, beginning in 1975, the concept of Indian self-determination as the guiding principle of its contemporary Indian law and policy, there has been some progress made toward the social and economic

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65. *Id.* at 571.

66. U.S. v. Lara, 2004 U.S. Lexis 2738 (April 10, 2004).

development of Indian Country.<sup>67</sup> The Indian Self Determination Act of 1975<sup>68</sup> authorizes qualified Indian tribes to contractually “takeover” Indian benefit programs presently administered by the Bureau of Indian Affairs (“BIA”) or the Indian Health Service (“IHS”). Under the contractual authority granted by this act, many Indian tribes have assumed administrative control of many BIA and IHS programs within their respective reservations.<sup>69</sup>

Other congressional efforts to promote Indian self-determination have generated significant conflict with non-Indians’ ostensible equal protection and due process rights. This nation’s first “reverse discrimination” lawsuit arose from a non-Indian’s equal protection challenge to an Indian employment provision of the 1934 Indian Reorganization Act (“IRA”).<sup>70</sup> The BIA in the early 1970s acted to enforce that hitherto dormant provision that called for the preferential employment of qualified Indians within the BIA. The BIA interpreted the purpose of this Indian employment preference statute to be the eventual “Indianization” of that agency, where practicable.

The Supreme Court in 1974 heard a non-Indian employee’s equal protection challenge to this Indian preference statute in *Morton v. Mancari*.<sup>71</sup> The Court agreed with the non-Indian plaintiffs characterization of the statute’s effect as imposing a significant “employment disadvantage” on non-Indian employees of the BIA. The Court also agreed that if this Indian employment preference was fulsomely implemented, then existing non-Indians employees would be “gradual[ly] replace[d] by Indians within the BIA.”<sup>72</sup> But the Court nonetheless held that the non-Indian plaintiff could not be heard to complain because this Indian preference statute did not constitute “racial discrimination” at all, it was,

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67. See generally Tadd M. Johnson and James Hamilton, *Self-Governance For the Indian Tribes: From Paternalism To Empowerment*, 27 CONN. L. REV. 1251 (1995) [hereinafter Johnson].

68. 25 U.S.C. § 450(a)-(n) (2000).

69. Johnson, *supra* note 67, at 1267-68.

70. Pub. L. 73-383, 48 Stat. 984 (1934).

71. 417 U.S. 535 (1974).

72. *Id.* at 544.



instead, a permissible means by which Congress sought to fulfill a trust duty it owed to members of quasi-sovereign Indian nations.<sup>73</sup>

*I. Summary: Indian Self-Determination and the Deepened  
Exclusion of the Indian Peoples from Participation in  
American Civic Life*

By seeming consensus, almost everyone agrees that the Indian peoples have made remarkable progress toward self-determination over the past thirty years since Congress' adoption of the Indian Self-Determination Act.<sup>74</sup> But the Supreme Court's recent Indian law decisions—perhaps because of the Indian peoples' acknowledged economic and social development—nonetheless confirm that the Indian peoples remains excluded, as qua Indians, from any future role in American civic life. The Indian peoples' entry into American civic life, therefore, has to be premised on a fundamentally different legal and political approach. In the next section of my essay, I sketch the legal and political rationale for Indian civic participation based on what I call the “second American founding” based on principles of deep diversity.

II. THE LEGAL AND POLITICAL PRESUMPTIONS  
UNDERLYING THE SECOND AMERICAN FOUNDING  
BASED ON PRINCIPLES OF DEEP DIVERSITY

*A. Why the First American Founding Failed the Indian  
Peoples and Other Ethnic Minorities of America*

Many constitutional scholars have criticized the “first American founding” as based on principles of political and legal exclusion, rather than on a broad-gauged, inclusive vision of a liberal polity that welcomed future citizens of all races, gender and religious or cultural affiliations.<sup>75</sup> The Indian peoples were, of

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73. *Id.* at 553.

74. 25 U.S.C. § 450 (a)-(n) (2000).

75. Professor Nathan Glazer, for example, argues that the *Winning of the West*, written on the epic scale by Teddy Roosevelt, created

course, explicitly excluded by constitutional language from any future civic participation in the American republic, while other groups—particularly African-Americans and women—were implicitly excluded from any meaningful civic participation in the republic’s future civic life.<sup>76</sup>

The overtly compromised character of the “first American founding” is best evidenced by the Fourteenth Amendment’s continued exclusion of the Indian peoples. That amendment’s explicit purpose—as the proudest constitutional product of the vaunted American Reconstruction Era—was to extend the right of civic participation to America’s hitherto excluded “involuntary minorities” in a politically and morally “re-founded” American Republic.<sup>77</sup> The lower federal courts interpreted the Fourteenth Amendment’s blanket grant of citizenship to “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof” as intentionally excluding the Indian peoples.<sup>78</sup>

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the national text of “unabashed nationalism” for the displacement and dispossession of the Indian peoples. The Indians in Roosevelt’s text are unredeemably cruel and treacherous. He characterizes the Indians thus” Not only were they terrible in battle, but they were cruel beyond all belief in victory...The hideous, unnamable, unthinkable tortures [practiced] by the red men on their captured [foes’] tender women and helpless children were such as read of in no other struggle, hardly even the revolting pages that tell the deeds of the Holy Inquisition.” Nathan Glazer, *American Epic: Then and Now*, Pub. Int. 12 (Winter 1998). Given the unredeemable Indian character, Roosevelt feels no need for a retrospective national apology for the Indians’ destruction by federal military forces: “Looking back, it is easy to say that much of the wrong-doing could have been prevented; but if we examine the facts to find out the truth, not to establish a theory, we are bound to admit that the struggle could not possibly have been avoided.....Unless we were willing that the whole continent west of the Alleghenies should remain an unpeopled waste, the hunting ground of savages, war was inevitable.” *Id.* at 12-13.

76. David C. Williams, *The Borders of the Equal Protection Clause: Indians As Peoples*, 38 UCLA L. Rev. 759 (1991).

77. *McKay v. Campbell*, 16 Fed. Cases 161, 165 (D. Or. 1871) (No. 840).

78. *Id.*

The Supreme Court later adopted that reasoning, in its 1884 decision in *Elk v. Wilkins*,<sup>79</sup> holding that an individual Indian could not free himself from his Indian status by self-help through his voluntary adoption of non-Indian ways of living which included paying taxes, sending his children to public school and regularly attending Christian church services.<sup>80</sup> Indeed, some quasi-conservative constitutional legal scholars—such as Professor Kenneth Karst—have criticized Congress’s later enactment of the American Indian Naturalization Act of 1924,<sup>81</sup> as both potentially illegal, given the exclusionary language of the Fourteenth Amendment and the Elk decision, and wrong-headed because Indians should remain excluded from the national civic culture.<sup>82</sup>

My sketch of the political and legal rationale underlying a real, not merely rhetorical, second American founding presumes the founding of a “new Indian citizenship.” This new citizenship, deriving from principles of deep diversity, will become the primary

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79. 112 U.S. 94, 109 (1884) (holding that Indians are “not subject to the jurisdiction” of the United States, or citizens of the United States, or of the states within which they reside).

80. *Id.*

81. 8 U.S.C. §1401(a)(2) (2000).

82. Indians should remain excluded from American civil society because their political participation, qua Indians, therein would fundamentally skew the ruling American concepts of equal protection and due process. Karst makes this clear in his following statement: “[T]he separation of the Indian nations from the rest of American society now rests on more than white domination and is actively cultivated by a number of Indian leaders who see separation as the markedly from those faced by only way to preserve their cultures. Among Indians, cultural politics has always faced issues that differ among immigrant groups. None of our immigrants, from the Irish to the Vietnamese, have faced anything closely nations, or the pan-Indian comparable to the questions raised by the role of the reservation, the reach of sovereignty of Indian movement. Those issues confront Indians, as individuals and nations, with some hard choices as they seek to preserve their separate cultures and still participate in the American economy and society. Whatever political forms may emerge from the current ferment, the larger society has an obligation--the obligations of citizens to each other--to see that Indian peoples have the resources they need if these choices are to be real.” See David Williams, *supra* note 76, at 772.

means by which Indians, qua Indians, can achieve full participation in the civic life of the re-founded American Republic. It further presumes that if the Indian peoples succeed in their endeavor of establishing a new Indian citizenship, then its underlying civic principles can be extended to other existing and emerging ethnic and cultural minorities within America.<sup>83</sup>

Hopefully, the non-Indians' residual "fear and prudence," that caused them to originally exclude the Indian peoples from American social and political life, will have to be allayed via thorough educational and dialogic means of encounter between these two peoples. Fortunately, there are political and legal means at hand to develop this new dialogic relationship. I first sketch this process of legal and political dialogue that will lay the groundwork for this second American founding. I then sketch, in bare outline, what this new civic relationship, founded on principles of deep diversity, may look like.

*B. Constructing an Appropriate Mythology for the Second American Founding*

The chronicle of the first American founding was written in the shed blood of patriots and the cant of American Manifest Destiny. The chronicle of the second American founding will be written in the more modest, but equally hard muscled, grammar of human generosity, tolerance and diversity.<sup>84</sup> The principles of the first American founding were constitutionally broadcast in universal terms that ostensibly commanded justice and equality for all, but, in practice, were available only to the select few deemed fit to govern in the first American republic. The principles of the second American founding will, in theory and practice, welcome

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83. Professor Adeno Addis has coined the phrase "pluralistic solidarity" that will facilitate the development of "institutional structures and processes that would simultaneously allow us to affirm and respect plurality while also cultivation some notion of [national] solidarity." Adeno Addis, *On Human Diversity and the Limits of Toleration, in Ethnicity And Group Rights* 112 (Ian Shapiro and Will Kymlicka eds., N.Y. U. Press 1997).

84. *Id.*

and respect the differing ethnic, cultural and religious minorities who choose to enrich and build this new American society. The accompanying mythology of this new American republic appropriately begins by welcoming the Indian peoples into the civic life of the old American Republic.

The transition to this new America is made legally and politically possible by incorporating the political theory of economist and social theorist, A.K. Sen.<sup>85</sup> Sen argues for affirmative governmental action that builds the agential capacities of hitherto politically and socially excluded groups—women, as well as unwelcome ethnic and cultural minorities—as the means for creating greater social wealth and the promoting of shared democratic values and interests.<sup>86</sup> Sen would likely agree that the Indian peoples, as well as other American ethnic and cultural minorities, would embrace this new American citizenship because it does not demand, as did the old version of American citizenship, that they sacrifice their Indian identities and cultural values as the price for their admission into American civic life.<sup>87</sup>

In the next two sections of my essay I contrast the “wrong” way and the “right” way of achieving this transition to a new citizenship status for America’s hitherto excluded ethnic and cultural minorities—particularly the American Indian peoples. The wrong transitional strategy derives from non-Indians’ historic “fear and prudence” that lead them to regard the Indian peoples, as well as other contemporary American ethnic and cultural minorities, as the potentially dangerous, “excluded other.” This wrong strategy presumes that their inclusion will threaten the delicately woven political and social fabric of the American civic order. I examine the failure of this first strategy that sought to “shoehorn” the Indian peoples as a newly racialized minority group, into a new American citizenship status. By this thinking, Indians would benefit legally and politically because as a racial, rather than a political, minority

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85. Amartya Kumar Sen, *Development as Freedom* 145-59 (1st ed., Oxford U. Press 1999).

86. *Id.*

87. *Id.*

they would be entitled to the affirmative protections afforded by the equal protection and due process clauses of the Constitution.<sup>88</sup>

*C. Why the Attempted “Shoehorning” of the Indian Peoples, as a Newly Racialized Minority, into Contemporary American Civic Life, Failed*

*1. Why Indian Peoples Were Re-Classified as a Racial Minority During the American Civil Rights and Great Society Eras of the 1960s and 1970s*

Re-classifying the Indian peoples as a racial minority during the American civil rights era of the mid to late 1960s seemed to afford a quick and economical means to end the Indian peoples’ longstanding exclusion from American civic life.<sup>89</sup> Indeed, this re-conception of Indians as a racial minority made practical and legal sense. The red-hot rhetoric of the civil rights activists, during the 1960s and 1970s, exposed the Indian peoples to the reality of their exclusion from the economic and political realms of American power and success. Many Indian peoples participated in the famed 1968 “Poor People’s March on Washington,” thus demonstrating their solidarity with other destitute and politically powerless American ethnic and cultural minorities. Many Indian young peoples, myself included, benefited personally from those government initiatives directed at overcoming economic and social disadvantages imposed on the Indian peoples by entrenched, ostensibly race-based state and private discrimination, coupled with

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88. Professor Mark Tushnet, while not explicitly mentioning American Indians, obviously speaks to their politically and economically excluded status as ethnic minorities when he speaks of the “constitutional vision of the New Deal-Great Society regime” in these terms: “Racial segregation had to be overcome by aggressive policies of national support for the aspirations of African-Americans; economic inequality had to be addressed through a War on Poverty; the travails of old age had to be reduced by providing health care to the elderly through the Medicare program.” Mark Tushnet, *The New Constitutional Order* 30 (Princeton U. Press 2003).

89. *Id.*

institutional barriers that had historically hindered their entry into the professional and political life of America.<sup>90</sup>

Indians were perceived by civil rights activists as having been originally imprisoned on their respective Indian reservations by wrong-headed, if not discriminatory, federal action in the late nineteenth century. Given their heightened poverty rate and their lack of educational achievement, the Indian peoples were viewed as especially worthy recipients of federal civil rights and social welfare attention.

Because I grew up on the Fort Berthold Indian Reservation, North Dakota, during the “hay day” of President Kennedy’s civil rights revolution and President Johnson’s Great Society programs, I witnessed the federal expenditure of millions of dollars, on my home reservation alone, to fund new Indian housing developments, create new reservation-based jobs and fund new Indian education initiatives. Some Indian leaders, such as my father, a tribal council member at that time, deemed these federal anti-poverty expenditures as the long delayed fulfillment of the government’s Indian treaty and trust duty obligations. Meanwhile, leaders of other ethnic minority groups, particularly those African-Americans residing in America’s economically by-passed inner cities, viewed these new civil rights initiatives and social welfare reforms, as the long delayed federal action necessary to redeem America from its ignoble history of slavery.<sup>91</sup>

## 2. *Why This Wrong Strategy Failed to Achieve its Legal and Political Goals*

There are many competing theories as to why the American civil rights revolution and the Great Society programs of the 1960s and 1970s failed to realize their legal and political goal of integrating America’s hitherto excluded ethnic and racial minorities into the professional and economic life of America.<sup>92</sup> Somewhat

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90. David Getches, et. al., *Federal Indian Law* 226 (4th ed.).

91. Tauyna Lovell Banks, *Exploring White Resistance To Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903 (Summer, 2003).

92. Richard J. Herrnstein & Charles Murray, *The Bell Curve*:

reluctantly, I add my own assessment to the already lengthy list of commentators on this issue. In my opinion, these initiatives failed because they sought to integrate the Indian peoples, as well as other ethnic and cultural minorities, as “honorary whites” into American economic and social life. As Professor Williams demonstrated early, these contemporary civil rights and social welfare programs were built on the deeply flawed “ethnic succession” model which required the targeted ethnic minorities to shed their deeply held, perhaps seemingly idiosyncratic, beliefs and values as the price of their admission into American citizenship.<sup>93</sup> Understandably, many, if not most, of the Indian peoples rejected civil and political “integration” into American civic life as unduly destructive of their unique life-ways.<sup>94</sup>

It’s not surprising, therefore, that by the early 1980s, the grand era of civil rights and Great Society reforms came to a screeching halt. While some political pundits attribute this outcome to a sea change in the American peoples’ attitude towards “big government” and “big social welfare programs,” I believe these initiatives failed primarily because the Indian peoples, and other ethnic and cultural minorities, did not want to be “integrated” into American civic life in the manner demanded by these initiatives. It’s true that many critics focused on the alleged failure of these federal initiatives to quickly produce the economic and social assimilation of America’s ethnic minority groups into mainstream American life. Other critics branded the Civil Rights and Great Society initiatives of the 1960s as overly grandiose and practicably unrealizable “social engineering” prescriptions. Some of those same critics claimed that their failure proved the bogus character of the theory and practice of racial integration as the route to a morally refounded American republic.<sup>95</sup> Predictably perhaps, the competing Presidential hopefuls during the 1980 election—both Democratic and Republican—competed to “re-invent” a leaner and meaner federal government that would “get off the peoples’ backs” by

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*Intelligence and Class Structure In American Life* (Free Press 1994).

93. See B. Williams, *supra* note 39, at 401-44.

94. *Id.*

95. See Herrnstein, *supra* note 93.



radically shrinking the federal government's social welfare and regulatory roles in Americans' lives.<sup>96</sup>

### 3. *How the Failure of the Integrationist Ideal Introduced Agential Theory into American Life*

I have chosen two climactic federal actions to symbolize the closing of the "integrationist" era of American civil rights law, and the arrival of the "agential" era of federal Indian law. The first climactic action is represented by President William Jefferson Clinton's political "change of heart" that led him to champion the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>97</sup> Some of his staunchest political allies opposed this act as a breach of a long standing federal promise to protect the America's dependent and vulnerable children.<sup>98</sup> But Clinton argued that in order to save the federal welfare program at all, it had to be fundamentally recast in, what I call, agentialist terms. America's welfare "moms and dads" are effectively appointed by this act as their dependent children's agents. They are given a stringently limited period of welfare eligibility in which to become dependable economic providers for their dependent children.<sup>99</sup>

The second climactic action is symbolized by Justice Ruth Bader Ginsberg's recent opinion in *United States v. Navajo Nation*.<sup>100</sup> Her *Navajo Nation* opinion requires Indian peoples to become independent and active agents in their assertion and protection of their distinctive legal rights. In *Navajo Nation*, the United States challenged the lower federal court's decision that declared it in breach of its Indian trust duties, thereby rendering it

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96. William R. O'Neill, *Commonweal of Woe? The Ethics of Welfare Reform*, 11 NOTRE DAME J.L., ETHICS & PUB. POLICY 487 (1997).

97. This act imposes work requirements and lifetime caps, limits aid to young mothers, limits aid to immigrants, and provides for child support enforcement. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

98. See Larry Cata Baca, *Poor Relief Welfare Paralysis and Assimilation*, 1996 UTAH L. REV. 1, 2-3 (1996).

99. *Id.*

100. 537 U.S. 488 (2003).

potentially liable for over \$600 million in damages to the Navajo Nation.<sup>101</sup> The facts of this case focused on the Interior Secretary's admittedly unsavory conduct in connection with his execution of a Navajo coal lease with Peabody Coal Company in the early 1980s.<sup>102</sup> The Court had to decide whether his shabby treatment of his Navajo wards' legal and economic interests breached the trust duties that he owed to those Indian peoples. Undisputed facts showed that Interior Secretary Donald P. Hodel secretly set aside, at Peabody Coal's behest, a BIA recommended twenty-percent lease royalty rate based on the prevailing fair market value of the affected Navajo coal resource.<sup>103</sup>

Instead of exercising his secretarial power to include that recommended rate as part of the proposed lease agreement, Secretary Hodel told the Navajos to go back to the bargaining table and make the best deal they could with Peabody Coal.<sup>104</sup> Chastened by Hodel's advice, the Navajos returned to the bargaining table and eventually negotiated a 12.5-percent per ton royalty rate with Peabody Coal.<sup>105</sup> The Navajos' complaint claimed they thereby lost over \$600 million in foregone royalty payments over the life of the coal lease.

But the Supreme Court, per Justice Ginsberg's opinion, reversed the lower court's breach of trust holding. It did so because the Navajo Indians, and presumably the other Indian peoples, as well, must now act, given her reading of the Indian Mineral Leasing Act's ("IMLA's") self-determination language and intent, as legally and economically capable agents who bear the primary responsibility for negotiating beneficial mineral lease agreements with outside third party interests.<sup>106</sup> Justice Ginsberg quoted the IMLA's statutory preamble describing its overriding purpose as the "enhancement of tribal self-determination."<sup>107</sup> Given this plain

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101. *Id.* at 495-96.

102. *Id.* at 498.

103. *Id.*

104. *Id.* at 497.

105. *Id.*

106. *Id.* at 513.

107. *Id.*

statutory intent, she concluded that it was the Navajo tribe's responsibility, not Secretary Hodel's responsibility, to negotiate a fair deal with Peabody Coal Company. She concludes:

In sum neither the IMLA, nor any of its regulations, established anything more than a bare minimum royalty. Hence, there is no textual basis for concluding that the Secretary's approval function includes a duty, enforceable in an action for money damages, to ensure a higher rate of return for the tribe concerned. Similarly, no pertinent statutory or regulatory provision requires the Secretary, on the pain of damages, to conduct an independent "economic analysis" of the reasonableness of the royalty to which a tribe and a third party have agreed.<sup>108</sup>

#### 4. *Why Justice Ginsberg's Theory of Indian Agentialism Will Fail*

These two federal actions seek to establish a new legal and political relationship between America's ethnic minorities, including the Indian peoples, and mainstream American society. The Indian peoples and other ethnic minorities are given notice that they can no longer function as passive rights holders. They must now become active agents, acting on their own behalf, to promote and protect their rights, abilities, talents and resources. But Justice Ginsberg's "Indian agentialism" rationale suffers from the vice of presuming its result. She failed to take into account the widely varying educational, economic and social circumstances of America's many Indian peoples. Put simply, the agential capacity of any given Indian peoples is directly correlated to, and to a large degree determined by, that particular Indian people's knowledge base and experiential record as it relates to a particular self-determination endeavor.<sup>109</sup>

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108. *Id.*

109. *See* Robert Miller, *Economic Development in Indian*

Perhaps the Indian peoples should, as Justice Ginsberg's opinion encourages them to do, scrutinize their past dependence on their legal trustee, the federal government, to act on their behalf in the assertion and protection of their unique rights and entitlements. But Ginsberg does not explain how such self-scrutiny will aid the Indian peoples in becoming more effective agents on their own behalf. Her only oblique suggestion, in this regard, is her bare citation to the self-determination language of the IMLA."<sup>110</sup>

Justice Ginsberg's *Navajo Nation* opinion imports, into the legally and politically incommensurate Indian self-determination context, the well-worn neoliberal claim that today's ethnic minority groups have become overly dependent on federal and state help for their economic subsistence. An early academic critic of President Lyndon Johnson's Great Society initiatives, Professor Daniel Patrick Moynihan, worried that easy federal or state welfare eligibility may condemn America's ethnic minorities to a multi-generational cycle of joblessness and single-parent families, eventually sapping their individual and collective initiative to do the hard work necessary to climb out of poverty. But Moynihan failed, as does Ginsberg, to set forth any affirmative program of agential development that would restore these damaged groups to a contemporary ethic of individual and collective self-regard.<sup>111</sup>

Absent a realistic, governmentally supported, program for agential development, these two federal actions—Justice Ginsberg's *Navajo Nation* opinion and Bill Clinton's welfare act—seem merely petty and punitive in nature. No respected authority on development theory has claimed that the Indian peoples—absent substantial financial and technical assistance from their trustee—the federal government—can become effective agents of self-determination who are capable of negotiating fair mineral development agreements with powerful and influential non-Indian economic interests.<sup>112</sup> Likewise, no respected social welfare thinker has argued that today's welfare “moms and dads,” can effectively

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*Country: Will Capitalism or Socialism Succeed?* 80 OR. L. REV. 1 (Fall 2001).

110. *Navajo Nation*, 537 U.S. at 488.

111. See Baca, *supra* note 99.

112. Miller, *supra* note 109, at 837.

transition, without substantial federal financial and technical assistance, into effective wage earners, capable of supporting their dependent children.”<sup>113</sup>

The dictionary definition of agential success is the personal or collective ability to make and carry out informed decision for a particular person’s own, as well as for his particular group’s, benefit. By all reasonable expert accounts on the subject, the putative agent must undergo an extensive program of appropriately tailored training and professional mentorship. Given that reality, any long term program for agential development must be designed around the circumstances and aspirations of particular Indian peoples or other targeted ethnic minority groups.

### III. THE SECOND AMERICAN FOUNDING WILL BEGIN WITH “SPECIFIC AND LOCALIZED” DIALOGUE BETWEEN THE INDIAN AND NON-INDIAN PEOPLES IN FAR-FLUNG PLACES SUCH AS MONTANA

#### *A. Re-Defining Agential Development as a Shared Responsibility of Both Indian and Non-Indian Peoples*

Justice Ginsberg and President Clinton seem to assume that agential development is a task borne solely by America’s Indian peoples and other ethnic minority groups, and that such an endeavor is not a shared responsibility of the American peoples generally. Such a mistaken view of agential development will only perpetuate the *de facto*, if not *de jure*, exclusion of the Indian peoples and other ethnic minorities from American civic life. I sketch an alternative vision of agential development that will hopefully, over the long-term, lead to a “second founding” of the American republic. My alternative vision is built around A. K. Sen’s “freedom centered” program of agential development. His theory of economic and social development focuses on the individual’s agential success as the primary instrumental means of

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113. Baca, *supra* note 99.

ensuring a given society's maturation into a just and well-ordered society.<sup>114</sup>

Sen identifies three crucial "freedoms" that form the core of his program of individual, as well as group, agential development. Sen focuses on a society's educational system as the primary means for instilling the individual understanding, and valuation, of these three freedoms as crucial for his or her future individual development, as well as for their society's future development.<sup>115</sup> Both Sen and minority educational advocates rightfully emphasize education as the *sine qua non* for the individual's meaningful exercise of these three agential freedoms.

Sen's crucial individual freedoms are political freedom, economic freedom and social freedom.<sup>116</sup> First, he contends that only the educated individual possesses the capacity to exercise political freedom through the informed scrutinizing and criticizing of official societal action. Only the educated individual possesses the capacity to effectively express his political opinions and beliefs through his exercise of the democratic franchise of dialogue, dissent and criticism. Second, he maintains that only the educated individual possesses the capability to exercise economic freedom wisely and responsibly so as to use his personal talents, in combination with society's economic resources, in making his consumption, production and exchange decisions. Third, he argues that only the educated individual possesses the capacity to interact with the larger social community on the basis of mutual respect, equality and trust. Only the educated individual possesses the capability to make wise use of available social information so as to make informed inter-personal judgments and establish meaningful life relationships."<sup>117</sup>

Undoubtedly, many of us—as parents, as educators, or just good citizens—already intuitively and instinctively subscribe to Sen's "freedom centered" view of agential development. We may further intuitively and instinctively subscribe to Sen's view that the

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114. Sen, *supra* note 85 at 145-59.

115. *Id.*

116. *Id.*

117. *Id.*

lack of an education may well diminish a given individual's appreciation and enjoyment of his or her social freedoms. In the extreme case, we may also grasp that a given individual's lack of a basic education may amount to the denial of his or her civil or human right to become a functioning member of our society. Fortunately, Montana has likewise grasped Sen's pragmatic points and it has sought to constitutionally link his "freedom centered" view of education to the agential and self-determination rights of each individual school child in Montana's K-12 educational system.<sup>118</sup>

*B. Beginning the Second American Founding In Montana:  
Three Case Studies in Localized and Specialized Agential  
Development*

Clifford Geertz urges us to re-discover "a plurality of ways of [societal] belonging and being" that re-establishes a new "sense of connectedness that is neither uniform nor comprehensive" so as to recognize the multi-ethnic heritage and integrity of contemporary America.<sup>119</sup> I present three local and specialized case studies in agential development that I believe exhibit Geertz's call for new political and legal means for founding a new American society.

My first case study focuses on Montana's extraordinary constitutional commitment to deliver an "Indian centered" education so as to build the agential capabilities of both non-Indian and Indian school children within its K-12 educational system. My second case study focuses on the newly activist role played by Indian political representatives, within Montana's political system, as the agents for building a more open and inclusive democratic process within this state. My third case study focuses on the agential role played by the Indian lawyers and other professionals in

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118. Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 UALR L. Rev. 941, 965-69 (Summer 1999).

119. Geertz, *supra* note 21, at 224.

building A. K. Sen's vision of the just and well-ordered society in Montana and elsewhere.<sup>120</sup>

*1. Case Study One: Montana's Constitutional Obligation to Provide "Indian Education for All"*

My first case study focuses on Montana's constitutional commitment to link Sen's agential development principles to the "on the ground" educational processes and practices within its K-12 educational system. By adopting Article X, section 1, clause 2, of the Montana Constitution of 1972, the peoples of Montana declared: "The state recognizes the distinct and unique cultural heritage of the American Indians, and it is committed in its educational goals to the preservation of their cultural integrity."<sup>121</sup>

This constitutional recognition of the American Indians' cultural heritage as an integral part of Montana's educational mission has profound agential development implications for the reconstruction of elementary and secondary education in Montana. This provision, on the one hand, repudiates past state and federal Indian educational initiatives that sought to coercively assimilate Indian school children into the values and practices of the surrounding non-Indian communities.<sup>122</sup> This provision, on the other hand, positively values the Indian peoples' cultural and social contributions by requiring them to become an integral part of its K-12 educational system for all Montana's school children, Indian and non-Indian.<sup>123</sup>

But, as is the case with all pragmatic endeavors, the "proof of the pudding is in the eating." Montana faces a daunting financial and social challenge in implementing its constitutionally promised "Indian education for all." It has taken some crucial, but tentative, first steps towards implementing that provision. The state legislature has recently enacted House Bill 528 which encourages public school districts, especially those on or near Indian

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120. Sen, *supra* note 85, at 145-59.

121. Cross, *supra* note 119, at 965-69.

122. *Id.*

123. *Id.*



reservations and those with large Indian student enrollment, to ensure that their certified teaching personnel have an adequate grounding in historic and contemporary Indian history and culture.<sup>124</sup>

This past legislative session, the state legislature considered, but rejected, proposed Indian education legislation that would have authorized local school districts to hire Indian teachers preferentially under the appropriate circumstances. Other states with large Indian populations, such as Minnesota, have already adopted such statutes. The Minnesota Indian teacher preference statute is part of its larger American Indian Education Act of 1988.<sup>125</sup>

That act's preamble cited to current learning theory and concluded that Indian school children may benefit from being taught by Indian teachers who both grasp and understand their distinctive cultural and social learning styles and needs. For these practical reasons, the Minnesota Appeals Court upheld the statute against an equal protection challenge. The court held Minnesota's Indian teacher preference statute was a rational and logical response to the daunting challenge of improving Indian educational achievement within that state's public schools.<sup>126</sup>

Montana has recognized that education will play an important role in ensuring the future agential success of both its non-Indian and Indian school children. However, the state legislature and the state courts have taken only the first steps towards realizing its educational mission on behalf of Indian and non-Indian school children in Montana.<sup>127</sup>

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124. *Id.*

125. *Id.*

126. *Id.*

127. The Ninth Circuit Court of Appeals affirmed the lower court's finding of fact "that Blaine County's white residents voted as a bloc to prevent American Indians from electing their preferred candidates." *See United States v. Blaine County*, 363 F.3d 897, 900-01 (9th Cir. 2004).

2. *Case Study Two: Building Indian Political Agency in Montana*

Sen's credo of agential development as the enhancement of human freedom requires a given civil society to assist its ethnic or cultural minority groups in their explicit recognition and assertion of their political interests in both conceptual and practical terms.<sup>128</sup> Only recently have Montana's Indian peoples sought greater political representation in state and local governmental affairs. Their new political engagement has required them to learn the intricacies and complexities of "hard ball" local and state politics. Originally, they sought to achieve greater political representation in state and local governmental affairs without the active support or help of the state of Montana or the federal courts. But bitter experience confirmed that entrenched, non-Indian political interests preferred the Indian peoples remain on the political sidelines, excluded from any effective political voice in the state affairs.<sup>129</sup>

The relatively few Indian representatives in Montana's legislature have understandably sought to leverage their limited political influence by establishing common cause and alliances with non-Indian legislators who share their values and goals. For example, Indian representative Carol Juneau, from the Blackfeet Reservation, works with fellow non-Indian legislators to implicitly address Indian peoples' issues under the broader banner of "women's social agency" issues. She recognized that both Indian and non-Indian women in Montana seek an improved health care and welfare status for themselves and their children.<sup>130</sup>

But achieving a meaningful measure of Indian political agency in Montana, as elsewhere, has proven a never ending and uphill battle. A brief case study may illustrate this reality. Disenfranchised Indian voters challenged Montana's 1992 state

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128. Sen, *supra* note 85, at 145-59.

129. *Id.*

130. My personal conversations with state representative Carol Juneau, who also happens to be my sister, over the course of her tenure in office, is the source of these remarks.

redistricting plan in federal court as violating their electoral rights under the 1965 Voting Rights Act.<sup>131</sup> Because Montana's 1972 Constitution had created a new bipartisan redistricting commission and had empowered it to periodically reapportion the state legislature, the protection of minority voting rights became the constitutional responsibility of that commission.<sup>132</sup>

Given the Indian voters' pending federal lawsuits, Montana's 1999 legislative redistricting commission began its work under the watchful eye of federal judge Pro. He expressed his fulsome confidence that the state commission would "preserve the orderly administration of elections and encourage the highest possible participation by the [Indian] electorate and potential

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131. The named Indian plaintiffs contended that Montana's 1992 legislative redistricting plan for the House of Representatives and Senate unfairly diluted the voting strength of American Indian voters and was adopted with a discriminatory purpose, thereby violating the Voting Rights Act of 1965. The Ninth Circuit Court of Appeals reversed, in significant part, the lower court's judgment in favor of Montana's Governor and Secretary of State. *See Old Person v. Cooney*, 230 F.2d 1113 (9th Cir. 2000). Although the appeals court affirmed the lower court's ruling that the Indian plaintiffs had not demonstrated that Montana's 1992 legislative redistricting plan was adopted with a discriminatory purpose, it also held the lower court had erred in its application of the relevant law to other aspects of the plaintiffs' legal claims. *Id.* at 1131. That court also concluded that the lower court erred in finding proportionality between the number of state legislative districts in which Indian voters constituted an effective majority and the American Indian share of the voting age population of Montana. *Id.*

132. Indeed, federal district judge, Philip M. Pro, upon remand of the *Old Person* proceedings to the lower court for further action, judicially acknowledged the vital "role of the 2000 Montana [legislative redistricting] Commission in fashioning a viable remedy" to address the Indian plaintiffs' complaints in the *Old Person* case. *See Old Person v. Brown*, 182 F. Supp. 2d 1002, 1015 (D. Mont. 2002). The Indian plaintiffs offered statements by Montana's Attorney General and the 2000 Montana Commission as "admission[s] of a Voting Rights Act violation with regards to the particular House and Senate Districts at issue in the case." *Id.* at 1015. While Judge Pro found these proffered hearsay statements to be "undeniably trustworthy and relevant to the proceedings," he did not deem them tantamount to the state's admission that it had violated the 1965 Voting Rights Act. *Id.*

[Indian] candidates.”<sup>133</sup> Astute political insiders, such as Assistant Attorney General Sarah Bond, interpreted the judge’s remark as encouraging the commission to be highly attuned to the political aspirations of the state’s Indian electorate.<sup>134</sup>

The state commission’s proposed plan, known as Plan 300, sought to address the Indian voters’ representational concerns by increasing the number of “Indian majority” voting districts from six to nine. But not everyone was thrilled with “Plan 300.” Montana’s Republicans, who controlled both houses of the state legislature, complained the plan was both mathematically and democratically flawed, as seeming to favor potential Democratic political candidates. Indian leaders, such as Mr. Bruce Sun Child, Vice Chair of the Chippewa-Cree Tribal Council, applauded the proposed redistricting plan, saying: “It won’t cause injustice, it will restore justice.”<sup>135</sup>

State Republican leaders disagreed, and hastily enacted a new state law prohibiting the Secretary of State from accepting any legislative redistricting plan that deviated by more than one-percent from the mathematically equal legislative district of 9,022 residents. Because the commission’s plan allowed up to a five-percent deviation from such equally sized districts, it facially violated the new enacted state law on the matter. Achieving greater Indian political agency in Montana fell into hands of a state district judge, the Honorable Dorothy McCarter. She struck down the new state law as an unconstitutional interference with the commission’s express constitutional authority and duties.<sup>136</sup>

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133. Judge Pro declined to judicially compel partial legislative redistricting because such action may impair the on-going deliberations and functions of that commission. *Id.* at 1019.

134. *Id.*

135. See *Summary Minutes of Hearing on HB 309 3* (Jan. 17, 2003).

136. See *Let New Legislative Redistricting Plan Stand*, Great Falls Tribune (July 14, 2003).

3. *Case Study Three: Building Indian Legal Agency in Montana and Elsewhere*

Legal agency—the independent capacity and power of the Indian peoples to assert and protect their legal rights—is a recent phenomenon.<sup>137</sup> Indeed, much of modern Indian case and statutory law has been created by the Indian peoples’ increasingly effective exercise of their newly confirmed legal agential powers. The recent spate of breach of trust lawsuits brought by the Indian peoples against their putative trustee, the federal government, for the maladministration of their trust resources exhibits the reality of their new agential status.<sup>138</sup> Furthermore, modern American civil rights law was literally created by hitherto excluded ethnic minorities who asserted their new agential status through lawsuits against those federal and state officials who had long denied them the exercise of their fundamental personal civil rights and liberties.<sup>139</sup>

But making legal agency a working reality for the Indian peoples and the other American ethnic minority groups requires the resolution of that threshold question initially recognized during the late 1960s and early 1970s. To paraphrase, where are those Indian and other ethnic minority lawyers who intrinsically grasp their communities’ underlying legal and social needs so as to competently represent their interests before the courts, administrative agencies and legislatures? The resounding practical retort given to this question was: “There are none!”<sup>140</sup>

The same negative response was given when that question was asked in other important Indian or minority agential contexts.

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137. Professor David Getches attributes this, in part, to the success of the Pre-Law Summer Institute, at the University of New Mexico. Getches, *supra* note 90 at 19. Beginning in 1967, this BIA and congressionally supported programs has, as of 1993, provided financial and other assistance “to over one-half of the 1500 Native American attorneys nationwide...” *Id.* at 19-20.

138. *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999).

139. Getches, *supra* note 90, at 19.

140. Philip S. Deloria, *The American Indian Law Center: An Informal History*, 24 N.M. L. REV. 285 (Spring 1994).

There, the response was: there are too few Indian or ethnic minority medical doctors, elementary teachers, academics, engineers, scientists, or social workers to create the critical mass of agents needed to rebuild those shattered communities. How do we quickly create those Indian and ethnic minority professionals who will give flesh and blood content to the rhetorical idea of agential competence within their respective communities?<sup>141</sup>

In the late 1960s, this reality spurred the BIA, and other federal Indian action agencies, to institute several important Indian affirmative action programs.<sup>142</sup> These programs' avowed purpose was to quickly produce a critical mass of Indian lawyers, as well as other important Indian professionals, so as to give reality to the concept of Indian agential power. A similar empirical reality spurred President Lyndon Johnson to sign an executive order in 1965 requiring federal agencies and their contractors to develop affirmative action programs designed to create new agential opportunities for qualified ethnic minority individuals, businesses and organizations.<sup>143</sup> President Johnson's express goal in endorsing affirmative action as a federal goal was to give representational reality to the historic American ideal of equal opportunity under the law.<sup>144</sup>

But the intervening years have witnessed a significant rollback in both federal Indian and ethnic minority affirmative action programs. Both the judicial and executive branches of the federal government have questioned the legality and social efficacy of racially targeted federal and state government's affirmative action programs.<sup>145</sup> Some newly minted ethnic minority academics have claimed that these programs unfairly stigmatize those very minority individuals they were intended to benefit.<sup>146</sup>

This rollback has substantially blunted, but has not completely derailed, the significant agential contributions made by

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141. *Id.*

142. *Id.*

143. Getches, *supra* note 90, at 19.

144. *Id.*

145. *Id.*

146. *Id.*

those newly minted Indian and ethnic minority professionals in their respective communities in America. Without these new Indian lawyers, and other newly minted Indian professionals, it is doubtful that Indian self-determination gains made in the past three decades would have been possible in America's Indian reservations and in the many urban Indian communities. Nor has this rollback silenced the on-going political and legal debate over these issues within an increasingly multi-cultural and multi-racial America.

*C. Summary: Placing These Three Case Studies in Context*

These three case studies provide modest evidence that my hypothesized agential revolution may already be underway in America. If so, its success stems from, I believe, the average American's recognition that only by embracing the principles of deep diversity will America successfully adapt to the globalized economy and "world culture" of the future. By welcoming the Indian peoples, as contemporary cultural and political forces to be reckoned with, Montana can provide practical and realistic approaches as to how other American localities and regions may work with other ethnic and cultural groups within their borders. Deep diversity, when viewed from this pragmatic perspective, furthers the economic and political self-interest of non-Indian America.

Meaningful cultural and social change grows from below and slowly infiltrates and alters the institutional features of a given society. Is there evidence that principles of deep diversity have infiltrated our American institutions so as to modify their basic processes and practices? In my conclusion I briefly evaluate a recent Supreme Court decision suggesting that principles of deep diversity have infiltrated our most significant foundational document—the United States Constitution.

IV. THE USES AND MIS-USES OF DIVERSITY THEORY  
AND PRACTICE: WHY THE SECOND AMERICAN  
FOUNDING REQUIRES A BOTTOM-UP RATHER TOP-  
DOWN STRATEGY

Ecological historian Tim Flannery argues it was the Indian peoples who taught non-Indian settlers how to tame, and ultimately conquer, the American frontier.<sup>147</sup> Conquering the next great American frontier—that of founding a just and equitable society—will also require the Indian people’s active participation and assistance. Demographers maintain that by 2050 the United States will become, as the states of California and New Mexico already have become, a minority-majority nation. Diversity, for better or worse, has already created a poly-ethnic and poly-cultural America. Just as the Indians taught the starving Pilgrim immigrants of Plymouth Colony how to adapt to a harsh land, so too can today’s America’s ethnic and cultural minorities help teach non-Indians how to adapt to their new political and social roles in the America of 2050.

My conviction is that America’s future adaptation to diversity will be best realized through localized and graduated initiatives, similar to those now on-going between the Indian and non-Indian peoples of Montana, that compel political dialogue and mutual political accommodation so as to resolve local conflicts. Furthermore, I believe that a bottom-up approach to resolving potential ethnic and cultural conflicts will likely produce more realistic and sustainable outcomes than any other alternative. The past desultory history of top-down approaches—whether legislative, judicial or regulatory—to the resolution of diversity based concerns and conflicts seems to justify this approach.

National level discussions tend to focus on the deep legal thinking required to make diversity compatible with the equal protection clause of the Constitution. Nowhere is this conceptual struggle more evident than in the recent Supreme Court decision

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147. Tim Flannery, *The Eternal Frontier: An Ecological History of North America And Its Peoples*, 272-74 (A. Mthly. Press 2001).



upholding diversity-based admissions programs in America's public colleges and universities.<sup>148</sup> Some commentators argue that the Court's slim majority was swayed by the "occupational need" rationale for diversity, rather than by any deep re-theorizing of the equal protection clause. By this view, Justice O'Connor and her colleagues took a "common sense" approach to resolving the thorny constitutional issues in this case. One commentator, Bryan W. Leach, emphasizes the functional value of diversity as (a/the) crucial factor in the majority's decision:

After reviewing the pedagogical benefits of diversity, the *Grutter* majority turned to another line of arguments that in its view "further bolstered" the law school's claim of a compelling state interest. What these arguments shared in common was their recognition of the important role that universities play in preparing students to succeed in their chosen professions. Specifically, the Court described the pressing need for tomorrow's leaders to interact capably with peoples from diverse cultural backgrounds. In order to cultivate these skills, students should be "expos[ed] to widely diverse peoples, cultures, ideas and viewpoints." The Court did not dwell on the importance of racial sensitivity as a virtue in its own right. Rather, the development of greater cross-racial understanding was characterized as a means of promoting the smooth functioning of "today's increasingly global marketplace," preserving "the military's ability to fulfill its principle [sic] mission to provide national security" and cultivating a set of political and judicial leaders "with legitimacy in eyes of the citizenry."<sup>149</sup>

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148. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

149. Bryan W. Leach, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L. J. 1093, 1103 (2004).

Some other commentators have criticized the Court's proffered, functionally based rationales for diversity as both cynical and banal. While I share some of that sentiment, explaining diversity in terms of the economic and security focused self-interest of today's non-Indian majority does make practical sense. Down the road, once the non-Indians' "fear and prudence" concerns about diversity are allayed; a deeper dialogue about the moral and ethical significance of the "second American founding" can be broached. As with so many things in societal life, patience may prove to be a virtue in this endeavor.