RETHINKING THE EFFECT OF THE ABROGATION OF THE DAKOTA TREATIES AND THE AUTHORITY FOR THE REMOVAL OF THE DAKOTA PEOPLE FROM THEIR HOMELAND

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I. INTRODUCTION

In the aftermath of the Dakota-U.S. War of 1862, a demand arose in Minnesota for "extermination or removal" of *all* Dakota people from the state. Congress responded by passing an Act on February 16, 1863 that unilaterally "abrogated and annulled" all of the treaties with the four bands of Indigenous people known as the Dakota Oyate (Nation).[1] But Congress was not content with simply abrogating the treaties. This Act of Congress also included provisions that purported to seize the Dakota homeland.[2] Furthermore, in a companion Act passed fifteen days later, on March 3, 1863, Congress laid down the groundwork for the forced removal of *all* Dakota people to an unspecified reservation located beyond the boundaries of any state in the union.[3] In taking this legislative action, Congress, using the 1862 Dakota-U.S. War as pretext, purported to take title to the Dakota homeland and the steps needed to secure sole possession of it to the exclusion of the Dakota people through a program of ethnic cleansing of genocidal proportion. In the late spring of 1863, the United States mounted a military campaign that extended into 1864 to complete the *banishment* of the Dakota from their ancestral homeland that these congressional acts mandated.

The explicit language of the abrogation, seizure, and forced removal clauses of these acts has led many to hold the view that the twelve treaties concluded between the United States and the Dakota between 1805 and 1858 are null and void—artifacts of the past that now rest in the dustbin of history.[4] But the simple, oft

1. Act of Feb. 16, 1863, ch. 37, 12 Stat. 652.
2. *Id.* § 1.
3. Act of Mar. 3, 1863, ch. 119, 12 Stat. 819.
4. It is interesting to note that among the leading scholarly discussions of the 1862 Dakota-U.S. War and its aftermath, the abrogation of the Dakota treaties is mentioned relatively briefly without any extended analysis of the *legal justification* of the actual abrogation clause. *See, e.g.*, KENNETH CARLEY, THE DAKOTA WAR OF 1862: MINNESOTA'S OTHER CIVIL WAR 76 (2d ed. 1976); 2 WILLIAM WATTS FOLWELL, A HISTORY OF MINNESOTA 246–48, 258–59 (rev. ed. 1961); ROY W. MEYER, HISTORY

repeated statement that the abrogation of the treaties rendered the Dakota homeless, without rights and legally subject to the removal and exile they experienced, is false and misleading. It is a far more complex matter than that. To understand this we need to look carefully at the legal arguments that might be offered to justify these statutes and press our analysis to the very foundation on which federal Indian law is based. When we do, we shall encounter a profoundly disturbing story about America's original sin of ethnic cleansing against the Indigenous people of North America undertaken as an expression of the self-proclaimed manifest destiny of the republic and the role it played in the founding of the State of Minnesota. It is a story that is rarely told, even though it continues to play a large role in shaping the politics, law, and culture of our shared life.

But why even consider revisiting this story today, you might ask? *Legally* aren't the treaties a dead letter in light of their wholesale abrogation by Congress in 1863? At first glance it might seem so because the domestic American law of Indian treaty abrogation is quite clear. While the U.S. Supreme Court has held that treaties concluded by the United States with Indian Tribes are clearly part of the law of the land[5] and bind the federal government to carry out the obligations it undertakes in such treaties,[6] it has also held that Congress may unilaterally abrogate such treaties without an explicit statement, as long as there is "clear evidence" of congressional intent to abrogate the treaty in cases where subsequent legislation appears to be inconsistent with one or more of its provisions.[7] The abrogation clause of the February 16, 1863, Act states quite simply that "all treaties heretofore made and entered into by the [four bands of Dakota] with the United States, are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States."[8] Thus it seems clear beyond any doubt that Congress explicitly acted to abrogate *all* treaties with the Dakota people in such a way as to make the *legal* question of whether the treaties had been abrogated in this instance an easy case. But that

OF THE SANTEE SIOUX: UNITED STATES INDIAN POLICY ON TRIAL 140–41 (rev. ed. 1993); MARY LETHERT WINGERD, NORTH COUNTRY: THE MAKING OF MINNESOTA 331 (2010).

5. U.S. CONST. art. VI, cl. 2.
6. Holden v. Joy, 84 U.S. 211 (1872); Wilson v. Wall, 73 U.S. 83 (1867).
7. United States v. Dion, 476 U.S. 734, 738–40 (1986).
8. Act of Feb. 16, 1863, ch. 37, § 1, 12 Stat. 652.

does not fully answer the question of whether the abrogation clause could defeat the obligations the United States had undertaken in the Dakota treaties with respect to those Dakota who did not actively participate in the war. Nor does it answer the question of whether the subsequent seizure of the Dakota homeland and forced expulsion of the Dakota people from that land was *legally justified* by the forfeiture and removal clauses of these acts. To answer these questions about these three clauses (abrogation, forfeiture, and removal) in a way that incorporates the factual and legal complexity surrounding the questions, we need to look carefully at the texts of the abrogation and forfeiture clauses of the February 16, 1863 Act, by which Congress purported to seize the Dakota lands, and the removal clause of the March 3, 1863 Act, which implemented the forced expulsion of the Dakota from their homeland. But, in doing so, we must also "*look beyond the written words to the larger context that frames the Treaty*, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"[9] Furthermore, we shall also take seriously the task of searching for the underlying legal foundation, if any, of this exercise of power by Congress. When we do that, we shall discover that while Congress indeed may have had the power to unilaterally withdraw from its obligations under the treaties as a matter of international treaty law, ultimately the action it took to seize the Dakota homeland and expel them from it is based on the Doctrine of Christian Discovery that is without either theological or legal foundation, notwithstanding its incorporation by Chief Justice Marshall into American domestic law.

The discussion that follows is organized around three tasks: Part I describes the larger context of history that frames these congressional acts by focusing on the long road to war and the widespread demand for "extermination or removal" of the Dakota from Minnesota that erupted in the immediate postwar context that prompted these congressional acts; Part II examines the texts of these congressional acts with a focus on their abrogation, land forfeiture, and forced removal clauses; and Part III addresses the

9. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) (emphasis added) (quoting Choctaw Nation v. United States, 318 U.S. 423, 432 (1943)) (holding that subsequent actions did not constitute an explicit act of abrogation by the United States of the reserved usufructuary rights of the Ojibwe (Chippewa), including to hunt, fish, and gather as set forth in the 1837 Treaty of the United States with the Chippewa).

question of what legal authority might be offered to justify these congressional acts. Three sources of law will be considered: the International Law of Treaties; the U.S. Constitution; and U.S. Supreme Court precedent on the plenary power of Congress over Indian affairs. Special attention will be given to the claim that these acts, as an expression of a plenary power of Congress over Indian affairs, are rooted in the Doctrine of Christian Discovery. The article closes with a conclusion that sets out the implications of the foregoing analysis for the next steps that might be taken to heal the trauma of America's past and write a new chapter in federal Indian law and policy for the twenty-first century.

II. THE ARGUMENT IN A NUTSHELL

The argument to be developed within the foregoing structure of this article may be briefly summarized in two points: First, the abrogation of the treaties under the congressional action of 1863 relieved the United States from the obligations it undertook in those treaties. It did not create new rights on the part of the United States to the Dakota homeland, nor did it diminish the status of the Dakota people, their collective and individual rights, or their relationship to their land. If anything, as a matter of treaty law, it recovered for the Dakota the right to full use of their homeland. Furthermore, to claim that the Dakota people lost rights or privileges not specified in the treaties as a result of the abrogation is a mistake.

Second, the seizure of Dakota lands and forced removal of the Dakota people from that land by the congressional actions of 1863 is without legal foundation under both international and domestic law. Specifically, the international Doctrine of Discovery, properly understood as a legal rule limited to the determination of which several Christian European nation-states, engaged in global exploration beginning in the fifteenth century, obtained the prescriptive right to choose to purchase Indigenous land they had "discovered"—a principle which is now repudiated as a matter of international law—does not support the congressional action to remove the Dakota people from their homeland. As first developed, the Doctrine of Discovery was important for sorting out relations between Christian European nation-states engaged in expanding their respective empires to the lands of the Indigenous nations "discovered" by these growing empires. Thus, it is a mistake to view the Doctrine of Discovery as diminishing the rights

of the Indigenous people. Moreover, to claim that the Doctrine of Discovery, as received and incorporated by Chief Justice John Marshall into domestic law under *Johnson v. M'Intosh* in 1823,[10] and refined by Chief Justice Marshall in *Worcester v. Georgia* in 1832,[11] is the legal basis under domestic law for land seizure and removal is an overstatement of the reach of that doctrine as understood by Chief Justice Marshall. The overbroad misapplication of this outdated doctrine in subsequent Supreme Court decisions in the years immediately following the death of Chief Justice Marshall, during the presidency of Andrew Jackson, compounded and perpetuated this mistake. Today it is held to violate the human rights of Indigenous people everywhere. Ultimately, the Doctrine of Discovery is *Christian* doctrine that is without *theological* foundation. In light of this, the Doctrine of Discovery should now be abandoned as a matter of domestic law to conform to the growing repudiation of that doctrine under international law.

III. THE DEMAND FOR "EXTERMINATION OR REMOVAL" OF THE DAKOTA: THE POSTWAR CONTEXT FOR READING THE ABROGATION ACT OF 1863

We begin our task of reading the congressional acts of 1863 with a look at the "larger context that frames the Treat[ies,]"[12] purportedly abrogated by Congress in the February 16, 1863 Act, as required by established Supreme Court precedent for determining whether abrogation has occurred and the extent of such abrogation when present. We will look at the long road to war leading up to 1862, as well as the important immediate aftermath of the Dakota-U.S. War of 1862 ("the war" or "the 1862 war") that led to congressional action in 1863.

10. 21 U.S. 543 (1823).

11. 31 U.S. 515 (1832), *abrogated by* Utah & N. R. Co. v. Fisher, 116 U.S. 28 (1885).

12. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

A. The Long Road to the Dakota-U.S. War of 1862[13]

The arrival of the Europeans to the land of the Dakota in the seventeenth century set up a mutually beneficial relationship that continued during the height of the fur trade. As the fur trade began to die out and immigrant-settlers began moving on to Dakota land in what was to become the State of Minnesota in the nineteenth century, however, the Dakota became debtors, dependent upon credit they received from traders to purchase food and other goods to supplement what they were still able to secure through their traditional ways that included hunting what had now become declining populations of game and buffalo. As the wave of immigrant-settlers reached flood stage after the treaties of 1851, the relationship between the Dakota and the Europeans living among them changed dramatically. While the number of Europeans in the land of the Dakota had been relatively small for over two centuries, with the grant of territorial status to Minnesota by Congress in 1849 the stage was set for the rapid influx of a new kind of European. These Europeans would not be drawn by the fur trade, but rather by the prospect of *land* for forestry, commercial, and, especially, agricultural purposes. In 1850, it is estimated that there were about 6000 people of European origin in Minnesota. By the 1860 census, two years after statehood, the flow of European immigrant-settlers brought the number of Europeans to 180,000, a *thirty-fold increase*.[14] Where the Dakota had outnumbered the Europeans in 1850, they were now surrounded by the Europeans, who increasingly intruded upon their traditional hunting grounds that had played such a large role in sustaining their life since time immemorial. As a result, the Dakota became more and more dependent upon the support of the United States for supplies and food to see them through the harsh winters. Eventually, the

13. The story of the road to war as summarized here is drawn from the extended accounts found in CARLEY, *supra* note 4, at 1–75 (including an extended discussion of the 1862 war, its causes, and its aftermath); MEYER, *supra* note 4 (discussing a comprehensive history of the Dakota); WINGERD, *supra* note 4, at 258–300 (including a comprehensive history of the formation of the State of Minnesota from the earliest days of the fur trade in the seventeenth century down to the war of 1862 and its aftermath); *see also* GWEN WESTERMAN & BRUCE WHITE, MNI SOTA MAKOCE: THE LAND OF THE DAKOTA 133–95 (2012) (discussing the Dakota treaties). The author of the instant article served as a contributor to *Mni Sota Makoce: The Land of the Dakota* and was a co-author of chapter four on the Dakota treaties. *See* WESTERMAN & WHITE *supra* at 9, 233–34.

14. RHODA R. GILMAN, THE STORY OF MINNESOTA'S PAST 103 (1989).

Dakota, who had never been a cash economy people, were drawn into the cash economy of the newcomers that was developing as fast as these newcomers spread their agricultural and forestry activities over the land.

All of this took place, in large part, through a series of treaties between the United States and various representatives of the Dakota people that would dispossess the Dakota of their land. In the space of twenty-six years, 1825 to 1851, through three great cessions of land under treaties negotiated under increasing intimidation, and eventually under outright fraud by representatives of the United States, the Dakota people lost virtually all of their homeland, except for a small strip of land ten miles wide and 140 miles long running along the south shore of the Minnesota River in southwestern Minnesota.[15] As the Europeans settled down on this land that was so new to them, yet so old to the Dakota, tensions arose that interfered with the settlers' lives.

At first the tensions were primarily the product of feuding and violent skirmishes between the Dakota and the Ojibwe. The Ojibwe had gradually moved west into the Dakota homeland due to settler pressure they experienced on the eastern portion of their traditional homeland. By the 1750s, they had defeated the Dakota after a century of warfare and displaced them from Mille Lacs Lake in northern Minnesota, which had been an important center of Dakota life and culture. Periodic violent skirmishes that broke out between the Dakota and the Ojibwe became an inconvenience to the incoming immigrant-settlers. This led to the treaty of 1825, which attempted to set a boundary between the Dakota and the Ojibwe in order to stop the skirmishes and bring peace between them. The line drawn between the Dakota and the Ojibwe was designed to separate the Dakota from the Ojibwe by confining the Dakota to roughly the southern half of their homeland in the north of what eventually became the State of Minnesota in 1858.

15. Treaty with the Sioux—Mdewakanton and Wahpakoota Bands, Aug. 5, 1851, 10 Stat. 954; Treaty with the Sioux—Sisseton and Wahpeton Bands, July 23, 1851, 10 Stat. 949; Treaty with the Sioux, Sept. 29, 1837, 7 Stat. 538; Treaty with the Sioux, Etc., Aug. 19, 1825, 7 Stat. 272. These four treaties, and the three great cessions they affected, are discussed in WESTERMAN & WHITE, *supra* note 13, at 148–90. For an extended discussion of the way in which the human rights of the Dakota people were violated by these treaties, see Angelique Townsend EagleWoman, *Wintertime for the Sisseton-Wahpeton Oyate: Over One Hundred Fifty Years of Human Rights Violations by the United States and the Need for a Reconciliation Involving International Indigenous Human Rights Norms*, 39 WM. MITCHELL L. REV. 486 (2013).

Although the treaty of 1825 did not contain a cession clause, the line to be drawn under the terms of the treaty effectively acted as a "cession" of the northern half of the Dakota homeland by securing their agreement to relocate to the southern half. Thus, it effected what I have called "the first great cession."[16]

The second great cession occurred under the treaty of 1837 when the Dakota ceded all of their land east of the Mississippi as the settlements in the area of B'dote, a sacred place considered by the Dakota to be their place of origin, later to be known as the Twin Cities of Minneapolis and St. Paul, began to take hold. Finally, in 1851, in two treaties, the Dakota became almost entirely dependent upon the United States for their sustenance with the cession of virtually all of their land west of the Mississippi River and south of the 1825 treaty line, totaling twenty-four million acres, in exchange for promises of annual support. They retained a reservation on the Minnesota River running 140 miles long and ten miles wide on each side of the river.

With the 1851 treaties signed, the land rush was now on, even before their ratification in 1853. In the face of further demands for more land for settlement, the small section of reserved land on which the Dakota were now expected to live was cut in half in 1858 by another set of treaties concluded in Washington, D.C., under terms that were basically dictated to the Dakota by the United States.[17]

On the small strip of land to which the Dakota had been forcibly relocated, they were unable to sustain themselves through their traditional means of hunting, fishing, and gathering. Their lives now depended on the promises of regular support made to them by the United States under the treaties. These promises were rarely performed per the terms of the treaties. Shipments of annuity supplies and cash necessary for the Dakota to purchase additional needed provisions to sustain life, for example, were often late in arriving, adding to the profound uncertainty with which the Dakota were forced to live. By August 1862 their circumstances had become desperate. After what proved to be a difficult winter in 1861–1862, once again the annuity shipment of goods and cash did not arrive as required in mid-summer. With

16. WESTERMAN & WHITE, *supra* note 13, at 148–54.

17. Treaty with the Sioux—Mdewakanton and Wahpekute Bands, June 19, 1858, 12 Stat. 1031; Treaty with the Sioux—Sisseton and Wahpeton Bands, June 19, 1858, 12 Stat. 1037.

the prospect of another difficult winter coming on, and no sign that they would have the means to build up provisions to sustain them through it, frustration was running high. The killing of four members of a settler family by several young Dakota men near Action, Minnesota, on August 17, proved to be the spark that ignited war. At a meeting held that evening, notwithstanding his stated reservations about the possibilities for success, Taoyetuduta (Little Crow) agreed to lead a group of warriors into battle in an effort to drive off the immigrant-settlers and regain control of the homeland.

On the morning of August 18, 1862, the Dakota forces attacked the Lower Sioux Agency, where in recent weeks they had been rebuffed in their demand to have the provisions that were stored there opened and distributed in the absence of the arrival of the annuity shipment. From there they rode down the Minnesota River Valley, attacking settlements in their path, and eventually engaged in combat with several local militias that were hastily raised in defense of these settlements.

Governor Alexander Ramsey turned to his sometime political opponent, Colonel Henry Sibley, to gather a force to respond. On September 23, thirty-seven days after the beginning of the war, the Dakota forces were defeated at the Battle of Wood Lake. On September 26, the Dakota surrendered, and Sibley gathered into captivity at Camp Release the defeated warriors, plus a large contingent of Dakota who had refused to join the war effort, many of whom had rescued white refugees fleeing the hostilities. The combined number of Dakota in captivity at Camp Release numbered over 1500 people. On September 28, Sibley convened a five-member military commission that he had little authority to convene, before which he brought over three hundred warriors to face charges. On some days, the number of "trials" conducted by the commission would exceed forty. Of the 392 warriors put on trial, 303 were "convicted" and condemned to death. Sixteen others received prison terms.[18] The horrific retributive backlash that all Dakota would now experience had begun.

18. CARLEY, *supra* note 4, at 69. For an extended description of these "trials," see Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 (1990).

B. The Call for Vengeance in the Immediate Aftermath of the War[19]

In the aftermath of the war, widespread demands were voiced by private citizens and public officials alike throughout Minnesota for the *extermination or removal* of the Dakota people from Minnesota. Governor Ramsey was among the first, and certainly the most prominent public figure, to call for vengeance when, on September 9, 1862, he gave the opening address to the special session of the legislature he called to deal with state policy for conducting the war. He declared that:

> Our course then is plain. The Sioux Indians of Minnesota must be exterminated or driven forever beyond the borders of the State.
>
> . . . .
>
> They must be regarded and treated as outlaws. If any shall escape extinction, the wretched remnant must be driven beyond our borders and our frontier garrisoned with a force sufficient to forever prevent their return.[20]

General John Pope, who took federal command of the Minnesota forces that had been organized under the command of Henry Hastings Sibley, also called for the extermination of the Dakota.[21] The "trials" before the military commission convened by Sibley also became a focus of the demand for vengeance. The Episcopal Bishop of Minnesota, Henry Whipple, who had worked with the Dakota, was alarmed by the brevity of the military commission proceedings and appealed to President Lincoln to intervene. Lincoln did so, and ordered that the planned execution of the 303 warriors condemned to death not go forward until he had reviewed all of the records and made his own decision whether the death sentences were justified. Following review of the records in these cases, President Lincoln authorized the execution of thirty-

19. The story of the call for vengeance in the aftermath of the war as summarized here is drawn from the extended accounts of it found in the following: CARLEY, *supra* note 4, at 68–82 (discussing the aftermath of the 1862 war); MEYER, *supra* note 4, at 123–54 (including a comprehensive history of the Dakota); WINGERD, *supra* note 4, at 312–45 (discussing the aftermath of the 1862 war); and William E. Lass, *The Removal from Minnesota of the Sioux and Winnebago Indians*, 38 MINN. HIST. 353 (1963) (discussing the removal of the Sioux (Dakota) and Ho Chunk (Winnebago) from Minnesota in the aftermath of the 1862 war).

20. Alexander Ramsey, Governor, State of Minn., Annual Message to the Legislature of Minn. 12 (Sept. 9, 1862), *available at* http://archive.leg.state.mn.us/docs/NonMNpub/oclc18189672.pdf.

21. *See* WINGERD, *supra* note 4, at 313.

eight warriors. This was carried out on the day after Christmas in the largest mass execution in U.S. history before a huge crowd in Mankato, Minnesota.[22]

The death of the thirty-eight was not enough to quell the hysteria in Minnesota. Many people continued to demand retribution and expected that further executions would be carried out. Bounties reaching $200 were announced for deaths of Dakota people, although few were collected.[23] For those who might escape the gallows or the bounty hunter, the demand was that they be forcibly removed from the state, whether or not they had engaged in the hostilities. This widespread demand was also made concerning the Ho Chunk (Winnebago) people who had been moved to a reservation on what was considered prime land for agriculture and other development near Mankato. These Indigenous people did not support the war and had not engaged in it in any way; nevertheless, they too were now included in the call for removal beyond the borders of the state.[24]

The continuing demand for retribution against all Native Americans, including the Ho Chunk people, was expressed in the most extreme terms by John C. Wise, the editor of one of the Mankato newspapers, when he called for "extermination or removal" in a series of newspaper columns and articles.[25] A further complication at Mankato was the fact that it was well known that the warriors who had been condemned to death, but not executed, were now imprisoned in Mankato. Mob violence to lynch these prisoners was a real threat and led to the efforts by some who were sympathetic to the plight of the Dakota to join the effort to remove all of the Dakota for their safety.[26]

If Minnesota was no longer a safe place for the Dakota people, many settlers concluded it was also not safe for them. Thus, in the aftermath of the war, life changed for both the Dakota people, who had from time immemorial called Minnesota their homeland, as

22. For an analysis of the basis on which President Lincoln made the distinction between who would and would not be executed, see Paul Finkelman, "*I Could Not Afford to Hang Men for Votes." Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons*, 39 WM. MITCHELL L. REV. 405 (2013).

23. For a detailed description of the origin of, authorization for, and implementation of the bounty program, along with its effect on the Dakota people, see MEYER, *supra* note 4, at 135 & n.3.

24. *See* WINGERD, *supra* note 4, at 327–38; Lass, *supra* note 19, at 353.

25. *See* Lass, *supra* note 19, at 353. *See generally* CARLEY, *supra* note 4, at 77.

26. *See* CARLEY, *supra* note 4, at 77; WINGERD, *supra* note 4, at 328–29; Lass, *supra* note 19, at 356.

well as for the settlers, who had recently come to the young state and lived through the horror of war in their new home. For the Dakota, their immediate postwar experience would consist of incarceration followed by banishment from the state. Many Dakota fled to the west, far away from Minnesota. Others would be expelled from Minnesota by military force from 1863 to 1864. In the settlers' postwar experience, they had to decide whether to remain and rebuild their lives or to go on to other locales to pursue the dreams that brought them to what they called "the New World." Many settlers left—never to return.

The United States, in an apparent recognition of the continuing debt that was owed the "friendly Dakota" who had protected hundreds of settlers during the war, as well as the injustice of the treatment they received following the war, took steps over the years that followed that purported to provide for the well-being of the Dakota people. A federally recognized reservation was set up in 1863 in South Dakota at Crow Creek to receive the Dakota expelled from Minnesota. There could hardly have been a less suitable place for the Dakota to attempt to sustain themselves by adopting the agricultural methods of the Europeans. The land was unable to meaningfully support farming and many Dakota died under the harsh circumstances in which they found themselves. Eventually many were able to move to more hospitable surroundings. Four years later, in 1867, a treaty was concluded that led to the establishment of reservations for the Dakota at Spirit Lake (Devil's Lake) and at Lake Traverse in territory that eventually became North and South Dakota.[27] For some Dakota, however, their flight took them to lands as far north as Canada or west and south to Nebraska, where Dakota communities were established.[28] Thus, the Dakota entered their long exile from Minnesota.

Nevertheless, Mni Sota Makoce never ceased to be home for the Dakota. Thus, it is not surprising that, starting almost immediately after the war, small numbers continued to return to their homeland in Minnesota. Beginning in the 1880s, the federal government purchased four small parcels of land in Minnesota that led to the establishment of the four federally recognized Dakota

27. Treaty with the Sioux—Sisseton and Wahpeton Bands, Feb. 19, 1867, 15 Stat. 505.

28. An important Dakota community was established at the Santee Reservation in Nebraska. *See* MEYER, *supra* note 4, at 155–74.

communities in Minnesota today: Upper Sioux, Lower Sioux, Shakopee, and Prairie Island.[29] A Dakota community that did not receive federal recognition also was established at B'dote (Mendota) near the confluence of the Minnesota and Mississippi rivers.[30] Today these communities number a fraction of the larger Dakota Oyate.[31] Despite these measures, severe damage had been done to the Dakota people—culturally, physically, and psychologically—which continues to take its toll today.

Thus, in the aftermath of the war, two peoples, Indigenous and European in origin, would not be totally separated as many had hoped and as Governor Ramsey had called for in his opening address on September 9, 1862 to the special session of the Minnesota Legislature that meant to address the circumstances that the war had thrust upon the state. The Dakota people would not, as Ramsey had demanded, be "exterminated or driven forever beyond the borders of the State."[32]

IV. THE CONGRESSIONAL ACTS: RETHINKING THE RELIEF AND REMOVAL ACTS OF 1863

The sentiments for extermination or removal were widely held, and they were conveyed all the way to Washington, D.C. On February 16, 1863, six months after the end of the Dakota-U.S. War of 1862, Congress responded by passing legislation that unilaterally "abrogate[d] and annul[ed]" all of the treaties with the four bands of Indigenous people known as the Dakota Oyate (Nation).[33] The predominant focus of this legislative Act was the establishment and administration of a program of financial compensation for the non-

29. *See* KATHY DAVIS & ELIZABETH EBBOTT, INDIANS IN MINNESOTA 328 (5th ed. 2006); MEYER, *supra* note 4, at 198–241. Websites of these four communities provide further details on these communities: LOWER SIOUX INDIAN COMMUNITY, http://www.lowersioux.com (last visited Nov. 13, 2012); PRAIRIE ISLAND INDIAN COMMUNITY, http://www.prairieisland.org (last visited Nov.13, 2012); SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, http://www.shakopeedakota.org (last visited Nov. 12, 2012); UPPER SIOUX COMMUNITY PEZIHUTAZIZI OYATE, http:// www .uppersiouxcommunity-nsn.gov (last visited Nov. 13, 2012).

30. The website of the Mendota Mdewakanton Dakota Community provides further details on this community. *See* MENDOTA MDEWAKANTON DAKOTA COMMUNITY, http://mendotadakota.com/mn (last visited Nov. 13, 2012).

31. As of 1999, the combined number of enrolled members at the four federally recognized Dakota communities in Minnesota numbered 2182. DAVIS & EBBOTT, *supra* note 29, at 318, 320, 322, 323.

32. Ramsey, *supra* note 20, at 12.

33. Act of Feb. 16, 1863, ch. 37, 12 Stat. 652.

Indian victims of the war. This is reflected in the title of the legislation: "*An Act for the Relief of Persons for Damages Sustained by Reason of Depredations and Injuries by Certain Bands of Sioux Indians.*"[34] The predominance of the "relief" purpose is also demonstrated by the fact that of its ten sections, nine are devoted to the details for implementing the "relief" called for under the Act. Notwithstanding this fact, since our focus is on the legal effect of the abrogation of the Dakota treaties under this Act, I shall refer to it as the "Abrogation Act."

When it came to the provisions of the Abrogation Act that directly affected the Dakota people and their homeland, Congress was not content with simply abrogating the Dakota treaties. The Abrogation Act also includes a provision that purports to seize the Dakota homeland.[35] Even that was not enough to quell the postwar hysteria in Minnesota. Fifteen days after the passage of the Abrogation Act, Congress passed the Dakota Removal Act, on March 3, 1863, thus laying the groundwork to force the Dakota people to an unspecified reservation located beyond the boundaries of any state of the union.[36] In passing these two acts, using the Dakota-U.S. War of 1862 as pretext, Congress purported to take title to the Dakota homeland and embark on the steps needed to secure sole possession of it to the exclusion of the Dakota people through a program of ethnic cleansing of genocidal proportion that was enforced through banishment of the Dakota from their ancestral homeland. In the late spring of 1863, the United States mounted a military campaign that extended into 1864 to complete the ethnic cleansing that congressional action mandated.[37]

We now turn to a close examination of the texts of the Abrogation Act and the Dakota Removal Act, which sets the stage for Part III when we turn to the important question of what legal authority, if any, might be offered to justify the power exercised in these acts.

34. *Id.*
35. *Id.* § 1.
36. Act of Mar. 3, 1863, ch. 119, 12 Stat. 819.
37. CARLEY, *supra* note 4, at 87–92.

A. The Abrogation Act of 1863

The Abrogation Act, adopted on February 16, 1863, contains ten sections. Nine of these establish a program of relief, composed of monetary compensation for damages sustained by the white victims of depredations by the Sioux Indians during the 1862 war.[38] The first section contains the first mention of the relief program to be established, as well as two other clauses: one abrogating the Dakota treaties, and the other, a land forfeiture clause, seizing the Dakota homeland.

The relief clause of section 1 announces the rationale for compensation of the white victims in the following words: "[I]t is just and equitable that the persons whose property has been destroyed or damaged by the said Indians, or destroyed or damaged by the troops of the United States in said war, should be indemnified . . . ."[39] Sections 2 through 8 and section 10 establish the compensation fund, the commission to preside over fund distributions, and the procedures for the operation of the commission in hearing claims for compensation and making fund distributions. The relief clause of section 1 makes clear that the funds for the compensation of victims will come from the funds previously appropriated for payment to the Dakota under the obligations the United States undertook in the 1837 and 1851 treaties. Thus the effect of the relief clause and the sections that implement it, constitutes a decision by the United States, in light of the abrogation clause, to redirect the money originally appropriated for fulfilling its obligations under the treaties of 1837 and 1851 to a new purpose, namely to compensate white victims of the war.

In addition to these relief provisions, the Abrogation Act contains three other clauses that disclose three other purposes for which the Act also prescribes action: an abrogation clause, a land forfeiture clause, and a rescuers clause. A close examination of the texts of these three clauses reveals that the overarching purpose of Congress was to *banish* the Dakota from their ancestral homeland within the State of Minnesota.

38. Act of Feb. 16, 1863, ch. 37, §§ 1–8, 10, 12 Stat. 652.
39. *Id.* § 1, pmbl.

1. The Abrogation Clause

Section 1 states:

> [A]ll treaties heretofore made and entered into by the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux or Dakota Indians, or any of them, with the United States, are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States . . . .[40]

This clause contains the *only* mention of abrogation in the Abrogation Act. No further mention of abrogation is found in any other legislation. Thus, if we take the words of the text literally, it seems clear that Congress must have intended the declaration that all of the Dakota treaties were null and void would be self-executing and would take effect by virtue of the passage of the Abrogation Act without the need for further action. Beyond that, there is no mention of the specific "future obligations" of the United States that were to be no longer in effect. For that we have to turn to the treaties themselves and to subsequent conduct by the United States.

The obligations the United States sought to shed included, most importantly, promises made under the treaty of 1837 to provide an annuity in payment for the land cession and promises made under the 1851 treaties to provide cash payments for several purposes and an annuity payable for fifty years to help the Dakota move to an agricultural-based economy.[41]

The interesting point to note here is that, because the United States claimed to have shed its treaty obligations to the Dakota by virtue of its unilateral abrogation of those treaties, a question arises concerning the meaning of the Dakota's obligations to the United States under the treaties after abrogation. On that score, it seems that the conclusion may be that the abrogation clause abrogated *all* obligations undertaken by the terms of the treaties, by both the

40. *Id.* § 1.

41. Treaty with the Sioux—Sisseton and Wahpeton Bands art. 4, July 23, 1851, 10 Stat. 949 (specifying payments to be made, including an annuity for a period of fifty years); Treaty with the Sioux art. 2, Sept. 29, 1837, 7 Stat. 538 (specifying payments to be made, including an annuity forever); WESTERMAN & WHITE, *supra* note 13, at 159–60 (discussing the 1837 treaty negotiations on the annuity). The Treaty with the Sioux—Mdewakanton and Wahpakoota Bands, Aug. 5, 1851, 10 Stat. 954, was modeled on the Treaty with the Sioux—Sisseton and Wahpeton Bands, July 23, 1851, 10 Stat. 949, and contained a similar provision.

United States and the Dakota people. The unilateral abrogation by one party would seem to render the obligations of the other treating nation-state(s) no longer in effect as each of such nation-state(s) so chose. This makes sense when one considers the fact that treaties are acts that are constituted by the exchange of mutual promises made through a formal agreement between separate sovereign nations. Once one party to a treaty withdraws from that treaty unilaterally, assuming this is possible under the law of treaties, there is no reason to assume that the other non-abrogating party continues to be bound by the promises it made in the treaty now abrogated. Thus, unless the Dakota people chose to unilaterally reaffirm their various grants of permission they gave to the United States to enter upon and use Dakota land as specified under the terms of the now abrogated treaties, these grants of permission are no longer in effect. Absent such evidence, the unilateral abrogation of the treaties by the United States would seem to have returned the parties to their statuses prior to the treaties taking effect. In that case, *if* the Dakota Oyate chose to do so, it would appear that they could recover full access to all of the twenty-four million acres, which had been "ceded" under the 1851 and 1858 treaties, as well as land lost under cessions effected by the 1825 and 1837 treaties.[42]

But giving up access to the Dakota land by unilaterally abrogating the treaties is not what Congress had in mind when it enacted the abrogation clause. Immediately following the abrogation clause in section 1 is the forfeiture clause, which purports to transfer *all* of the Dakota homeland to the United States without any compensation to the Dakota from the United States. This action adds a more expansive meaning to the abrogation of the treaties set forth above when read in combination with the forfeiture clause, to which we now turn.

2. The Forfeiture Clause

Section 1 includes a clause that reads: "[A]ll lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or any of them, [are declared] to be forfeited to the United States."[43] This clause does two things: it purports to seize the entire Dakota homeland that was

42. *See supra* text accompanying note 15.
43. Act of Feb. 16, 1863, ch. 37, § 1, 12 Stat 652.

the subject of the now abrogated treaties, and it affirms the idea that the United States intended to shed all of its obligations under those treaties, in language that makes clear it would no longer honor any claims made upon the United States by the Dakota under the terms of the treaties.

This is the most astounding clause in the Abrogation Act. It is a straightforward and simple statement of what can only be called a legislatively sanctioned seizure of the Dakota homeland. The Abrogation Act does not specify the legal basis on which such seizure might be based. This cries out for careful consideration of what legal justification, if any, might be offered for such action. This we shall undertake in Part III below. Here we note that this appears to be an effort to exercise a claimed *plenary power* over the tribes, a feature that has been a part of federal Indian law for many years. Notwithstanding this longstanding practice by the federal government, in Part III we shall reexamine the legal justification, if any, for the exercise of such power.

When considered in the larger context of the long road to war and the actions of the United States in the two years following the war, the forfeiture clause is nothing less than an act of conquest through a *continuation* of the war after the Dakota forces were finally defeated at the Battle of Wood Lake on September 23, 1862. In light of this and the story of the long, tortured history of federal Indian policy, I am left with the question of why the United States ever entered into treaties with the tribes at all, at least after the disparity in military power became evident at the mid-nineteenth century. Perhaps it was done for no more than salving the conscience of the Americans bent on conquest who might otherwise be committed to the idea of the Rule of Law.[44] It remains

44. The "Rule of Law," as used here, refers to the idea "embedded in the Charter of the United Nations encompass[ing] elements relevant to the conduct of State to State relations." *United Nations and the Rule of Law*, UNITED NATIONS, http://www.un.org/en/ruleoflaw/index.shtml (last visited Dec. 5, 2012). According to the *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*:

> [For the United Nations, the rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers,

for us to ask, what further light might be shed on this story by the rescuers clause of the Abrogation Act?

3. The Rescuers Clause

Section 9 reads that "the Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians."[45]

The war split the Dakota tribes. The Upper tribes (Sisseton and Wahpeton) disagreed, for the most part, with Little Crow and those who joined him in conducting the war. Some of them resisted the war by (1) directly calling upon Little Crow to cease military action, (2) participating in espionage that provided valuable information to the state militia assembled hastily to defend the settlements, and (3) providing refuge for settler families to shield them from the onslaught of the Dakota forces.[46] Thus, while some Dakota went to war, others provided aid and comfort to the settlers. In neither case can these actions be taken as abandonment by the Dakota of their deep connection to the homeland. To the contrary, each action, in its own way, was a desperate effort under extremely difficult circumstances to maintain that connection.

The rescuers clause of the Abrogation Act is a specific recognition of the debt owed to those friendly Dakota who had helped in "rescuing the whites from the late massacre."[47] Literally this means the clause applied *solely* to those friendly Dakota who resisted the war through rescue efforts, as opposed to other friendly Dakota. These rescuers would each receive land that was described as "eighty acres in severalty" from the "public lands, not

> participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

UNITED NATIONS, REPORT OF THE SECRETARY-GENERAL ON THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST-CONFLICT SOCIETIES 4 (2004), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement.

45. Act of Feb. 16, 1863, ch. 37, § 9, 12 Stat. 652.

46. Carrie Reber Zeman, *Historical Introduction* to MARY BUTLER RENVILLE, A THRILLING NARRATIVE OF INDIAN CAPTIVITY: DISPATCHES FROM THE DAKOTA WAR 1, 1–112 (Carrie Reber Zeman & Kathryn Zabelle Deroudian-Stodola eds., 2012).

47. Act of Feb. 16, 1863, ch. 37, § 9, 12 Stat. 652.

otherwise appropriated."[48] Land would be distributed to qualifying Dakota rescuers as individual owners of land on which they could carry on their lives and could pass on to their heirs "forever."[49] No doubt, in this provision Congress had in mind the prospect that such landholders either had adopted or would adopt the agricultural habits and practices of whites. Indeed, many of the friendly Dakota had in fact already done just that. Adoption of agriculture had long been an important part of the effort to separate the Dakota from their homeland as well as part of the missionaries' campaign to convert the Dakota to Christianity.[50]

It is very important to note that the land specified by this clause for distribution to the Dakota rescuers was to be taken from "public lands, not otherwise appropriated" *without any specification of where that land might be located.* Furthermore, the clause states that "[t]he land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be aliened or devised, except by the consent of the President of the United States."[51] This seems to open the possibility, at least theoretically, that land to be distributed to the rescuers could be within the borders of Minnesota and free of any local taxation. And while the land so distributed could be passed down to the heirs of those who qualified as rescuers, they could not, without consent of the President, convey the land to anyone other than their heirs. In light of the continuing backlash in Minnesota against *all* Dakota, however, assigning land to the rescuers from land located within their ancestral homeland in Minnesota was most unlikely. From a Dakota point of view, Minnesota was now an unsafe place to live. What was more likely was that the rescuers would join other Dakota on land outside the boundaries of any state as specified in the Dakota Removal Act passed on March 3, 1863.

B. The Dakota Removal Act of 1863

The Dakota Removal Act, passed on March 3, 1863, a mere fifteen days after the Abrogation Act, deals with the status of *all* Dakota people who were not rescuers of white victims.[52] The Removal Act makes clear that all other friendly Dakota would be

48. *Id.*
49. *Id.*
50. WINGERD, *supra* note 4, at 272–73.
51. Act of Feb. 16, 1863, ch. 37, § 9, 12 Stat. 652.
52. Act of Mar. 3, 1863, ch. 119, 12 Stat. 819.

forcibly removed to "unoccupied land" at an unspecified location "outside of the limits of any state."[53] This unspecified land would be paid for out of the proceeds to be collected by the federal government from the sale of Dakota land seized in Minnesota.[54]

While the provisions of the Removal Act seemed aimed at the non-rescuing friendly Dakota people, it is likely that the rescuers would join their kinsmen in the reservations yet to be specified beyond the borders of the State of Minnesota. This was likely to occur because of the extreme hatred that whites now had for all indigenous people, expressed in ongoing demands for more executions of convicted warriors. Retribution against all Dakota meant that all of the friendly Dakota, including the rescuers, were at risk for outbreaks of mob violence, which the government was not in a good position to prevent. As a result, the Dakota people were exiled to an unspecified land that prevented them from remaining part of their ancestral homeland, a land that was a central component of their individual, collective, and cultural identity.

With the foregoing specific terms of the 1863 Acts in mind, we turn now to the most important question concerning their implementation, namely: By what legally authorized power, if any, did Congress take these actions?

V. THE CLAIMED LEGAL AUTHORIZATION FOR THE 1863 ACTS OF CONGRESS

The commitment to the Rule of Law as a limit on the exercise of government power is a core American commitment that goes back to the Declaration of Independence and the indictment it sets out against King George as having engaged in a pattern of behavior that violated the "unalienable rights" of his subjects in the American colonies. It was this pattern of behavior, above the limits of the Rule of Law, which justified that the colonies should be "Free and Independent."[55] This is the backdrop against which we shall undertake a search for the legal justification, if any, for the power exercised by Congress in abrogating the Dakota treaties, seizing the Dakota homeland, and forcibly removing the Dakota people from their homeland through the 1863 Acts passed in the

53. *Id.* § 1.
54. *Id.* §§ 3–4.
55. THE DECLARATION OF INDEPENDENCE paras. 2, 6 (U.S. 1776).

aftermath of the 1862 war. The discussion is organized around three possible sources of legal authorization for the power that might be drawn upon to justify these Acts: treaty power, constitutional power, and plenary power.

A. The Treaty Power

1. International Treaty Law on Unilateral Abrogation

To understand the *legal justification* and *legal effect* of the abrogation clause, we shall have to consult both international and domestic law. In turning first to international law, it is important to start by noting that treaties are entered into between separate and sovereign nations. Thus, under international treaty law, treaties entail mutual recognition of such sovereign status by the respective parties to the treaties. Even though the status of the Indian tribes as discreet sovereign nations is limited under domestic American law by their status as "domestic dependent nations,"[56] such status has always included a measure of sovereignty under domestic law. This has effectively insulated the tribes in large measure from the jurisdiction of the several states of the union on matters occurring within tribal jurisdiction on reserved tribal land.[57] Thus, even if we read the Indian treaties with this limited notion of sovereignty in mind, that does not alter the fact that the treaties were entered into for the purpose of, and in consideration of, exchanging obligations between parties to the treaty. Why else would the United States seek to enter into a treaty with the Dakota people except out of recognition that some measure of sovereignty was held by the Indian tribes over their land when they met at the treaty-making table?

While unilateral termination of a treaty is frowned upon, nation-states (such as the United States) can take such action under international treaty law as an internationally recognized aspect of their sovereignty.[58] Thus, under international law, the abrogation clause must be read to have released the United States from its treaty obligations to pay cash and provide other support for the Dakota under the terms of the 1837 and 1851 treaties. No doubt, the same can be said for the United States' obligations under all

56. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

57. *Id.* at 71–72; *see also* Worcester v. Georgia, 31 U.S. 515, 536 (1832).

58. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 37–40 (4th ed. 2003) (discussing unilateral termination).

other previous treaties concluded between representatives of the Dakota people and the United States from the first treaty of 1805 up to the February 16, 1863 Abrogation Act.

2. Domestic American Law on Unilateral Abrogation

The exercise of unilateral treaty abrogation power is usually presumed to be justified, as a matter of domestic law, only when circumstances arise that justify the federal government in not carrying out its treaty obligations, so as to serve the national interest and that of the Indian nations with whom they have concluded a particular treaty that is the subject of abrogation legislation. The case most often cited for this proposition is *Lone Wolf v. Hitchcock*.[59] In all cases, clear evidence is required that Congress actually considered and acted to abrogate the treaty in question. Thus, in the absence of a clear statement of congressional intent to abrogate a treaty, courts have held that action that appears to be inconsistent with a treaty does not necessarily provide evidence of a clear congressional intent to abrogate the treaty. In such cases, the courts apply the Rules of Sympathetic Construction of Indian treaties. This complex set of rules was developed by the courts for the construction of Indian treaties when they are the subject of dispute in a court of law in order to preserve those rights reserved by tribes in the treaties they have entered into with the United States.[60] The Rules of Sympathetic Construction of Treaties are also applicable to abrogation of such treaties. In some cases, such as the well-known *Minnesota v. Mille Lacs Band of Chippewa Indians*,[61] the tribes claimed that various rights that they reserved under their treaties with the United States were not abrogated by virtue of various actions taken subsequently by the United States. In a nutshell, the evidence did not demonstrate a clear statement of abrogation.[62]

Judge William C. Canby Jr., a leading expert in federal Indian law, helpfully identified and summarized the foundational purpose of the Rules of Sympathetic Construction of Indian treaties and acts

59. 187 U.S. 553 (1903).

60. *See, e.g.*, Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) (upholding the hunting and fishing rights on reservation land notwithstanding the passage of a termination act governing the relationship between the United States and the tribe).

61. 526 U.S. 172 (1999).

62. *Id.* at 189–91.

of Congress which purport to abrogate them, when he wrote that these rules require courts to construe treaties in a way that is "sympathetic to Indian interests" in order "[t]o compensate for the disadvantage at which the treaty-making process placed the tribes, and to help carry out the federal trust responsibility" to the tribes.[63] The rules developed by the courts for application in reading Indian treaties, in pursuit of this purpose, are, in turn, based on three core principles. Courts are required to: (1) "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties;'"[64] (2) construe the treaties "in accordance with the meaning they were understood to have by the tribal representatives at the council;"[65] and (3) ensure that the treaties "are to be liberally interpreted to accomplish their protective purposes, with ambiguities . . . resolved in favor of the Indians."[66]

These three core principles are recognized by two other leading experts on federal Indian law, Charles F. Wilkinson and John M. Volkman, in their widely cited article on judicial review of Indian treaty abrogation as "canons of construction designed to rectify the inequality" in the "bargaining position of the tribes and the recognition of the trust relationship" that the federal government has with the tribes.[67] Wilkinson and Volkman describe "[t]hree primary rules."[68] "[A]mbiguous expressions must be resolved in favor of the Indian parties concerned."[69] "Indian treaties must be interpreted as the Indians themselves would have

63. WILLIAM C. CANBY JR., AMERICAN INDIAN LAW IN A NUTSHELL 122–30 (5th ed. 2009).

64. *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196 (quoting Choctaw Nation v. United States, 318 U.S. 423, 432 (1943)).

65. Tulee v. Washington, 315 U.S. 681, 684 (1942).

66. CANBY, *supra* note 63, at 122 (citing Carpenter v. Shaw, 280 U.S. 363 (1930)).

67. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CALIF. L. REV. 601, 617–20 (1975).

68. *Id.* at 617.

69. *Id.* (citing McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973); *Carpenter*, 280 U.S. at 367; Winters v. United States, 207 U.S. 564, 576–77 (1908)).

understood them."[70] "Indian treaties must be liberally construed in favor of the Indians."[71]

Wilkinson and Volkman's description matches the core principles identified by Judge Canby cited above.[72] In both cases, the rules or canons of construction are rooted in the foundational recognition of the *disadvantage of the Indians* engaged in the negotiations at the treaty-making table and try to compensate for that in an active way in the judicial interpretation of the treaties that were signed there. It is worth reiterating the words of Justice Sandra Day O'Connor in her opinion for the Supreme Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, an important recent case involving a question of abrogation concerning a treaty with the Ojibwe (or Chippewa) people in the State of Minnesota, which were quoted by Judge Canby. In the course of her opinion denying that such abrogation had occurred, Justice O'Connor wrote that: "[T]o determine whether [the treaty] language [in question] abrogates Chippewa Treaty rights, we *look beyond the written words to the larger context that frames the Treaty*, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"[73] Justice O'Connor makes clear that the Rules of Sympathetic Construction require that courts undertake a *contextually sensitive* reading of the treaties that goes far beyond the mere words of the treaties themselves. Furthermore, the specific rules require that, in looking beyond the mere words of the treaty to "the larger context that frames the treaty," the courts engage in a reading of the treaty that favors the Indian tribes by relying on the understanding of tribal representatives, rather than simply on the traditional Anglo-American understanding of such things within the tradition of Anglo-American real property law. This is important when there is no explicit abrogation. In the case of the Dakota treaties, however, there is an explicit statement of abrogation—as we have seen in the abrogation clause of the Abrogation Act of 1863. Unless we seek to

70. *Id.* (citing Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Starr v. Long Jim, 227 U.S. 613, 622–23 (1913); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832)).

71. *Id.* (citing Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943); Tulee v. Washington, 315 U.S. 681, 684–85 (1942); United States v. Walker River Irrig. Dist., 104 F.2d 334, 337 (9th Cir. 1939)).

72. *See supra* text accompanying notes 63–66.

73. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) (emphasis added) (quoting *Choctaw Nation*, 318 U.S. at 432).

limit the application of this clause by claiming that "all" in the phrase "all treaties" should only apply to the hostile Dakota, it would seem that the friendly Dakota are also included in the sweeping abrogation statement. Indeed, the postwar backlash against all Dakota indicates as much. Furthermore, to the extent that the United States sought to ameliorate the impact of the abrogation, it appears to have done this by virtue of the establishment of reservations and the later purchase of land in Minnesota for the four federally recognized communities currently in existence in the state. In making these observations, I am not arguing against an effort to restrict the scope of the abrogation clause. Rather, I am simply trying to suggest the arguments that might be made by the United States against any such efforts.

B. Constitutional Power over Indian Affairs

It is a fundamental tenet of American constitutional law that all power of government comes from the people, who are sovereign. What power the federal government does have is limited to what has been delegated to it from the sovereign people through the Constitution.[74] The purpose of this delegation of power to the government is to promote the people's freedom. Such power is either enumerated in the text of the Constitution or implied from the text. In either case, the specific contours and limits of power are derived from the text of the Constitution. Beyond the simple notion that the government can only exercise those powers that were delegated to it by the Constitution, the core idea that government is limited is expressed in two other ways. The first is the complex system of checks and balances between the various branches of the federal government and the division of power between the federal and state governments. The second is the commitment to a set of enumerated rights of the people that precede the Constitution. These core features of the Constitution reflect the deep American commitment to organizing and operating the government of the people under the Rule of Law noted earlier.[75]

74. The classic statement of these core features of the Constitution are set out in Chief Justice Marshall's opinion for the Court in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

75. *See supra* text accompanying note 55.

In light of this fundamental feature of American constitutional government, it is always appropriate to ask, when Congress acts, whether the action taken is *constitutionally authorized*. If it is not, the action taken is beyond the scope of power delegated to Congress by the people and thus is unconstitutional and void.[76] Therefore, it is appropriate for us to ask whether the congressional Acts of 1863 are authorized under the Constitution.

Mark Savage, in an article entitled *Native Americans and the Constitution: The Original Understanding*, has made an exhaustive inquiry into the question of what power has been delegated to the federal government with respect to Indigenous tribes located within the boundaries of the United States.[77] He begins by noting:

> [A] resplendent multitude of federal statutes and an august line of opinions by the Supreme Court of the United States declare that the Constitution bestows . . . plenary power to legislate the form of government of Native Americans[;] . . . to determine whether a "tribe" does or does not exist and whether a Native American is or is not a citizen of it[;] to control property rights and relations of Native Americans[; and that t]he power of Congress can reach all social, cultural, economic, political, and personal facets of Native Americans' lives.[78]

A particularly disturbing example of the breathtaking scope of the plenary power of Congress to regulate what might otherwise be regarded as property rights is a case decided only fifty-eight years ago, in 1955, when the Court upheld the plenary power of the United States to take and extinguish title to tribal land without giving any compensation in return.[79] Noting that even the conferral of citizenship on Native Americans by the United States did not give rise to limits on this plenary power, Mark Savage declares: "The truth . . . is stranger than fiction: The Constitution never conferred such power over Native Americans. Two hundred years of decisions by the Supreme Court and legislation by Congress and the President *lack* constitutional authority."[80]

The assertion by the federal government of wide-ranging power over virtually all aspects of the life and relations of the

76. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

77. Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57 (1991).

78. *Id.* at 59–60 (citations omitted).

79. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

80. Savage, *supra* note 77, at 60 (emphasis added).

Indian tribes has a long history, despite the fact that there is not a shred of evidence to support a grant of such power to the government as required by the Constitution. Thus, unless some source of law can be found to justify the exercise of such power, all of the actions the United States has taken over the last two centuries under such assumed power are without legal foundation under the Constitution. As such, it rests on nothing more than legislative and judicial fiat that undermines the American commitment to the Rule of Law.

Savage reaches this conclusion after searching the text and history of the adoption of the Constitution. In so doing, he points out that only two provisions of the original Constitution address relations with "Indians" and the "Indian tribes." The first instance is the Three-Fifths Clause of Article I.[81] The second is the Indian Commerce Clause, also in Article I.[82] The Three-Fifths Clause deals with counting the population for the purpose of representation in the House of Representatives and direct taxation. After searching the records of the Constitutional Convention, Savage concludes that it does not grant any power to Congress over Indian affairs, although "[i]t implies that states had some power to tax individual Native Americans."[83] In the case of the Indian Commerce Clause, Savage concludes that "the national legislative power is limited to commerce with Native American tribes, and extends no further."[84]

Having searched the records of the Constitutional Convention for the purpose of determining the meaning of the text of the Three-Fifths and Indian Commerce Clauses that do mention Indians, Savage goes on to explore a number of arguments that might be made to derive the plenary power of Congress over Indian affairs as an implied power from the entire text of the Constitution. In doing so he searches from the records of colonial America's dealings with Native Americans that pre-date the

81. The Three-Fifths Clause reads as follows:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 2, cl. 3.

82. The Indian Commerce Clause reads as follows: "[Congress shall have power to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* § 8, cl. 3.

83. Savage, *supra* note 77, at 72.

84. *Id.* at 78–79.

Constitution to the arguments in *The Federalist Papers* written in support of ratification of the Constitution. But that too, he demonstrates, is to no avail.[85] Thus, he concludes:

> The United States—its President, its Congress, and its Supreme Court—can exercise no power over Native Americans unless the Constitution grants it. Examination of the text of the Constitution, the intentions of the Framers, contemporary notions about sovereignty, the records of the Continental Congress, and contemporary treaties with Native American nations makes it clear that the Constitution has never granted to the United States a plenary power over Native Americans.[86]

Savage closes his article by asking: "What then shall we do?" He answers:

> First, we can prevent with national legislation any further contravention of and disrespect of Native Americans' territorial and personal sovereignty. We can confess the fallacy of a policy grounded in "manifest destiny," and we can change it. At this point, it is the least we can do.
>
> Secondly, a process must be jointly designed by which to decide how to remedy this unjust and unconstitutional situation. . . .
>
> Finally, advocates for Native Americans can use the research and argument [set out in this article] in the courts, to challenge exercises of state and federal power over Native Americans and their lands and thus to accomplish the ends of self-determination and self-government.[87]

If we take Savage's proposal that "[w]e . . . confess the fallacy of a policy grounded in 'manifest destiny'"[88] as a first step in taking action to change it, we need to tell the full truth about the plenary power and its foundation in the Doctrine of Discovery. It is to that task that we now turn.

C. Plenary Power as an Expression of the Doctrine of Christian Discovery

In the absence of any constitutional warrant for the plenary power, we must ask: What other source of law, beyond the

85. *Id.* at 87–115.
86. *Id.* at 115–16.
87. *Id.* at 118.
88. *Id.*

Constitution, could possibly serve as the warrant for United States seizure of the Dakota lands and the forcible removal of the Dakota people from that land in the aftermath of the 1862 war?

One of the sources referred to by the Court in the cases affirming plenary power is the five-hundred-year-old Doctrine of Discovery[89] as incorporated into domestic American law by Chief Justice Marshall in three cases known as the "Marshall Trilogy."[90] These three cases are universally regarded as the foundation of federal Indian law. By examining the Discovery Doctrine in its American incarnation, we shall see that it is what ultimately lies behind the forfeiture and forced removal clauses of the congressional response to the demand for extermination or removal of the Dakota people from Minnesota in the aftermath of the 1862 war. If the Discovery Doctrine, as the foundation of these congressional acts, cannot be justified any more than we can find textual warrant for these acts within the Constitution, then both of the 1863 Acts are without foundation and *ultra vires*.[91]

To explore the American incarnation of the Discovery Doctrine we need to turn first to its origin in fifteenth-century Europe. The European version of this doctrine was developed to serve the imperial interests of the Christian European nations that launched an aggressive campaign of discovery and conquest in the fifteenth century. This campaign sparked disputes between Western European nations as they raced each other to expand their empires on land being "discovered" far from Europe. The origin of the doctrine is found in a series of fifteenth-century Papal Bulls. Two are of special importance: *Romanus Pontifex*, issued by Pope Nicholas V in 1455, and *Inter caetera divinai*, issued by Pope Alexander VI in 1493 written *after* the "discovery of America" by Christopher Columbus. The Papal Bulls, as well as other documents drafted to facilitate European discovery and dominion

89. For an extended discussion of the origin of the Doctrine of Discovery and its role in the legal image of Native Americans, see ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 13–50 (1990). For a discussion of ten characteristics of the Doctrine of Discovery, including the assumed preeminence of the Christian European Nations and the United States and how they played an important role in the westward expansion of the United States that came to be rationalized through "Manifest Destiny," see ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY 3–10, 12–23, 25–58, 115–61 (2008).

90. *See generally* Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. M'Intosh, 21 U.S. 543 (1823).

91. Savage, *supra* note 77, at 82.

over foreign lands, were predicated on the assumed superiority and preeminence of the Catholic Church as the universal authority for governance of the world. In particular, they were also based, in part, on Pope Innocent IV's thirteenth-century legal commentary on an earlier decree by Pope Innocent III justifying the Christian Crusades undertaken between 1096 and 1271.[92] *Inter caetera divinai* is the Papal Bull most often cited as the origin of the Discovery Doctrine. It divided the earth's continents between Portugal and Spain to prevent competition between their respective imperial activities. Under this Papal Bull, nearly all of the Americas were granted to Spain. It "called for non-Christian 'barbarous nations' to be subjugated and proselytized for the 'propagation of the Christian empire.'"[93]

The Discovery Doctrine facilitated the spread of Christian European dominion over land where such dominion had not previously existed by laying down the principle that once dominion was established by one Christian nation over such lands, no other Christian nation could exercise the same right. Thus, in an important sense, the Doctrine of Discovery was about regulating *relations between Western Christian European nations* as much as it described the relations between these nations and the Indigenous peoples they encountered as a result of their imperial discovery

92. In addition to the Papal Bulls, calling on the western Christian nations to go out and subdue and reduce to slavery the "barbarous inhabitants of foreign lands," other documents played an important role in the creation and justification of the Discovery Doctrine. For example, in 1513, Spain created the notorious "Requerimiento," a document that was subsequently read out loud by Spanish conquistadors when they encountered the Indigenous peoples in the Americas upon landing in their land on a "discovery" voyage. The document purported, as a matter of law, to provide justification for enslavement of the Indigenous people to whom this document was read if they did not accept the pre-eminence of the Catholic Church and the Pope, along with the dominion of the Spanish Crown, a Christian head of state of a Christian nation, to whom God had given the power to rule over others. The last paragraph of the Requerimiento warns that if the Indigenous people did not comply, they would be subjected to war aimed at forcibly bringing about their enslavement and dispossession of their families and property. The Requerimiento and the other documents alluded to here are available at *The Doctrine of Discovery*, EPISCOPAL STUDY GROUP, http://www .doctrineofdiscovery.org (last visited Nov. 17, 2012).

93. EXECUTIVE COMM., WORLD COUNCIL OF CHURCHES, STATEMENT ON THE DOCTRINE OF DISCOVERY AND ITS ENDURING IMPACT ON INDIGENOUS PEOPLES, ¶ 6 (Feb. 17, 2012) [hereinafter WCC STATEMENT] (quoting Pope Alexander VI), *available at* http://www.oikoumene.org/en/resources/documents/executive-committee/bossey-february-2012/statement-on-the-doctrine-of-discovery-and-its-enduring-impact-on-indigenous-peoples.html.

activities. With respect to the Indigenous peoples so encountered—understood from a European perspective—the doctrine authorized the "discovering" Christian nations to exercise dominion over them and their lands by virtue of what came to be viewed as the *theologically sanctioned conquest* of the non-Christian inhabitants found in the new lands. Discovery and conquest went hand in hand, laying a theologically supported legal foundation for the spread of the European empire across the earth. Thus, the Discovery Doctrine provided the basis for Spanish, Dutch, French, and English land claims in North America and for carving up the "discovered" land between these European sovereign powers, all of whom at one time or another established settlements in North America to perfect their claim to the land they "discovered" there. Eventually, as these European powers were supplanted in North America by the new American republic in the late eighteenth and early nineteenth centuries, the doctrine was embraced as legal precedent within the domestic law of the United States. Today, it continues to function as the foundation of federal Indian law.[94]

The Doctrine of Discovery became incorporated in a distinctive way into the domestic law of the United States through the three early nineteenth-century cases decided by the U.S. Supreme Court that are collectively referred to as the "Marshall Trilogy."[95] In broad terms, these cases hold that the sovereignty and property rights of the Indigenous peoples are limited. In the first of these cases, *Johnson v. M'Intosh*, Chief Justice John Marshall, writing for the Court, held that, while native peoples residing in their homelands within the expanding territorial boundaries of the United States had the right to use and occupy these lands, they no longer had the power to convey title to them.[96] That title now rested in the United States and in any of its successors to whom the land might have been transferred or sold under established principles of real property law imported to the United States from England. In the two cases that followed, in 1831 and 1832, the Court defined Indian nations as "domestic dependent nations," captive within the territorial boundaries of the United States,[97] and able to exercise a limited amount of sovereignty with which the

94. MILLER, *supra* note 89, at 56–58.
95. *See supra* note 90 and accompanying text.
96. 21 U.S. 543, 573–74 (1823).
97. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

individual states could not interfere.[98] Collectively these cases also held that while the "Indian nations" had some limited sovereignty to govern affairs on the land on which they resided, without interference from the states, they did so at the pleasure of, and subject to, the plenary power of Congress.[99] Thus, Congress could, if it so chose, have the last word on how affairs were to be governed within the communities of Indian nations on their homelands.

The foregoing summary of the holdings in the Marshall Trilogy is the conventional understanding that is in effect today.[100] But close examination of Chief Justice Marshall's opinion in *Johnson* reveals that it is not so simple. Mark Savage's search of the historical background leading up to the Constitutional Convention in 1787, especially including the records of the Continental Congress that predate the Convention, clearly reveal the fact that both the colonies and the young republic viewed Native Americans as sovereign and in full possession of their property rights.[101] Thus, prior to the Marshall Trilogy, the tribes were considered sovereign on their own lands vis-à-vis the United States, and any desire by the United States to secure access for use or outright ownership of what were understood to be Indian lands could only be accomplished by purchase or through war as an act of conquest.[102] It stretches the imagination to think that Chief Justice Marshall was unaware of this history, given his role in the formation of the republic, when he wrote his opinion in *Johnson*. Nevertheless, in dealing with what was basically a real property issue between non-Indians, in which he had a personal stake,[103] he undertook a wide-ranging discussion of the Discovery Doctrine and incorporated a broad reading of it into domestic law. Thus, in *Johnson,* he observed:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. . . . But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to

98. *See id.*

99. Worcester v. Georgia, 31 U.S. 515, 558–61 (1832) (holding that Georgia law is inapplicable to Indian tribes).

100. *See, e.g.*, CANBY, *supra* note 63, at 15–19.

101. *See* Savage, *supra* note 77, at 96–103.

102. *See id.* at 105.

103. *See* LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 86–89 (2005).

> establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.[104]

In taking this view, to decide the case as Chief Justice Marshall did, he set out what has become the foundation for the understanding of the relation between the tribes and the United States in federal Indian law up to the present day.

It bears repeating here that the primary purpose of the Discovery Doctrine, as developed in Europe, was to regulate the relations between the European nations engaged in discovery far from Europe. But in *Johnson*, Chief Justice Marshall used the doctrine primarily to describe the relation between the tribes and the United States, rather than to regulate the relation between the United States and other nation-states with whom it might be in competition for foreign land in the expansion of empire. Moreover, he used the Discovery Doctrine, in *Johnson*, for the purpose of settling a real property dispute between non-Indians, in which he had a personal interest that could have been settled on real property legal grounds.[105] Not only is this arguably a departure from international practice, it is a clear departure from American colonial practice and from that of the young republic in the early years after its formation at the conventions that adopted first the Articles of Confederation in 1781 and later the Constitution in 1787.

The *narrow* reading of the Discovery Doctrine that pertained in the colonies and the young republic prior to *Johnson v. M'Intosh* is located in its origin as an early expression of the law of nations *as applied to relations between the Christian Nations* of Western Europe. Under such a reading, the Discovery Doctrine gives the "discovering" nation no more than a preemptive right, over other European nations, to purchase the land of the Indigenous peoples, rather than outright title to that land. As such, it also respects a

104. Johnson v. M'Intosh, 21 U.S. 543, 573 (1823).

105. ROBERTSON, *supra* note 103, at 75–76 (noting alternative grounds that could have been the sole basis for deciding the case without involving the Discovery Doctrine); *id.* at 86–89 (discussing Marshall's personal interest in the case); *id.* at 95–116 (discussing Marshall's construction of the ruling and rationale in the case).

more robust view of the retained sovereignty of the Indigenous peoples.

Severing title from the Indigenous people, as an aspect of application of the *broad* reading of the Discovery Doctrine as incorporated in domestic American law by Chief Justice Marshall, has been sharply criticized as a mistake by Lindsay Robertson, in his exhaustive and definitive study of *Johnson v. M'Intosh* and its judicial legacy.[106] Robertson argues that the better reading of the case, especially in the context of Chief Justice Marshall's clarification of the Discovery Doctrine as domestic law in *Worcester v. Georgia*, is one in which the Discovery Doctrine is read as sorting out, as between competing claims of nation-states, which of them has a prescriptive right to *choose to purchase* the land of the Indigenous peoples that had been "discovered" by one or more of these competing European nation-states. Thus, what the United States gained was the prescriptive right to *choose to purchase* the lands of the Native American peoples. It is a mistake to say that the United States gained outright title to these lands. Robertson goes on to show that Chief Justice Marshall himself seems to have recognized that he went too far in *Johnson*. Thus, in *Worcester v. Georgia*, Chief Justice Marshall backtracked from the view that title was severed from the tribe and went to the discovering nation, the position he had taken in *Johnson*. In *Worcester*, he rejected the idea that title in the Indigenous people was extinguished by discovery, in effect acknowledging that in *Johnson* he had read the Doctrine of Discovery too broadly. His revised view, as stated below, "would dismantle the discovery doctrine by overruling that part of the doctrine assigning fee title to the discovering sovereign."[107] Chief Justice Marshall quoted his statement in *Johnson* "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession."[108] Immediately thereafter, Chief Justice Marshall stated:

> This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements

106. *See id.* at 133–35.
107. *Id.* at 133.
108. Worcester v. Georgia, 31 U.S. 515, 543–44 (1832) (quoting *Johnson*, 21 U.S. at 573).

> on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.[109]

Despite Chief Justice Marshall's correction in *Worcester* of the principle he laid down in *Johnson*, the Court has ignored the correction following Chief Justice Marshall's death and up to the present day. Instead, the Court has consistently applied the broad view of the Discovery Doctrine that Chief Justice Marshall set out in *Johnson* to uphold the broad plenary power of Congress to exercise virtually unlimited regulation of the terms of existence and activities of the tribes.[110]

Today, we need to forthrightly recognize the fact that Chief Justice Marshall's original view that discovery severed title and placed it in the United States is an unnecessarily overbroad reading of *Johnson* that should be abandoned. The harmful effect of the broad view of plenary power that it purportedly supports was harmful to the Dakota people in the nineteenth century and continues to be harmful today—notwithstanding the success of many lawyers to secure some measure of protection for the sovereignty of the tribes and some measure of benefit for the tribes by virtue of the principles attributed to the Marshall Trilogy. As Robert Williams, Jr. and others have pointed out, these benefits are always at risk in the face of the continued existence of the plenary power of Congress.[111] If Congress wanted to terminate some or all of the benefits that have been secured by tribes in recent years, as well as terminating the tribes themselves, the plenary power, as conventionally understood today, would appear to support such action.[112]

109. *Worcester*, 31 U.S. at 544.

110. *See* ROBERTSON, *supra* note 103, at 117–34.

111. ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 71–83 (2005); *see also* CANBY, *supra* note 63, at 99–101.

112. *See* WILLIAMS, *supra* note 111, at 82–83; *see also* CANBY, *supra* note 63, at 99–101.

D. Rethinking the Foundation of Federal Indian Law: Repudiating the Doctrine of Discovery in Service of the Rights of Indigenous Peoples

Steven Newcomb's analysis of the *religious roots* of the Doctrine of Discovery in his book entitled *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery*[113] takes the critique of the doctrine further than what we have explored so far. He goes to the very root of the doctrine to emphasize its theological underpinnings by pointing out that a good deal of Chief Justice Marshall's opinion in *Johnson* turns on repeated references to the distinction he makes between "Christians" and "heathens."[114] This, Newcomb argues, is often overlooked by those who view the contemporary understanding of the Discovery Doctrine as being secular in character.[115] The continued adherence to the doctrine by the Court also overlooks this fact. The truth shows that what occurred, both in the aftermath of the Dakota-U.S. War of 1862 and the treaty-making years that led up to it, is deeply rooted in stereotypes of Indigenous peoples as "savage," "primitive," and "heathen," all of which resonate with the theological underpinning of the broad reading of the Discovery Doctrine. That broad reading supports the exercise by Congress of its plenary power in seizing the Dakota land and forcibly removing them from that land. If we are to take seriously the possibility of abandoning the Discovery Doctrine as one step toward dismantling the plenary power of Congress over Indian affairs today, we need to take the theological character of the doctrine into account.

In fact, that is exactly what several religious bodies that have begun to repudiate the Discovery Doctrine are now doing. For example, the World Council of Churches ("WCC") Executive Committee noted that the Papal Bulls, on which the Discovery Doctrine is based, "called for non-Christian peoples to be invaded, captured, vanquished, subdued, reduced to perpetual slavery and to have their possessions and property seized by Christian monarchs."[116] The WCC Executive Committee went on to point out:

113. STEVEN T. NEWCOMB, PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF CHRISTIAN DISCOVERY (2008).

114. *Id.* at 85–102.

115. *Id.* at 139 n.3. Thus, despite Newcomb's deep appreciation for Robert Williams, Jr.'s work on the Discovery Doctrine, Newcomb criticizes Williams's characterization of the Discovery Doctrine as a *secular* doctrine. *Id.*

116. WCC STATEMENT, *supra* note 93, ¶ 3.

> [T]he current situation of Indigenous Peoples around the world is the result of a linear programme of legal precedent, originating with the Doctrine of Discovery and codified in contemporary national laws and policies. The Doctrine mandated Christian European countries to attack, enslave and kill the Indigenous Peoples they encountered and to acquire all of their assets. The Doctrine remains the law in various ways in almost all settler societies around the world today.[117]

In light of this history, the WCC Executive Committee "[d]enounce[d] the Doctrine of Discovery as fundamentally opposed to the gospel of Jesus Christ and as a violation of the inherent human rights that all individuals and peoples have received from God."[118] In repudiating the Doctrine of Discovery, the WCC Executive Committee called on governments to "dismantle the legal structures and policies based on [it] . . . ."[119] In taking this position, the WCC Executive Committee noted that, in recent years, the Discovery Doctrine has been repudiated by other religious bodies in Western Christianity, including the Episcopal Diocese of Maine, Episcopal Diocese of Central New York, Philadelphia Yearly Meeting of the Religious Society of Friends (Quaker), the Episcopal Church at its 76th General Convention, and the General Synod of the Anglican Church of Canada.[120] Other religious bodies continue to consider taking similar action. In July 2012, the New York Yearly Meeting of the Religious Society of Friends (Quaker), which is made up of Quaker meetings in New York State, northern New Jersey, and southern Connecticut, approved a minute to formally repudiate the Doctrine of Discovery at its annual Summer Sessions.[121]

The "gospel of Jesus Christ", cited by the WCC Executive Committee in its repudiation of the Doctrine of Discovery,[122] is stated most simply in the Gospel According to Mark: "The time is fulfilled, and the kingdom of God has come near; repent, and

117. *Id.* ¶ 6.

118. *Id.* ¶ 7, pt. A. (The source cited has two parts "A." The citation here is to the second one.)

119. *Id.* ¶ 7, pt. B.

120. *Id.* ¶ 6.

121. The Religious Society of Friends (Quaker), Minutes of the 317th New York Yearly Meeting (July 22–28, 2012), http://www.nyym.org/?q=ym_2012summin#thurs.

122. WCC STATEMENT, *supra* note 93, ¶ 7, pt. A (denouncing the Doctrine of Discovery).

believe in the good news."[123] In this simple statement, and in its elaboration in the parables and teachings of Jesus, one will search in vain for any call to embark on imperial conquests such as those carried out under the Doctrine of Discovery. To the contrary, Jesus' teaching stands more as a challenge than as a sanction for such adventures by nations. In declaring that the kingdom of God is already imminent and constantly breaking open, Jesus makes clear that what some might be seeking is already at hand. Thus, he calls those who hear him to "repent." The English word "repent," chosen to translate the Greek word *metanoia*, does not fully capture the meaning of Jesus' call, as it is understood in the Greek word found in the Greek New Testament of the Bible. Taking the meaning of the Greek word *metanoia* into account reveals that Jesus is calling those who hear him to *transform their minds* in order to see with different eyes than they have in the past, and in so doing to recognize that what they seek is already at hand and even "among" them.[124] Further illustration of what it means to change one's mind is found in what is perhaps the most well-known of Jesus' parables: the Parable of the Good Samaritan. After being asked by a lawyer, "[W]hat must I do to inherit eternal life?," Jesus answered with the Great Commandment: "You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself."[125] Jesus goes on to tell the Parable of the Good Samaritan, the story of a stranger coming to the rescue of a wounded man lying along the wayside, to give an example of what it means to follow this commandment in everyday life. How the core teaching of Jesus, briefly described here, could possibly support the Doctrine of Discovery is a question to be taken seriously today by all for whom the Christian tradition is dear.

It may seem odd to find a theological reflection, however brief, in an article about the law. But it is important to note that the

123. *Mark* 1:15 (The New Oxford Annotated Bible: New Revised Standard Version).

124. "The kingdom of God is not coming with things that can be observed; nor will they say, 'Look, here it is!' or 'There it is!' For, in fact, the kingdom of God is among you." *Luke* 17:20–21 (The New Oxford Annotated Bible: New Revised Standard Version).

125. *Luke* 10:25–37 (The New Oxford Annotated Bible: New Revised Standard Version). The "Great Commandment" appears throughout the teachings of Jesus. Most often, the citation given for it appears in *Matthew* 22:37–39 (The New Oxford Annotated Bible: New Revised Standard Version), where Jesus identifies it as the Great Commandment.

Doctrine of Discovery is deeply rooted in the Christian religious vision of fifteenth-century European Christendom. The claimed superiority and preeminence of Christianity justified, for Christendom, the invasion of Indigenous lands and the enslavement of Indigenous peoples. Today many who claim the heritage of the Church are emphatically repudiating the Discovery Doctrine as a violation of the tradition they hold dear. Thus, in the absence of such repudiation by the secular courts of today, the theological mistake of fifteenth-century Christendom is perpetuated in the unchallenged incorporation of the Discovery Doctrine in *Johnson v. M'Intosh* that is regarded today as the cornerstone of Federal Indian Law.

The repudiation of the Doctrine of Discovery by religious organizations comports with the international recognition of the human rights of Indigenous peoples and the central importance of land in that recognition, as set out in the *United Nations Declaration on the Rights of Indigenous Peoples*.[126] In light of these emerging statements, and in the absence of any constitutional foundation for the plenary power doctrine and for the Discovery Doctrine on which it is founded, further adherence to these doctrines as a matter of law by domestic courts in the United States is both a legal embarrassment as well as a theological embarrassment. Legally, it is a profound contradiction of the American commitment to the Rule of Law. Theologically, it is a profound contradiction of the Church's commitment to the gospel of Jesus. In a nation that prides itself as committed to the Rule of Law, the Discovery Doctrine is nothing more than a judicial fiat with religious overtones. In the context of the journey of this article to the root of the Discovery Doctrine, the action taken by Congress to seize the Dakota lands and forcibly remove the Dakota people from that land in the aftermath of the 1862 war is revealed as nothing more than legislative fiat without legal foundation.

126. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, arts. 3–7, 10, 26–28, U.N. Doc. A/RES/61/295 (Oct. 2, 2007), *available at* http://www.unhcr.org/refworld/docid/471355a82.html (adopted by the General Assembly in 2007; articles 3 through 7 address indigenous peoples' self-determination, article 10 addresses them not being subject to forcible relocation from their lands, and articles 26 through 28 address their rights to their lands).

VI. CONCLUSION: TRUTH TELLING ON THE ROAD TO REPARATIONS—THE NEXT STEPS

The 1863 Acts of Congress, seizing the land of the Dakota and forcibly removing them from that land, like the foundation of federal Indian law, ultimately rests on the cornerstone of the Doctrine of Christian Discovery—a cornerstone that is without moral or legal justification. If we are truthful about this, we need to confess that this doctrine, and its continued vitality today, disfigures the lives of many people, especially the Dakota, at the same time that it disfigures and violates the core purpose of the enterprise we call the Rule of Law. This legacy of trauma, which continues to be perpetuated through federal Indian policy, is rooted in the American incorporation and expansion of the Doctrine of Discovery as a means of conquest and expansion of the territory of the United States. As such, it is an example of a legal doctrine that does not serve the higher purposes of law to secure justice. The courts have been active participants in this for too long. But the reform of American law that is needed is not something that should be simply left up to the courts. The Doctrine of Discovery, and all that it fosters, needs to be repudiated and abandoned through words backed up by concrete deeds of reparative justice that can bring healing to the trauma of America's past. This will require active commitment by all Americans to undertake imaginative and innovative initiatives to deal with the truth of this troubling past and the need for reparations to address the horrific legacy that it has left us with today. Only then will it be possible to write a new, more hopeful American story that might yet lead us to a shared future in which all life may flourish. The first step to be taken on the road to reparative justice is truth-telling about America's original sin and the role it has and continues to play in the story of Minnesota as well as the nation.[127]

In recent years, signs of the needed truth-telling have appeared. The Dakota Commemorative Marches of the Twenty-First Century, held every two years since 2002, retrace the route of

127. WAZIYATAWIN, WHAT DOES JUSTICE LOOK LIKE?: THE STRUGGLE FOR LIBERATION IN DAKOTA HOMELAND 167–74 (2008). The importance of truth-telling through honest recognition of the trauma rooted in the past but still felt today is discussed at length in DONALD W. SHRIVER JR., AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS (1995) and DONALD W. SHRIVER JR., HONEST PATRIOTS: LOVING A COUNTRY ENOUGH TO REMEMBER ITS MISDEEDS (2005).

the forced march of 1862.[128] These marches are a Dakota effort to remember and heal the enduring trauma that is the legacy of the long pattern of action by the United States to separate the Dakota from their homeland through a program of ethnic cleansing of genocidal proportion.[129] The marches bring to public attention the injustice the Dakota have experienced in the past as well as the trauma they carry today. With the coming of the war's sesquicentennial in 2012, evidence of truth-telling has appeared through the efforts of the descendants of the Dakota who first experienced the trauma and through a growing number of non-Dakota allies. These groups are looking for a way forward that might lead to writing a new, more hopeful chapter in Minnesota history. For example, on August 16, 2012, on the occasion of the 150th anniversary of the war, Minnesota Governor Mark Dayton issued a statement in which he expressly repudiated former Governor Ramsey's call for extermination.[130] Two days later, on August 18, 2012, the Indigenous spiritual leader Arvol Looking Horse led a formal "re-entry of the homeland" by Dakota people who crossed back into Minnesota from the west.[131] These and other initiatives[132] support the ongoing efforts of the Dakota people to reclaim, recover, and restore their deep relationship with Mni Sota Makoce—the homeland. The time has come for non-Dakota

128. *See* IN THE FOOTSTEPS OF OUR ANCESTORS: THE DAKOTA COMMEMORATIVE MARCHES OF THE 21ST CENTURY (Waziyatawin Angela Wilson ed., 2006). For a compelling call for such truth-telling by a Dakota historian in the context of the experience of the Dakota people, see WAZIYATAWIN, *supra* note 127, at 71–94. For a suggestion of how the Talking Circle process, a form of Restorative Justice practice, might be employed to engage in truth-telling about the trauma of America's past in its dealings with Indigenous people in general and the Dakota people in particular, see Howard J. Vogel, *Healing the Trauma of America's Past: Restorative Justice, Honest Patriotism, and the Legacy of Ethnic Cleansing*, 55 BUFF. L. REV. 981, 1038–39 (2007).

129. Waziyatawin Angela Wilson, *Decolonizing the 1862 Death Marches*, *in* IN THE FOOTSTEPS OF OUR ANCESTORS, *supra* note 128, at 43, 49–54. For an extended discussion of how the actions of the United States against the Dakota people meet the international law definition of genocide, see WAZIYATAWIN, *supra* note 127, at 37–62.

130. Press Release, Mark Dayton, Governor, State of Minn., Governor Mark Dayton's Statement Commemorating the U.S.-Dakota War of 1862 (Aug. 16, 2012), *available at* http://mn.gov/governor/newsroom/pressreleasedetail.jsp?id=102-46359.

131. Curt Brown, *Dakota Cross Border to a 150-Year Old Welcome Home,* STAR TRIB., Aug. 17, 2012, http://www.startribune.com/local/166553796.html?refer=y.

132. WESTERMAN & WHITE, *supra* note 13, at 197–223 (describing recent, ongoing efforts to reclaim the land of the Dakota).

Minnesotans and Americans everywhere to join them by repudiating the Doctrine of Christian Discovery and to back that up with concrete acts of reparation to heal the trauma of the past.