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Erin Brock
Freese & March

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Cover Page Footnote

Erin Brock is a practicing attorney with the firm of Freese & March, PA in Tulsa, Oklahoma and a graduate of the University of Tulsa College of Law.

BETTING ON THE TRIBES: UNITED STATES ENDORSEMENT OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE AND THE INDIAN REGULATORY ACT

Erin D. Brock^{*}

The first Americans--the Indians--are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement--employment, income, education, health--the condition of the Indian people ranks at the bottom.

This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny. Even the Federal programs which are intended to meet their needs have frequently proven to be ineffective and demeaning.

But the story of the Indian in America is something more than the record of the white man's frequent aggression, broken agreements, intermittent remorse and prolonged failure. It is a record also of endurance, of survival, of adaptation and creativity in the face of overwhelming obstacles. It is a record of enormous contributions to this country--to its art and culture, to its strength and spirit, to its sense of history and its sense of purpose.

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.¹

^{*} Erin Brock is a practicing attorney with the firm of Freese & March, PA in Tulsa, Oklahoma and a graduate of the University of Tulsa College of Law.

¹ Richard Nixon, *Special Message to the Congress on Indian Affairs*, THE AMERICAN PRESIDENCY PROJECT, March 20, 2015, <http://www.presidency.ucsb.edu/ws/?pid=2573>.

I. INTRODUCTION

It is common knowledge that Native Americans, as well as indigenous peoples from all corners of the globe, have been subjected to genocide, forced assimilation, and oppression for centuries. "In the United States in particular, Native Americans have historically been discriminated against. The injustices they suffered have never been adequately addressed, and they continue to struggle for redress and full recognition of their group and cultural identity."² Historically, indigenous peoples have been viewed as "savage nations" to be conquered and Christianized. Early European colonization forced many native peoples to flee their lands or face extinction at the hands of the civilized world. This continued marginalization has led to the degradation of Native populations into impoverished conditions and mental suffering.³

In the 1970s, President Nixon addressed Congress and ushered in the Era of Self-Determination for Native Americans.⁴ Prior to this, federal policy towards Native Americans had been one of termination.⁵ Native American peoples were pushed into adopting the culture of white America and eschewing their own traditional ways.⁶ President Nixon rejected this forced assimilation and his policies in the 1970s helped further human rights causes in Native America. However, the 1980s saw the Supreme Court and Congress turning back toward legal decisions that threatened tribal self-determination.

In 1988, Congress passed the Indian Gaming Regulatory Act.⁷ The act set forth guidelines by which gaming would be allowed to continue in Indian Country and imposed a federal regulatory scheme that included federal oversight and approval, organizational requirements, and forced state interaction with regard to certain classes of gaming.⁸ The act placed restrictions on what had previously been an area entirely

² Eva Nudd, *Indigenous Peoples and the International Criminal Court* (2005) available at <http://www.amicc.org/docs/Indigenous%20Peoples%20Fact%20Sheet.pdf>, (last visited March 22, 2015).

³ "The societal trauma in Native American history is brought on by the successive march of war, disease, mass population loss, conquest, colonization, dispossession, subjugation, and marginalization. Left unhealed, the trauma is deposited by intergenerational means into the culture and socio-economic indicators that characterize Native American communities today." WALTER R. ECHO-HAWK, *IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*, 104 (2013).

⁴ See Nixon, *supra* note 2.

⁵ *The Native American Power Movement*, DIGITAL HISTORY, http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3348 (last visited March 19, 2015).

⁶ *Id.*

⁷ Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988)(codified as 25 U.S.C. § 2701 (2014), available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/ReadingRoom/IGRA%20PL%20100-497.pdf> (last visited March 22, 2015).

⁸ 25 U.S.C. § 2702.

regulated by tribes.⁹ Tribes were forced to subjugate portions of their sovereignty in the hopes of continuing tribal gaming that had been in place for nearly a decade.¹⁰

Also in 1988, in response to the growing swell of indigenous voices demanding protection of their basic human rights, the United Nations completed the first complete draft of the Declaration on the Rights of Indigenous People.¹¹ While the draft would go through several incarnations, this initial draft began a global conversation regarding the fundamental rights that had been denied to indigenous peoples the world over, including the United States.¹² Though initially the United States participated in the revision process of the Declaration, it would be the last UN State to endorse the final version. In December of 2012, President Obama formally issued a statement that, in response to Native American outcry and “to further United States policy on indigenous issues”, the United States would join the more than 140 other UN States in endorsing the Declaration.¹³

The endorsement of the Declaration by the United States is reminiscent of Nixon’s initial promotion of self-determination. The Declaration calls for a review of laws and policies that are not in line with the ideals set forth in the Articles of the Declaration.¹⁴ One of the major areas of concern addressed by the Declaration is the need for indigenous peoples to have control of their own economic development, free from outside interference.¹⁵ This policy challenges several, long-standing, United States legal principles and will require a review of current law regarding tribal issues. The Indian Gaming Regulatory Act, with its federal and state involvement in tribal economic affairs, must be examined for inconsistencies with the United Nations’ Declaration and new United States indigenous policy, and significant steps will need to be taken to protect the basic rights of Native Americans as indigenous peoples within the United States.

⁹ 25 U.S.C. § 2701(3).

¹⁰ Sioux Harvey, *Winning the Sovereignty Jackpot: Indian Gaming Regulatory Act and the Struggle for Sovereignty*, in INDIAN GAMING: WHO WINS? 25 (Angela Mullis & David Kamper eds., 2000).

¹¹ S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 63 (2nd Edition 2004).

¹² *Universal Declaration on Indigenous Rights: A Set of Preambular Paragraphs and Principles*, U.N. Doc. E/CN.4/Sub.2/1988/25, at 2 (1988). After comments by governments and indigenous peoples’ representatives, the chair revised the draft in 1989. See *First Revised Text of the Draft Universal Declaration of the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1989/33 (1989). After comments by governments and indigenous peoples’ representatives, the chair revised the draft in 1989. See *First Revised Text of the Draft Universal Declaration of the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1989/33 (1989).

¹³ President Barack Obama: *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous People*. <http://usun.state.gov/documents/organization/153239.pdf>.

¹⁴ UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, G.A. Res. 61/295 U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at <http://www.un.org/esa/socdev/unpfii/en/declaration.html> [hereinafter UNDRIP].

¹⁵ *Id.* at ART. 3.

II. UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

A. *The History of the United Nations Declaration on the Rights of Indigenous People.*

The United Nations General Committee officially adopted the United Nations Declaration on the Rights of Indigenous Peoples on September 13, 2007.¹⁶ While seemingly modern, the Declaration had roots in early human rights policies of the mid-20th century.¹⁷

“At the close of World War II the international system had instituted the United Nations Charter and incorporated human rights precepts among its foundational elements. The reformed system joined the revolutionary movements that fought colonialism where it continued to exist in its classical form and urged self-government in its place.”¹⁸

These early attempts to battle colonization did not take into account the traditional indigenous government systems, but marked the early recognition of the need for intervention in the colonial systems that had previously existed. This recognition was the beginning of the shift towards recognition of indigenous rights.¹⁹

While the initial human rights charter provisions ignored indigenous peoples, in 1957 the International Labour Organization (ILO) Convention No. 107 noticed the vulnerability of indigenous peoples with regard to unfair labor practices and lack of adequate training.²⁰ The ILO conducted studies regarding these perceived vulnerabilities, but still ignored the indigenous peoples’ “designated representatives”, thus never fully addressing the desires and needs the indigenous peoples voiced.²¹ This investigation by the ILO was one of the first to focus on the need for attention to indigenous people and their rights as individuals; however, it ignored their distinct cultural natures.²² These policies mirrored the assimilation approach practiced within the United States at that time because they neglected to perceive indigenous nations outside the confines of western ideals. The belief that it was in the best interest of native

¹⁶ See ECHO-HAWK, *supra* note 4 at 4.

¹⁷ See ANAYA, *supra* note 12 at 53-54.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 54-55.

²¹ See ANAYA, *supra* note 12 at 54-55.

²² “This Convention applies to . . . members of tribal or semi-tribal populations.” Convention No. 107 ART. 1, para 1.

groups to be wholly integrated into the “larger social and political order” was pervasive and had deep impacts on international policy.²³

By 1960, the UN had “officially repudiated colonialism.”²⁴ The 1960s and 1970s were known for their activist nature, which spread into the indigenous populations. The Aboriginal People of Australia completed a “Freedom Ride” in 1965 through the most racist portions of the Australian countryside in an effort to raise awareness for Aboriginal issues.²⁵ This action helped push forth a victory for the 1967 Referendum that counted Aboriginal People in the Australian Census and allowed for the Commonwealth to pass laws dealing with Aboriginal peoples and issues.²⁶ This measure was passed with a 91 percent approval rating and marked the starting place for true discussion of Aboriginal Rights in Australia.²⁷

Meanwhile, Native Americans were engaging in their own awareness campaigning. “In 1961, a militant new Indian organization, the National Indian Youth Council, appeared and began to use the phrase ‘Red Power.’ They sponsored demonstrations, marches, and ‘fish-ins’ to protest state efforts to abolish Indian fishing rights guaranteed by federal treaties.” This early movement helped spawn several more groups that began to take action with regard to protecting rights that were promised decades before by the federal government. “In 1964, Native Americans in the San Francisco Bay area established the Indian Historical Society to present history from the Indian point-of-view. At the same time, the Native American Rights Fund brought several legal suits against states that had taken Indian land and abolished Indian hunting, fishing, and water rights in violation of federal treaties.”²⁸ One of the most infamous and public displays of Native American activism followed closely behind these initial efforts;

“In November 1969, some 200 Native Americans seized the abandoned federal penitentiary on Alcatraz Island in San Francisco Bay. For 19 months, Indian activists occupied the island to draw attention to conditions on the nation's Indian reservations. Alcatraz, the Native Americans said, symbolized conditions on reservations: ‘It has no running water; it has inadequate sanitation facilities; there is no industry, and so unemployment is very great; there are no health care facilities; the soil is rocky and

²³ Convention No. 107 ART. 1, at 56.

²⁴ See ECHO-HAWK, *supra* note 4 at 29.

²⁵ *Collaborating for Indigenous Rights; Freedom Ride, 1965*, NAT’L MUSEUM AUSTRALIA, INDIGENOUSRIGHTS.NET.AU, http://indigenousrights.net.au/civil_rights/freedom_ride,_1965 (last visited March 22, 2015).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

unproductive.”²⁹

This new, powerful voice among Native American activists helped spark new discussion into the rights and needs of indigenous peoples globally.

President Nixon’s 1970 speech was one of many acts that would help shape international view of indigenous rights and work towards the eventual drafting of the United Nations Declaration on the Rights of Indigenous Peoples. The United Nations’ attention turned toward indigenous rights within the framework of defeating racism in 1971.³⁰ A study was authorized by the UN to investigate the discrimination against indigenous peoples globally. The study took more than a decade to complete and the results were dismal.³¹ Morbidity, lack of access to health care, poverty and lack of decent housing were among the issues noted in the report.³² In America alone, the life expectancy for Native Americans in the 1970s was 44 years compared to the national average of the mid-60s.³³ “The UN Economic and Social Council (UNECOSOC) responded to these findings by creating the Working Group on Indigenous Populations (WGIP), comprised of five independent experts as well as Indigenous advisors, in order to focus exclusively on Indigenous issues worldwide. Its role was to make recommendations to the Commission of Human Rights through the Subcommission.”³⁴

The working group has acted as a conduit for information between the indigenous populations of the world, other interested groups, and as an instrument of change.³⁵ While initially confined to a very limited set of tasks, the working group was expanded multiple times and allowed for open participation in its annual sessions.³⁶ The working group’s most vital work has been through its “standard-setting mandate” which

²⁹ *Id.*

³⁰ See ECHO-HAWK, *supra* note 4 at 30.

³¹ *Id.*

³² Martinez Cobo, *The Problem of Discrimination against Indigenous Populations* (1984) available at http://www.un.org/esa/socdev/unpfii/documents/MCS_xxi_xxii_e.pdf.

³³ “In 1970 . . . 40 percent of the Native American population lived below the poverty line. In that year, Native American life expectancy was just 44 years, a third less than that of the average American . . . Conditions on many of the nation’s reservations were not unlike those found in underdeveloped areas of Latin America, Africa, and Asia. The death rate among Native Americans exceeded that of the total U.S. population by a third. Deaths caused by pneumonia, hepatitis, dysentery, strep throat, diabetes, tuberculosis, alcoholism, suicide, and homicide were 2 to 60 times higher than the entire U.S. population. Half a million Indian families lived in unsanitary, dilapidated dwellings, many in shanties, huts, or even abandoned automobiles.”

See *The Native American Power Movement*, *supra* note 6.

³⁴ Erin Hanson, *UN Declaration on the Rights of Indigenous Peoples*, INDIGENOUS FOUNDATIONS.ARTS.UBC.CA, March 10, 2013, <http://indigenousfoundations.arts.ubc.ca/?id=1097> (last visited March 19, 2015).

³⁵ See ANAYA, *supra* note 12 at 63.

³⁶ *Id.*

led the sub-commission to approve the drafting of a declaration on indigenous rights for adoption by the U.N. General assembly.³⁷ This draft was produced with minimal revisions by the chair in 1989.³⁸ It was then further reviewed and developed over several years before it was finally submitted to the committee in 1993.³⁹ This draft reflected the concerns of indigenous peoples along with proposals submitted by their representatives as well as comments made by interested governments.⁴⁰

After years of revisions the declaration was finally adopted by the sub-commission in 1994 and was submitted for approval to the U.N. Commission on Human Rights.⁴¹ That Commission then developed its own working group to review the sub-commission's draft. This ad hoc working group consisted of human rights experts and over 100 Indigenous organizations.⁴² This group worked tirelessly on the draft declaration, subjecting the draft to a series of extensive reviews "to assure U.N. member states that it remained consistent with established human rights, and did not contradict nor override them."⁴³

After nearly a quarter of a century of debate the U.N. Declaration on the Rights of Indigenous Peoples, referred to by many as the UNDRIP, was finally adopted by the U.N. General Assembly in September of 2007.⁴⁴ While widely accepted as the new normative standard for the treatment of indigenous peoples; several major states refused to commit to the adoption of the UNDRIP. Canada, New Zealand, Australia, and

³⁷ Sub-Commission on the Prevention of Discrimination and Protection of Minorities Res. 1985/22 (Aug. 29, 1985).

³⁸ See ANAYA, *supra* note 12 at 63.

³⁹ "submitted in 1993 to the Subcommission on the Prevention of Discrimination and Protection of Minorities (now known as the Subcommission on the Promotion and Protection of Human Rights), who approved it the following year." Hanson: *UN Declaration on the Rights of Indigenous Peoples*. <http://indigenousfoundations.arts.ubc.ca/?id=1097>.

⁴⁰ "Through the process of drafting a declaration, the [WGIP] engaged states, indigenous peoples, and others in an extended multilateral dialogue on the specific content of norms concerning indigenous peoples and their rights . . . The working group provided important means for indigenous peoples to promote their own conceptions about their rights within the international arena." See ANAYA, *supra* note 12 at 63-64.

⁴¹ *Id.*

⁴² See Hanson, *supra* note 35.

⁴³ "The process moved very slowly because of concerns expressed by States with regard to some of the core provisions of the draft declaration, namely the right to self-determination of indigenous peoples and the control over natural resources existing on indigenous peoples' traditional lands. The need to accommodate these issues led to the creation, in 1995, of the open-ended inter-sessional working group to consider and elaborate on the 1994 draft" *Historical Overview*, UNITED NATIONS, PERMANENT FORUM ON INDIGENOUS ISSUES, <http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples/HistoricalOverview.aspx> (last visited Mar. 19, 2015).

⁴⁴ "In 2006, the draft was accepted by the UN Human Rights Council, and the following year, it was adopted by a majority of the UN. General Assembly." *Id.*

the United States all refused to endorse the UNDRIP, citing their respective positions with regard to native rights.⁴⁵ These four states,

“have all pointed to their track records in upholding human rights, including the recognition of Indigenous rights within their own national governance systems, as a justification for their reluctance to endorse the UNDRIP. They have noted that many nations that have signed on to the UNDRIP do not appear to uphold these minimum standards.”⁴⁶

The initial rejection of the UNDRIP by these four states has been reversed in all cases, with the United States being the last of the four to announce their full endorsement in December of 2010.⁴⁷ While all four states continue to point out the “aspirational” nature of the UNDRIP, President Obama has stated publicly that actions are the key to the success of the UNDRIP and that is the standard to which his administration will be held.⁴⁸

B. The Structure and Mission of The United Nations Declaration On The Rights Of Indigenous People.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) consists of a Preamble and 46 articles.⁴⁹ The UNDRIP addresses a comprehensive list of indigenous issues ranging from the protection of religious freedoms in Article 12 to issues regarding labor laws in Article 17.⁵⁰ The text lists the human rights that constitute

⁴⁵ “The Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on Thursday, 13 September 2007, by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).” *Peoples*, UNITED NATIONS, PERMANENT FORUM ON INDIGENOUS ISSUES, <http://undesadspd.org/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx> (last visited Mar. 19, 2015).

⁴⁶ See Hanson, *supra* note 35.

⁴⁷ “The United States government announced its decision to review its stance on the Declaration in April 2010, and at various times, President Barack Obama has expressed interest in supporting it. In November 2009, Obama signed a presidential memorandum to begin consultations with tribal leaders, non-governmental organizations and government representatives on how the UNDRIP may be effectively implemented in the United States. In April 2010, the United States announced that it would hold a formal review of the UNDRIP, and, in December 2010, after several months of consultations, Obama announced that the US fully endorsed the UNDRIP.” *Id.*

⁴⁸ “But I want to be clear: What matters far more than words -- what matters far more than any resolution or declaration — are actions to match those words. And that’s what this conference is about. That’s what this conference is about. That’s the standard I expect my administration to be held to.” Pres. Barak Obama, *Remarks by the President at the White House Tribal Nations Conference*, WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Dec. 16, 2010), *available at* <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>.

⁴⁹ *Supra* note 15.

⁵⁰ *Id.*

“minimum standards” for the ‘survival, dignity and well-being of indigenous peoples of the world,’ and it also defines the obligations of nations toward their indigenous peoples and provides guidelines for implementing and interpreting the rights and obligations contained in the instrument.⁵¹ The UNDRIP is a basic set of human rights principles and guidelines for the international community to implement those rights. The UNDRIP does not purport to grant any new rights to indigenous peoples, but instead recognizes basic rights that arise from “norms and obligations that are generally applicable” to the all people under basic international law.⁵²

One of the primary purposes of the UNDRIP is to “connect the human rights of indigenous peoples to the larger body of international human rights law and make that body of law more accountable to the needs and circumstances of indigenous peoples.”⁵³ The UNDRIP “protects collective rights that may not be addressed in other human rights charters that emphasize individual rights” which is key to protecting indigenous peoples traditional cultural norms.⁵⁴ This approach, unlike the relationship between the United States federal government and Indians, takes into account not just the societal norms of western civilization but also the inherent character of indigenous peoples, as Congressman Dawes noted in 1885.

Of particular interest are the sections dealing with indigenous peoples’ rights to self-determination and to their pursuit of economic development projects free from interference.⁵⁵ Article 3 of the UNDRIP “recognizes Indigenous peoples’ right to self-determination, which includes the right ‘to freely determine their political status and freely pursue economic, social and cultural development.’... and Article 5 protects their right to ‘maintain and strengthen their distinct political, legal, economic, social and cultural institutions.”⁵⁶ These sections illustrate the importance of sovereignty to indigenous people on an international level. Under the principles lined out in the UNDRIP, self-determination and economic development are basic, fundamental human rights for indigenous communities.

The UNDRIP also recognizes the tremendous harms done to indigenous peoples throughout their histories. “The Declaration has a distinct remedial purpose. It is driven by the persistent denial of basic human rights of indigenous peoples by entrenched forces of colonialism, dispossession, discrimination, and assimilation practices that are

⁵¹ See ECHO-HAWK, *supra* note 4, at 39.

⁵² *Id.*

⁵³ *Id.* at 40.

⁵⁴ See Hanson, *supra* note 35.

⁵⁵ See ECHO-HAWK, *supra* note 4, at 40.

⁵⁶ See Hanson, *supra* note 35.

justified by nefarious legal doctrines from a bygone era.”⁵⁷ The General Assembly, in drafting the preamble, highlights these issues, which it found to be so pervasive.⁵⁸ The UNDRIP was adopted with the hope that some of these deep seated and long standing animosities and grievances could be addressed and corrected so that the future of indigenous peoples did not follow the same bloody and dark pathways from the last several centuries.

C. The Endorsement of the United Nations Declaration on the Rights of Indigenous People by the United States.

The idea that the UNDRIP’s goal of recognizing indigenous rights as a worthy endorsement was not clear in a nation where equality is one of the founding tenets. The United States was the last major nation to endorse the UNDRIP, nearly 3 full years after 144 other states had already signed off on its principles.⁵⁹ Even after Canada, Australia, and New Zealand, countries with huge indigenous populations and complex legal and historical relations, all reversed their earlier refusal to endorse the UNDRIP.⁶⁰ While the United States espoused several reasons for its hesitance to sign, the most likely is that they feared that the recognition of external standards for the treatment of native populations within their borders might upset the current balance of power.

After the United States’ initial rejection of UNDRIP, indigenous people throughout America began calling for the United States to reconsider its position. In April of 2010, in “response to calls from many tribes, individual Native Americans, civil society, and others in the United States”, the United States began an extensive review of the UNDRIP.⁶¹ This review was led by the State Department and consisted of a series of “tribal and NGO consultations to review what endorsement of the international human rights declaration would mean for indigenous populations in the United States”⁶² Reviewing the Declaration included three rounds of consultations with tribal leaders, both in D.C. and in Rapid City, South Dakota, as well as the review of more than 3,000 written comments.⁶³ The State Department declared that endorsement of the UNDRIP would “further United States Policy on indigenous issues” and that such support goes

⁵⁷ See ECHO-HAWK, *supra* note 4, at 40.

⁵⁸ “Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources” which have prevented their “development in accordance with their own needs and interests.” See UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 15, at Preamble.

⁵⁹ See Hanson, *supra* note 35.

⁶⁰ *Id.*

⁶¹ See OBAMA, *supra* note 14.

⁶² Angela Chang, *President Obama endorses the UN Declaration on the Rights of Indigenous Peoples!*, AMNESTY INTERNATIONAL USA, (Dec. 16, 2010) <http://blog.amnestyusa.org/us/president-obama-endorses-the-un-declaration-on-the-rights-of-indigenous-peoples/> (last visited Mar. 20, 2015).

⁶³ See OBAMA, *supra* note 14.

“hand in hand with the United States commitment to address the consequences of a history in which . . . few have been more marginalized and ignored by Washington for as long as Native Americans.”⁶⁴ The President also stated that supporting the UNDRIP “reflects the United States Commitment to work with [America’s 565 federally recognized] tribes . . . to address the many challenges they face.”⁶⁵

The endorsement of the UNDRIP by the United States carries some interesting obligations. While the UNDRIP operates as an international charter for human rights, it is not actually legally binding on the states that endorse it, as the United States has continually pointed out.⁶⁶ Although technically true, the UNDRIP does appear to have force within legal community. “Many leading legal experts believe that numerous provisions of the Declaration constitute customary international law.”⁶⁷ Further, “[k]ey provisions of the Declaration are linked to treaties ratified by the United States and are therefore the supreme law of the land.”⁶⁸ Whether these provisions are tied to a treaty or merely recognized as international law in a customary sense, they lend legal weight to the Declaration itself proving that there are legal ramifications regardless of the lack of legally binding terms. It is obvious that “contemporary international law now includes broad moral precepts among its constitutional elements, particularly within the rubric of human rights” and, as such, the “legal character of the obligation [to uphold the terms of the UNDRIP] can thus be seen to attach to all the subjectivities of obligation that surface within the realm of human rights.”⁶⁹ While the United States professes that its endorsement of the UNDRIP is purely “aspirational” in nature; it is impossible to believe that there are no tangible, legal obligations to abide by the terms set out in the UNDRIP under international common law.

III. INDIAN GAMING REGULATORY ACT

A. *A Brief History of the Tribal Sovereignty and Indigenous Rights in the United States*

In order to fully grasp the struggle between states and tribes over tribal gaming, it is important to first understand the framework of tribal sovereignty in the United States. The nature of the relationship of tribes to the federal government is entirely unique. Tribes were present on the American continent long before westerners began colonizing this area and did not readily submit to outside authority. As initial explorations gave way

⁶⁴ *UN Declaration on the Rights of Indigenous Peoples Review*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/s/tribalconsultation/declaration/> (last visited Mar. 20, 2015).

⁶⁵ See OBAMA, *supra* note 14.

⁶⁶ See *UN Declaration on the Rights of Indigenous Peoples Review*, *supra* note 65.

⁶⁷ See ECHO-HAWK, *supra* note 4 at 40.

⁶⁸ *Id.* at 91-93.

⁶⁹ See ANAYA, *supra* note 12 at 69.

to more permanent government, westerners began to treat the indigenous tribes of America as conquered peoples.

In 1823, Chief Justice Marshall of the United States Supreme Court fashioned what is known as the “Doctrine of Discovery”.⁷⁰ In *Johnson v. M’Intosh*, Chief Justice Marshall wrote that all lands were acquired by the conquering force in this country, the westerners, and “maintained by force”.⁷¹ This gave absolute power to the conquering power to prescribe the limits of that power.⁷² “This rule flew in the face of international law, since bare conquest has never been considered sufficient to convey good title under the law of nations . . . Thus, Marshall had to craft an exception to the hard and fast rule that conquerors must respect property rights in the lands they invaded”.⁷³ Marshall used flagrant and unjust depictions of native peoples as wild, savage, and incapable of being ruled under normal circumstances to justify his new doctrine. Most importantly, Marshall’s opinion in *Johnson v. M’Intosh* forever established the way Indian title to lands is treated in the United States. Marshall stated that,

“[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.”⁷⁴

This case set the tone for the country and it gave the federal government absolute power of Indian nations. States quickly followed suit and began issuing decisions that reflected the same concepts of “right by conquest” espoused by the Marshall Court. During the Removal Era of Federal Indian Policy, the Alabama Supreme Court held that they had “clear proof, that, in the understanding of all the civilized worlds, a discovered Indian country was a conquered country: that the new sovereign always so considered it, and exercised the rights of a conqueror over his new subjects...”⁷⁵ The Alabama Court continued to use this doctrine to “sanction state power over the Creek Nation”, and it “did not mince words about the fate of the Creek Indians under state rule.”⁷⁶ The South had equated Indians with a pestilence to be exterminated and Alabama’s Court “looked forward with confidence to the time when the whole state

⁷⁰ *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

⁷¹ *Id.* at 589.

⁷² *Id.*

⁷³ See ECHO-HAWK, *supra* note 4 at 106.

⁷⁴ *Johnson v. M’Intosh*, 21 U.S. at 588-589.

⁷⁵ *Caldwell v. State*, 1 Stew. & P. 327, 1832 WL 545 (Ala. 1832) at *45.

⁷⁶ See ECHO-HAWK *supra* note 4 at 108.

would be freed from its Indian Population.”⁷⁷ Tennessee’s Supreme Court went a step further and specifically stated that Indian tribes must “accept a master or perish.”⁷⁸

During the Removal period there was tension between the Supreme Court and the Executive and Legislative branches of the federal government. President Andrew Jackson pressured Congress to pass the Removal Act of 1830. This set the stage for President Jackson to begin the process of systematically forcing tribal groups from their traditional homes to lands west of the Mississippi.⁷⁹ While Jackson was successful in moving 50,000 Indians west of the Mississippi to what became known as “Indian Territory”, he faced opposition from the Cherokee Nation of Georgia.⁸⁰ The Cherokee Nation sued Georgia and Chief Justice Marshall produced a second decision affirming the status of tribes as subservient beings and bolstering Jackson’s position. Marshall stated plainly “the Indian territory is admitted to compose a part of the United States.”⁸¹ He reiterated his earlier position that tribes constituted “domestic dependent nations” and set forth the trust doctrine holding that tribes “relation to the United States resembles that of a ward to his guardian.”⁸²

While initially appearing to support Jackson’s position that tribes could be forced by states and the Executive Branch to submit to their authority, Marshall quickly reversed his position. In 1832, Marshall decided the last of his famous “trilogy” of cases, *Worcester v. Georgia*. Marshall held that the Cherokee Nation was a sovereign power unto itself and was free from the laws of Georgia regarding activities occurring within the borders of its territory.⁸³ President Jackson, however, refused to follow the Court’s

⁷⁷ *Caldwell v. State*, 1832 at *53.

⁷⁸ *State v. Foreman*, 1835 WL 945, 16 Tenn. 256, at *8-9.

⁷⁹ The Act established a process whereby the President could grant land west of the Mississippi River to Indian tribes that agreed to give up their homelands. As incentives, the law allowed the Indians financial and material assistance to travel to their new locations and start new lives and guaranteed that the Indians would live on their new property under the protection of the United States Government forever. With the Act in place, Jackson and his followers were free to persuade, bribe, and threaten tribes into signing removal treaties and leaving the Southeast.” *Milestones: 1830-1860: Indian Treaties and the Removal Act of 1830*, U.S. DEPARTMENT OF STATE, <https://history.state.gov/milestones/1830-1860/indian-treaties> (last visited Mar. 20, 2015).

⁸⁰ *Id.*

⁸¹ *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 17 (1831).

⁸² *Id.*

⁸³ “The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States. The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity. The acts of the legislature of Georgia interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, is committed exclusively to the government of the union.” *Worcester v. State of Ga.*, 31 U.S. 515, 520 (1832).

holding. Jackson has apocryphally been attributed with saying "John Marshall has made his decision, now let him enforce it" but there has been no conclusive evidence of that.⁸⁴ Jackson did, however, flaunt his presumed authority and ignored Marshall. Jackson did the following:

[He] obtained the signature of a Cherokee chief agreeing to relocation in the Treaty of New Echota, which Congress ratified . . . in 1835. The Cherokee signing party represented only a fraction of the Cherokee, and the majority followed Principal Chief John Ross in a desperate attempt to hold onto their land. This attempt faltered in 1838, when, under the guns of federal troops and Georgia state militia, the Cherokee tribe were forced to the dry plains across the Mississippi. The best evidence indicates that between three and four thousand out of the fifteen to sixteen thousand Cherokees died en route from the brutal conditions of the 'Trail of Tears.'⁸⁵

The Indian nations continued to experience similar forms of degradation while the government continued to struggle with the place of Indians in America. The Dawes Act of 1887 allowed the Executive Branch to break apart the reservations that had been promised to the tribes into small, individual parcels of land.⁸⁶ Ostensibly this was intended to promote farming among the tribes and push them towards assimilating with the western culture that was quickly taking over.⁸⁷ However, this forced assimilation completely ignored tribal mentality and disregarded any possibility of tribal self-determination or sovereignty. Dawes himself noted that Indians appeared to lack the "selfishness" that is at the heart of civilization.⁸⁸

⁸⁴ Jeffrey Rosen, *Supreme Court History: The First 100 Years*, THE SUPREME COURT, (Dec. 2006) <http://www.pbs.org/wnet/supremecourt/antebellum/history2.html> (last visited Mar. 20, 2015).

⁸⁵ See *Milestones: 1830-1860: Indian Treaties and the Removal Act of 1830*, *supra* note 80.

⁸⁶ *Transcript of Dawes Act* (1887), OURDOCUMENTS.GOV, *available at* <http://www.ourdocuments.gov/doc.php?doc=50&page=transcript>.

⁸⁷ "The act, also known as the General Allotment Act, was named for Massachusetts Congressman Henry Dawes, who declared that private property had the power to civilize. To be civilized, he said, was to "wear civilized clothes, cultivate the ground, live in houses, ride in Studebaker wagons, send children to school, drink whiskey (and) own property." Dawes's plan was to extend the protection of the nation's laws to American Indians by allotting reservation land in parcels of 40 to 160 acres to individuals and heads of households." Alys Landry, *Native History: Dawes Act Signed Into Law to 'Civilize' Indians*, INDIAN COUNTRY TODAY, (Feb. 18, 2014), <http://indiancountrytodaymedianetwork.com/2014/02/08/native-history-dawes-act-signed-law-civilize-indians-153467> (last visited Mar. 20, 2015).

⁸⁸ "The head chief told us that there was not a family in that whole nation that had not a home of its own. There was not a pauper in that nation, and the nation did not own a dollar. It built its own capitol, and it built its schools and its hospitals. Yet the defect of the system was apparent. They have got as far as they can go because they own their land in common ... there is no enterprise

In 1903, the Supreme Court again affirmed the position that indigenous peoples were weak and in need of protection.⁸⁹ When the Kiowa Chief Lone Wolf sued the government on behalf of his people to enforce their treaty rights, the Supreme Court found that Congress had “plenary authority,” power over tribes, and could change the terms, “abrogate,” the treaty at any time without fear of repudiation from the Court.⁹⁰ The Court held that addressing the claim of Lone Wolf would, in effect, limited Congress’ power over the tribes, power that Marshall had earlier established was limitless.⁹¹ Yet again tribal interests were subsumed by their “conquerors.”

In the 1950s, Congress again turned its attention towards termination of the tribes. The goal was to begin assimilating them into white society to get them from the poor management of the Bureau of Indian Affairs (BIA) and to help them achieve the same levels of prosperity as the rest of the nation.⁹² Congress agreed by resolution to make it the official policy of the United States to “make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives

to make your home any better than that of your neighbour’s. There is no selfishness, which is at the bottom of civilisation. Til this people will consent to give up their lands, and divide them among their citizens so that each can own the land he cultivates, they will not make much more progress.”

Henry Dawes, U.S. Senator from Mass., *Address at the Third Lake Mohonk Indian Conference* (1885), quoted in SCOTT L MALCOMSON, *ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE* 15 (Farrar, Strauss, and Giroux, 1st ed. 2001). (alteration in original).

⁸⁹ It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They own no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903).

⁹⁰ Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. *Id.* at 222.

⁹¹ “To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress . . . of all power to act, if the assent of the Indians could not be obtained.” *Id.* at 221.

⁹² “In 1943 the United States Senate conducted a survey of Indian conditions. The living conditions on the reservations were found to be horrific, with the residents living in severe poverty. The Bureau of Indian Affairs and the federal bureaucracy were found to be at fault for the troubling problems due to extreme mismanagement.” HISTORY AND CULTURE, TERMINATION POLICY: 1953-1968. AMERICAN INDIAN RELIEF COUNCIL. http://www.nrcprograms.org/site/PageServer?pagename=airc_hist_terminationpolicy.

pertaining to American citizenship.”⁹³ Further, Congress wanted this completed “as rapidly as possible.”⁹⁴ The termination of indigenous peoples special status was to be affected by the abolishment of the BIA and a massive overhaul of all federal policy including treaties and legislation currently in place.⁹⁵

In the same year, Congress passed what is commonly referred to as Public Law 280.⁹⁶ Public Law 280 was enacted in the hopes of combating what was considered the rampant “lawlessness” present within Indian Country.⁹⁷ Originally six states were given jurisdiction over criminal offenses committed by or against Indians in their respective states regardless of where the offenses took place.⁹⁸ This allowed state law to replace any form of tribal law that may have been in existence at the time and forced tribes under the rule of a separate sovereign. Not all states were happy about this development, as the federal government did not allow for any additional funding for states to enforce their new jurisdiction creating additional antagonism between the tribes and the states.⁹⁹

Congress also granted limited, civil regulatory jurisdiction in the same six states. These two provisions were a departure from the traditional, purely federal regulation that had been exercised until that point.¹⁰⁰ Public Law 280 marked the beginning of true

⁹³ H.R.Con.Res. 108, 83d Cong., 1st Sess., 67 Stat. B132. *available at* http://digital.library.okstate.edu/kappler/Vol6/html_files/v6p0614.html (last visited March 30, 2015).

⁹⁴ *Id.*

⁹⁵ “[The] offices of the Bureau of Indian Affairs whose primary purpose was to serve any Indian tribe or individual Indian freed from Federal supervision should be abolished. It is further declared to be the sense of Congress that the Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties between the Government of the United States and each such tribe, and report to Congress at the earliest practicable date, but not later than January 1, 1954, his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution.” *Id.*

⁹⁶ 18 U.S.C. § 1162.

⁹⁷ “In Pub.L. 280, the primary concern of which was combating lawlessness on reservations, California [along with five other states] was granted broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State but more limited, nonregulatory civil jurisdiction.” *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

⁹⁸ “Initially, Public Law 280 transferred all criminal jurisdiction over tribes in California, Minnesota, Nebraska, Oregon, and Wisconsin to those states. Congress added Alaska shortly thereafter. These six states are collectively known as the “mandatory Public Law 280” states, as their assumption of jurisdiction was dictated by Congress.” Daniel Twetten, *Public Law 280 and the Indian Gaming Regulatory Act: Could Two Wrongs Ever Be Made into A Right?*, 90 J. CRIM. L. & CRIMINOLOGY 1317, 1323 (2000).

⁹⁹ *Id.* at 1322.

¹⁰⁰ “In discharging its duty to care for the tribes, the federal government struck a balance with tribes regarding tribal justice systems. After the passage of the Major Crimes Act in 1885, the Bureau of Indian Affairs, through the Courts of Indian Offenses, maintained jurisdiction over major crimes committed on Indian lands. Tribes retained exclusive jurisdiction over lesser crimes and exercised concurrent jurisdiction over many of the major crimes. However, Congress wiped out this arrangement in 1953 when it passed Public Law 280” *Id.* at 1323.

state authority over tribes and was eventually expanded to include an additional 10 states.¹⁰¹ It was not until 1968 that Congress limited the state's power over tribes by requiring tribal consent to additional exercises of jurisdiction.¹⁰² The amendment also allowed for states to "retrocede" jurisdiction back to the federal government.¹⁰³ Several states took the opportunity to return jurisdiction to the federal courts in some small part, but tribes still remained under the rule of the states. This abdication of power left tribes at a serious disadvantage as sovereigns with no real sovereignty and states that refused to administer justice for crimes committed in Indian country due to a lack of funding.

While the landscape of Indian sovereignty appeared bleak at the end of the 1960s, there were some who were fighting to protect the native population in America from outright extinction.¹⁰⁴ The 1968 Indian Civil Rights Act forced the interest of protecting individual tribal members rights on tribes by imposing similar protections on tribes as the Bill of Rights imposed on the federal government.¹⁰⁵ While forcing tribal governments to submit to more outside interference, this act marked a step away from assimilation and back towards self-determination. Two years later, President Nixon furthered this end and promulgated a new era of tribal self-determination and respect.¹⁰⁶ Calling for an end to paternalism, Nixon urged Congress to "return control of federal Indian programs to tribes."¹⁰⁷ While these steps seemed to be leading the country back towards recognizing the inherent sovereignty of tribal nations, "[o]ne critic observed, the federal government's self-determination policy 'involve[d] contracting with tribes, rather than actually transferring power to them'." ¹⁰⁸

B. The Rise of Tribal Gaming In The United States.

¹⁰¹ FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 368-70 (1982 ed.)

¹⁰² Twetten, *supra* note 99 at 1324.

¹⁰³ "The 1968 amendments also allowed states to retrocede jurisdiction back to tribes. Five states have returned jurisdiction to certain tribes pursuant to this amendment. Minnesota, Wisconsin, and Nebraska each returned complete jurisdiction over crimes on one reservation to the federal government. In addition, Washington returned jurisdiction to two tribes, and Nevada returned jurisdiction to nearly all tribes."

Id. at 1323.

¹⁰⁴ "In 1968, President Lyndon Johnson identified the "new goal" of federal Indian policy as one of "partnership and self help." This policy was meant to allow Indians to either retain their traditional homelands or to move into cities with adequate skills to live alongside the white Americans successfully. STEVEN ANDREW LIGHT AND KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE, 33 (2005).

¹⁰⁵ 94 U.S.C. §§ 1301-1341.

¹⁰⁶ See Nixon, *supra* note 2.

¹⁰⁷ *Id.* at 34.

¹⁰⁸ *Id.* (quoting PAUL H. STUART, *Organizing for Self-Determination: Federal and Tribal Bureaucracies in an Era of Social and Policy Change*, in AMERICAN INDIANS, 95 (Green and Tonnesen, eds.).

Many people believe that tribal gaming came into existence with the passage of the Indian Gaming Regulatory Act (IGRA) in 1988. However, Indian gaming predates IGRA by nearly a decade and was a flourishing economic endeavor long before Congress took notice.¹⁰⁹ Tribes, spurred on by the success of state lotteries and charity bingo games, began looking to gambling as a potential source of revenue to bolster their impoverished economies.¹¹⁰ As with any flourishing economic endeavor there were detractors who attempted to stifle this new source of economic growth. The very first casinos in Florida and California brought with them some of the most ferocious battles regarding sovereignty between states and tribal governments.¹¹¹ These court cases set the stage for the federal recognition of Indian gaming and for the creation of the IGRA in 1988.

“The Seminole Tribe opened a high-stakes bingo hall on their reservation at Hollywood, Florida on December 14, 1979 and the state tried immediately to shut it down. A final decision by the United States Supreme Court in 1983¹ was made after a series of court battles. The Court ruled in favor of the Seminoles affirming their right to operate their bingo hall.”¹¹² The case centered on whether or not the tribes could operate bingo halls in a Public Law 280 state, which allowed for some forms of gambling, like horse races and charity bingo, but provided criminal penalties for violations of certain regulations. Both parties agreed “that forms of gambling such as horse racing are regulated in Florida, and indeed the petitioner admits that the Indians could engage in the operation of horse racing activities without interference by the state. Petitioner suggests that the distinction between bingo and horse racing lies within the licensing requirements; however, we find that argument without merit. Regulation may appear in forms other than licensing, and the fact that a form of gambling is self-regulated as opposed to state-regulated through licensing does not require a ruling that the activity is prohibited.”¹¹³ Once the court determined that gaming was a regulated activity not a prohibited activity, the state no longer had civil authority over the tribes under Public Law 280.¹¹⁴

¹⁰⁹ Suzette Brewer, *Indian Gaming Regulatory Act History & Facts*, INDIAN GAMING, April 25, 2014, <http://www.indiangaming.org/info/pr/presskit/STATES.pdf>.

¹¹⁰ Harvey, *supra* note 10, at 15

¹¹¹ “Indians in Florida and California began to raise revenue by offering bingo with larger prizes than were allowed under state law. The states threatened to sue if the tribes did not stop their gaming. The tribes, in turn, sued in federal court.” *Id.* at 15-16.

¹¹² *Brief History of Indian Casinos*, INDIAN GAMING, May 4, 2014, http://500nations.com/news/Indian_Casinos/history.asp.
http://500nations.com/news/Indian_Casinos/history.asp.

¹¹³ *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 315 (5th Cir. 1981).

¹¹⁴ Referencing *Bryan v. Itasca County*, the court stated: “that ‘if Congress in enacting Pub.L. 280 had intended to confer upon the States general civil regulatory powers, including taxation over reservation Indians, it would have expressly said so.’ . . . Although the Supreme Court was interpreting the language of Public Law 280 as directed at the six mandatory states, it is clear that these same limitations on civil jurisdiction would apply to a state that assumed jurisdiction pursuant to Section 7 of the former Public Law

The court in *Seminole Tribe of Florida v. Butterworth* considered the public policy behind the gaming laws in Florida, which would become a key portion of the analysis in other major gaming cases. The court found that the prohibition on gambling in Florida was against lotteries, but that exceptions had been made for bingo, horse-racing, and a few other forms of gambling. These exceptions were enough to indicate that bingo was a regulated industry and not against Florida public policy.¹¹⁵ While the court reasoned that its decision could technically go either way, all ambiguities must be resolved in the favor of the tribes.¹¹⁶

The preeminent gaming case, *California v. Cabazon Band of Mission Indians*, was decided just six years later and spawned the development of federal regulations regarding tribal gaming. After the success of the Seminole tribes case, more than 80 tribes across the nation opened bingo halls to help generate revenue for their tribes and further their economic development.¹¹⁷ Two of these tribes, the Cabazon and Morongo Bands of Mission Indians, operated both bingo halls and a poker room as their sole source of revenue.¹¹⁸ The Cabazon Band was a tiny tribe, boasting only 25 members at the time, while the Morongo band has less than 750 enrolled members, and the small gambling operations they ran were within the confines of their federally recognized reservations in the Indio and Riverside areas of California.¹¹⁹

The Supreme Court in this case also dealt with the issue of Public Law 280 jurisdiction and came to the same conclusion. The regulatory nature of California's laws made them inapplicable to the tribes.¹²⁰ California threatened to shut down the tribes'

280. Thus, the mandate from the Supreme Court is that states do not have general regulatory power over the Indian tribes."

Id. at 313.

¹¹⁵ "Although this language suggesting that the legislature has chosen to regulate bingo is not binding on this court as to whether the statute is regulatory or prohibitory, the language indicates that the game of bingo is not against the public policy of the state of Florida." *Id.* at 314.

¹¹⁶ Although the regulatory bingo statute may arguably be interpreted as prohibitory, the resolution must be in favor of the Indian tribe. *Id.* at 316.

¹¹⁷ LIGHT, *supra* note 105, at 40.

¹¹⁸ *Id.* at 33.

¹¹⁹ The Cabazon Reservation was originally set apart for the "permanent use and occupancy" of the Cabazon Indians by Executive Order of May 15, 1876. The Morongo Reservation also was first established by Executive Order. In 1891, in the Mission Indian Relief Act, 26 Stat. 712, Congress declared reservations "for the sole use and benefit" of the Cabazon and Morongo Bands. The United States holds the land in trust for the Tribes. The governing bodies of both Tribes have been recognized by the Secretary of the Interior. The Cabazon Band has 25 enrolled members and the Morongo Band has approximately 730 enrolled members." *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

¹²⁰ We are persuaded that the prohibitory/regulatory distinction is consistent with *Bryan's* construction of Pub.L. 280. It is not a bright-line rule, however; and as the Ninth Circuit itself observed, an argument of some weight may be made that the bingo statute is prohibitory rather than regulatory. But in

gaming operations on their reservations and the tribe sued to protect them from closure.¹²¹ The tribes were adamant that their bingo halls and card room fell outside the scope of California's authority.¹²² California claimed that its interests in protecting the public from organized crime under the Organized Crime Control Act [OCCA] were superior to the tribes' need for income and made its restriction of "no limit" bingo prohibitory in nature, which would give them jurisdiction over enforcing "no limit bingo" as a crime under Public Law 280 and the OCCA.¹²³ While the Court recognized that a regulatory law could be enforced as a criminal law it held that a regulatory law enforced with criminal penalties "an otherwise regulatory law . . . does not necessarily convert it into a criminal law within the meaning of Pub.L. 280. Otherwise, the distinction between § 2 and § 4 of that law could easily be avoided and total assimilation permitted."¹²⁴

The Court also found that California was attempting to burden the tribe in regards to their non-Indian patrons. While in some extreme cases, states can exercise regulatory authority over tribes without express congressional authorization.¹²⁵ The Court found that the state's attempt to penalize non-Indian gamers on tribal land was pre-empted by both the tribal and federal interests in "self-sufficiency" and "economic development."¹²⁶ In this case, the tribe had no other means to support themselves; there were no natural resources or other means by which to pursue economic development, and the federal government's policy of tribal self-government outweighed any interest California may have in preventing Organized Crime.¹²⁷

C. The Indian Gaming Regulatory Act

the present case, the court reexamined the state law and reaffirmed its holding in *Barona*, and we are reluctant to disagree with that court's view of the nature and intent of the state law at issue here.

Id. at 1088-89.

¹²¹ "California sought to apply to the Tribes its statute governing the operation of bingo games. Riverside County also sought to apply its ordinance regulating bingo, as well as its ordinance prohibiting the playing of draw poker and other card games. The Tribes instituted an action for declaratory relief in Federal District Court."

Id. at 1084.

¹²² *Id.*

¹²³ "California argues, however, that high stakes, *unregulated* bingo, the conduct which attracts organized crime, is a misdemeanor in California and may be prohibited on Indian reservations."

Id. at 1089.

¹²⁴ *Id.*

¹²⁵ LIGHT, *supra* note 105, at 41.

¹²⁶ This case also involves a state burden on tribal Indians in the context of their dealings with non-Indians since the question is whether the State may prevent the Tribes from making available high stakes bingo games to non-Indians coming from outside the reservations. Decision in this case turns on whether state authority is pre-empted by the operation of federal law; and "[s]tate jurisdiction is pre-empted ... if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983).

¹²⁷ LIGHT, *supra* note 105, at 41.

Cabazon marked a huge victory for Indian gaming because it determined that states had no authority to regulate gaming on Indian lands.¹²⁸ Sadly, it was a hollow victory because it also forced Congress to take a role in regulating gaming on a federal level. As early as 1985, Congress began hearings on tribal gaming when lobbying for federal legislation came from both tribal and state sources.¹²⁹ The tension between state interest and tribal interests was intense.¹³⁰ The states wanted Congress to “limit tribal sovereignty” and extend state power over tribes by allowing state regulation of gaming.¹³¹ Tribes, on the other hand, wanted to continue their sole dominion over gaming enterprises, free from outside regulation.¹³² The federal government was concerned about the unregulated nature of cash games and jackpots in Indian gaming.¹³³

Since the late 70s, competing interests with regard to gaming had played out in the courts, requiring Congress to step in.¹³⁴ Representative Morris Udall introduced the first Indian gaming bill, H.R. 4566, in 1983.¹³⁵ Congress began drafting the gaming bill in the hopes that they could “maintain Indian gaming as a means of tribal economic development by preempting state regulation.”¹³⁶ The *Cabazon* decision rendered that step unnecessary and reaffirmed the right of the tribes to regulate bingo on their lands. After *Cabazon* the same senators who opposed Udall’s initial bill began clamoring for federal regulation.¹³⁷

The bill that eventually became the federal governing law over Indian Gaming was dubbed the Indian Gaming Regulatory Act (IGRA) and was enacted on October 17, 1988.¹³⁸ Though controversial in nature, IGRA was the Legislature’s attempt at a reasonable compromise between state and tribal interests.¹³⁹ While most states were supportive of the final version of IGRA, most tribes went “on records” opposing the bill

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ HARVEY, *supra* note 10 at 18.

¹³¹ LIGHT, *supra* note 105 at 42.

¹³² *Id.*

¹³³ “Marion Black Horn, the principal deputy solicitor of the Department of the Interior (DOI), testified that tribes; unregulated gambling held an unfair, competitive advantage over the states’ regulated gambling. She continued, stating that there were no state imposed limits on the size of the jackpots, no limits on the hours of operation, no licensing fees, and no state-imposed taxes.” HARVEY, *supra* note 10, at 19.

¹³⁴ U.S. Senator Harry Reid (D-New.) stated that-post *Cabazon*—“there was little choice except for Congress to enact laws regulating gaming on Indian lands. The alternative would have been for the rapid and uncontrolled expansion of unregulated casino-type gaming” LIGHT, *supra* note 105 at 42.

¹³⁵ Alex Tallchief Skibine, *The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, and Dilemmas*, FED. LAW. April 2013, at 35.

¹³⁶ HARVEY, *supra* note 10, at 19.

¹³⁷ Skibine, *supra* note 136.

¹³⁸ *Id.*

¹³⁹ LIGHT, *supra* note 105, at 43.

because “[m]ost of the tribal leadership believed IGRA represented a serious infringement on tribal sovereignty.”¹⁴⁰

One of the most innovative features of the bill was to assign regulatory authority based on the classification of the games being played.¹⁴¹ “IGRA divides all gambling into three classes: Class I encompasses social and traditional games; Class II is limited to bingo [in various forms] and non-banking card games like poker; Class includes primarily slot machines, casino banking and percentage games, off-track betting, and lotteries.”¹⁴² This breakdown allowed Congress to separate the authority to regulate gaming into multiple areas. Games that fell under Class I gaming were to remain sole under tribal oversight and not subject to IGRA’s requirements, Class II and III gaming would be subject to the provisions of IGRA and would require varying levels of federal and state oversight.¹⁴³

Class III, or “casino style” gaming was viewed as the most dangerous and states pushed the hardest for regulation of these games.¹⁴⁴ Several states, most notably Nevada, pushed for heavy involvement in the operation, licensing, and management of Indian gaming within their borders, citing the same concerns about organized crime previously raised in *Cabazon*.¹⁴⁵ The belief was that “as a ‘cash-business’...casino gaming necessarily attracted crime, whether organized or unorganized.”¹⁴⁶ This heightened concern over casino style gaming nearly choked IGRA prior to its enactment, until Congress developed a key compromise.

The tribal-state compact system was Congress’s answer for the “logjam” created by states “holding up federal legislation.”¹⁴⁷ Under IGRA, tribes who wished to pursue Class III gaming could only do so under an official contract, or “compact”, approved by the state in which the tribe intended to operate such gaming.¹⁴⁸ The compact system allowed for states to have some control over what they considered were dangerous activities within their borders. The provision requires states to negotiate their compacts in “good faith” with the tribes and, initially allowed tribes to pursue legal remedies when this provision was not properly followed.¹⁴⁹ The compromise helped IGRA pass through

¹⁴⁰ Skibine, *supra* note 136, at 36.

¹⁴¹ *Id.*

¹⁴² HARVEY, *supra* note 10, at 23.

¹⁴³ LIGHT, *supra* note 105, at 43-45.

¹⁴⁴ *Id.* at 43.

¹⁴⁵ HARVEY, *supra* note 10, at 22.

¹⁴⁶ LIGHT, *supra* note 105, at 43.

¹⁴⁷ *Id.* at 44.

¹⁴⁸ INDIAN GAMING REGULATORY ACT, 25 U.S.C. 2701-21 (2001).

¹⁴⁹ “Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the

the Legislature at the cost of tribal sovereignty".¹⁵⁰ A deal was made wherein Indians set aside some of their sovereignty in return for what Congress and the tribes thought would be a "rational scheme of management of gaming activities in Indian lands."¹⁵¹ This compromise extended state authority beyond the Public Law 280 restrictions to any tribe that operated gaming within state borders to the detriment of tribal self-determination.¹⁵²

The passage of IGRA did not mark the end of conflict over Indian gaming, as many believed it would. In 1992, four years after IGRA was enacted, Congress held hearings on issues arising from the implementation of IGRA.¹⁵³ There were issues with what constituted Class II and Class III gaming.¹⁵⁴ There had never been a federal act of this nature and the explosive growth of the gaming enterprise had far outstripped anyone's expectations.¹⁵⁵ The Gaming Act crossed multi-departmental boundaries, requiring the Department of the Interior to submit management plans, the Department of Justice to enforce violations, and the Federal Bureau of Investigation to conduct background checks. Furthermore, all of these activities had to comply with at least seven separate acts of Congress on topics from Freedom of Information to Paperwork Reduction.¹⁵⁶ Finally, the boom in gaming coincided with a technological revolution that further complicated implementation.¹⁵⁷

The most devastating blow to tribal sovereignty came in the form of a Supreme Court decision over tribal gaming compacts. The 1996 case, *Seminole Tribe of Florida v. Florida*, was originally over "good faith" negotiations between the Governor of Florida, Lawton Chiles, and the tribes.¹⁵⁸ Governor Chiles refused to negotiate any compact that would allow for Class III gaming on the Seminole Reservation. The State of Florida was successfully able to argue that IGRA's provision which allowed tribes to sue for enforcement of the "good faith" requirement in negotiations was a violation of the States' Eleventh Amendment immunity.¹⁵⁹ This allowed states to refuse to approve any

conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710.

¹⁵⁰ "Inouye . . . had to urge Indian governments to accept this new idea of negotiating with states instead of the federal government." HARVEY, *supra* note 10, at 25.

¹⁵¹ *Id.*

¹⁵² LIGHT, *supra* note 105, at 44.

¹⁵³ HARVEY, *supra* note 10, at 22.

¹⁵⁴ "The Department of Justice was awaiting finalization on the definitions of Class II and Class III gaming before it pursued violations of the Act." *Id.* at 23

¹⁵⁵ *Id.* at 26.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 27.

¹⁵⁸ LIGHT, *supra* note 105, at 48.

¹⁵⁹ The Indian Gaming Regulatory Act provides that an Indian tribe may conduct certain gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located. 102 Stat. 2475, 25 U.S.C. § 2710(d)(1)(C). The Act, passed by

compact for over two years after the decision was handed down.¹⁶⁰ The increase in tribal gaming and the intensification of public debate has allowed states to use this immunity from prosecution to influence Indian gaming policy within their borders and to impact tribal sovereignty by granting states the upper hand in negotiations. States can now bargain for larger revenue sharing agreements and to hold compacts until tribes capitulate with more increasing state demands.¹⁶¹

IV. UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE VS. THE INDIAN GAMING REGULATORY ACT

The UNDRIP outlines several key issues in indigenous rights but the most important of those in the context of IGRA are the right to self-determination and economic development. It is without question that Indian gaming has been the single most successful economic endeavor pursued by the tribes of the United States. The question is whether IGRA allows tribes the sovereign control that UNDRIP outlines or whether it forces indigenous peoples under the thumb of outside sovereigns and restricts their ability to fulfill their own economic agendas.

IGRA has been able to further tribal sovereign interests in limited ways.¹⁶² IGRA is in full compliance with the UNDRIP in several respects and some scholars feel that decisions like *Cabazon* are totally in line with the UNDRIP's principles.¹⁶³ Class I gaming is still within the full province of tribal entities and Class II gaming is under the jurisdiction of tribes with minimal federal interference and no state jurisdiction whatsoever.¹⁶⁴ Further, IGRA removes the prohibitions of the Johnson Act and the OCCA, as long as tribes operate within the confines of state compacts.¹⁶⁵ All of these things are in compliance, at least to a degree, with Article 20 of the UNDRIP which states that: "Indigenous peoples have the right to maintain and develop their political, economic, and social systems or institutions, to be secure in the enjoyment of their own

Congress under the Indian Commerce Clause, U.S. CONST., ART. I, § 8, cl. 3, imposes upon the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact, 25 U.S.C § 2710(d)(3)(A), and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty, 25 U.S.C § 2710(d)(7). We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and, therefore, 25 U.S.C § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued. We further hold that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), may not be used to enforce 25 U.S.C § 2710(d)(3) against a state official. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47, 116 S. Ct. 1114, 1119, 134 L. Ed. 2d 252 (1996)

¹⁶⁰ LIGHT, *supra* note 105, at 50.

¹⁶¹ Skibine, *supra* note 136, at 37.

¹⁶² Skibine, *supra* note 136, at 36.

¹⁶³ ECHO-HAWK, *supra* note 4, at 164.

¹⁶⁴ 25 U.S.C. 2701-21 (2001).

¹⁶⁵ Skibine, *supra* note 136 at 36.

means of subsistence and development, and to engage *freely* in all their traditional and other economic activities".¹⁶⁶ While Bingo had been fully regulated by tribes before and is now under the oversight of the federal government, it is still primarily under native control and therefore seems to be in compliance, particularly regarding the ability of tribes to become self-regulating after meeting a series of standards.¹⁶⁷ By allowing tribes to continue to monitor their own activities, Congress is acknowledging the success that was shown in the decade prior to their involvement.¹⁶⁸

While IGRA has accomplished a few steps forward for tribal sovereignty, it has hampered tribes far more than it has helped them and there are significant ways in which it does not comport with the UNDRIP. The most notable is the forced interaction between states and tribes in the compacting provisions. Tribes are forced to submit to two separate sovereigns when forced under federal law to gain the permission of the states to conduct casino style gaming. When IGRA was in the hearing stages, even though organized crime seemed like a pressing issue, it came to light only one of the more than 100 tribes engaged in gaming had any ties to organized crime. It was found that the tie was both accidental and secondary because it existed through the management company they had hired.¹⁶⁹ There has been no evidence presented that organized crime is now or has ever been a serious problem in Indian gaming. This grant of power to states over tribes is in direct conflict with Article 23 of the UNDRIP as it interferes with their ability to "administer [economic] programs through their own institutions."¹⁷⁰ The federal government's forced subjugation of tribes to state authority flies in the face of the principles acknowledged by the United States endorsement of UNDRIP. It demeans tribal sovereignty by forcing a nation to beg for permission from an entity which has no true power over them outside this inexplicable grant from the federal government. If tribes were instead allowed to regulate Class III gaming in the same manner as Class I gaming, or even Class II gaming, it would satisfy the UNDRIP's

¹⁶⁶ UNDRIP, *supra* note 15, at ART. 20. (emphasis added)

¹⁶⁷ (4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has-- (A) conducted its gaming activity in a manner which--(i) has resulted in an effective and honest accounting of all revenues;(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and (iii) has been generally free of evidence of criminal or dishonest activity; (B) adopted and is implementing adequate systems for--(i) accounting for all revenues from the activity;(ii) investing, licensing, and monitoring of all employees of the gaming activity; and(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and (C) conducted the operation on a fiscally and economically sound basis.

25 U.S.C.A. § 2710

¹⁶⁸ "By mid-1986, 108 tribes had gaming facilities and 104 of these conducted bingo. The combined receipts for these gaming activities were estimated to be \$100 million annually." HARVEY. *supra* note 10 at 21.

¹⁶⁹ HARVEY, *supra* note 10 at 27.

¹⁷⁰ UNDRIP, *supra* note 15, at ART. 23.

requirements for self-administration and free economic development and it would recognize what should be the obvious authority of tribes over their own businesses.

Several other provisions are also flawed in the same manner as the tribal compact provisions with regard to federal interference as opposed to state interference. Article 4 guarantees indigenous people the right to autonomy in their internal affairs.¹⁷¹ IGRA has provisions severely limiting the ways in which tribes may spend their gaming revenues, while also allowing for revenue sharing with the states.¹⁷² This not only infringes on tribes right to autonomy with regard to their spending but opens the door for additional interference by states in the tribes' ability to run their economic endeavors. By allowing for revenue sharing with the states, IGRA gives the states a means to leverage capital out of tribal programs and into state coffers in exchange for an agreed compact.

Also, federal government agency's implementation of Minimum Internal Control Standards (MICS) for Class II operations infringes on tribal autonomy and the right to run their own programs.¹⁷³ This implementation allows the federal government to reach into tribal casinos and require specific policies and practices to be followed by the employees and managers of the casinos. In effect, the federal government is attempting to write the employment policies of the tribes without their input or consent. The same could be said for the need for approval of Management Contracts under IGRA.¹⁷⁴ Tribes cannot contract with outside management companies without submitting to a complicated process with heavy restrictions and several hoops. This process severely stifle tribes' ability to freely choose the ways in which they pursue their economic development under the UNDRIP by forcing them to allow the federal government to dictate the terms of the contracts tribes may enter for the management of their casinos.

When looking at the IGRA it becomes clear that the benefits to tribes are, at best, minimal and that they could be accomplished by repealing the IGRA, removing the Johnson Act and OCCA from tribal lands, and allowing tribes to determine their own economic destiny. Under the UNDRIP, international law and, by its late endorsement, the United States, have recognized that indigenous peoples should be allowed the maximum freedoms possible. Indigenous peoples should be given the ability to forge

¹⁷¹ *Id.*

¹⁷² "Net revenues from any tribal gaming are not to be used for purposes other than--(i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies;" 25 U.S.C.A. § 2710.

¹⁷³ "Through IGRA, Congress established the National Indian Gaming Commission (NIGC) . . . in 1999 the commission promulgated . . . (MICS) for tribal gaming operations . . . these highly detailed standards [cover] aspects of gaming, ranging from mandating that a bingo ball be displayed to patrons . . . to requiring two employees to initial a corrected error on a slot machine count." LIGHT, *supra* note 105, at 52.

¹⁷⁴ 25 U.S.C.A. § 2711.

their own destinies, free from discrimination, oppression, coercion, or fear of retribution. Native Americans are a distinct people within both the federal and the international context and their rights, both as a collective and as individuals, must be protected from unwarranted restrictions placed on them without their consent or knowledge.¹⁷⁵ Under IGRA, tribes were coerced into a compromise that they believed would protect their right to game in the most 'rational' way possible.¹⁷⁶ When the *Seminole Tribe of Florida v. Florida* case was decided and their only form of redress against states was removed, tribes were no longer operating under the arrangement they believed they were initially entering. Furthermore, tribes are not actually granted the opportunity to vote in the Legislature on any of these matters because tribes do not have elected Congressional representatives separate from those of the states in which they live. This regulation without adequate representation or input undermines the sovereignty of the tribes and reduces tribal authority to that of a figurehead. The federal government allows tribes to claim they are a sovereign people but refuses to allow them the autonomy to determine for themselves the best means to provide for their people's economic growth.

V. CONCLUSION

The United States' endorsement of the United Nations Declaration on the Rights of Indigenous Peoples marks a huge victory for the rights of Native Americans. While Native Americans have long been forced to comply with federal laws and regulations that they had no true voice in creating, there is now a moral and international imperative to change. This current trend of forced subjugation to the whims of a government that does not allow tribes to speak for themselves must end. If the United States truly intends to support the principles set out by the United Nations, it must take a closer look at the policies and laws that currently shape tribal law and make radical changes.

While the Indian Gaming Regulatory Act has some sections that comply with the United Nations declaration, the majority of the Act stifles tribal self-determination and the rights of Native Peoples to forge their own economic path, free of outside interference. The United States must step away from the role of guardian to a weaker class and allow Native Americans to regulate their own economic endeavors by abolishing the Indian Gaming Regulatory Act in favor of tribal self-regulation. The notion that tribes are no more than a collection of ignorant, inept people lacking political savvy is both insulting and outdated. The tribes have shown through decades of success, in bingo and Class II gaming, that they are intelligent business people, capable of leading their own corporations and deciding their own fates. As President Nixon said in 1970, "It

¹⁷⁵ See UNDRIP, *supra* note 15.

¹⁷⁶ See LIGHT, *supra* note 105, at 43.

is long past time that the Indian policies of the federal government began to recognize and build upon the capacities and insights of the Indian people.”¹⁷⁷

¹⁷⁷ Gerhard Peters and John T. Woolley, Nixon: *Special Message to the Congress on Indian Affairs* (July 8, 1970), THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=257>.