LEGALIZING, DECOLONIZING, AND MODERNIZING NEW YORK STATE'S INDIAN LAW

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> The Indian Law, although a part of the scheme of general laws, is but a collection of special statutes relating to the several tribes of Indians remaining in the state. Following this plan an examination has been made of all statutes relating to Indians, and such as were found to be unrepealed but superceded or obsolete have been placed in the schedule for repeal, and those remaining have been added to the law under the article relating to the particular tribe to which they apply.[1]

INTRODUCTION

One of the most vexing problems in Federal Indian Control Law is how to regulate the relationship between the Indian nations and the states. In stark contrast to the federal government's role in Indian affairs, the Constitution makes no provision for the states to exercise authority inside the Indian territory located within their borders. As a result of having territory within a state that the state cannot control, there has long been conflict between the states and the Indian nations, usually revolving around state efforts to exert authority within the Indian territory.[2] These state efforts have been

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[1] Feb. 17, 1909, ch. 31, 1909 N.Y. Laws (Report of the Board of Statutory Consolidation, 1907).

[2] This history is borne out in the facts of several cases. For example, in 1971 the Leech Lake Band of the Chippewa Indians secured their right to fish, hunt and harvest wild rice on the Leech Lake Indian Reservation free from Minnesota laws regulating such activity. *See* Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001, 1002 (D. Minn. 1971). At trial, several Indians testified "that always in their dealings with the white man it was understood that they were to have unrestricted hunting and fishing rights on the Leech Lake Reservation." *Id.* at 1003. The court enjoined the enforcement of Minnesota's fish and game laws by the defendant Commissioner of Natural Resources. *See id.* at 1006. Another case involved an adultery prosecution of an Indian for the commission of that crime on a Sioux

justified primarily on the grounds that either the Indians or the non-Indians located within the Indian territory are engaging in conduct that contravenes state public policy and law. Not surprisingly, these disputes can be intense. But, because states are not burdened by the federal government's trust responsibility to safeguard Indian interests,[3] these conflicts may even be violent and life threatening.[4] As a result of this tortured relationship, the Supreme Court has recognized, that for the Indians, "'the people of the States . . . are often their deadliest enemies.'"[5]

Perhaps nowhere has this problem had more unique application than in the State of New York.[6] For over 300 years, the colonial and American inhabitants of New York have waged an ongoing battle for control over the Indian lands originally adjacent to, and later located within, the State.[7] The Indian nations most subject to these

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reservation in South Dakota. *See* United States v. Quiver, 241 U.S. 602 (1916). In *United States v. Quiver*, the Supreme Court precluded the application of a South Dakota adultery statute to the conduct of one Indian on the reservation towards another, noting, were it otherwise, the Indians "would [be] subject[ed] . . . not only to the statute relating to adultery, but also to many others which it seems most reasonable to believe were not intended by Congress to be applied to them." *Id.* at 606. Finally, the seminal case *Worcester v. Georgia*, 31 U.S. 515 (1832) addressed whether Georgia law applied within Cherokee territory to prosecute a missionary who had been living there with the consent of the tribe and federal authorities but in violation of Georgia law. The Court held it did not, stating "[t]he Cherokee nation, . . . is a distinct community occupying its own territory . . . which the citizens of Georgia have no right to enter." *Id.* at 561. *See infra* notes 105-11 and accompanying text for a discussion of *Worcester* and how the Supreme Court has since departed from its "bright-line" rule.

[3] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 573-76 (1832) (discussing the history of Federal/Indian relations and explaining that by a series of treaties the Indian people have accepted the protection of the United States government in exchange for peace). *See, e.g.*, FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES 61 (1994) (stating the Cherokees signed the Hopewell Treaty of 1785 to be under the protection of the United States government and no other).

[4] *See, e.g.*, Karen L. Folster, Comment, *Just Cheap Butts, or an Equal Protection Violation?: New York's Failure to Tax Reservation Sales to Non-Indians*, 62 ALB. L. REV. 697, 707-08 (1998) (describing a massive resistence by Senecas over New York's attempts to enforce an agreement entered into with five of the nine Indian nations in New York through which reservation merchants would charge less tax than off-reservation merchants for gasoline and cigarettes, but would be a greater tax than previously imposed); Kevin Collison, *Firm Laying Cable Detours 26 Miles to Bypass Indian Land*, BUFFALO NEWS (N.Y.), Sept. 21, 1997, at 1B (describing the same violent confrontation between the State and the Seneca Nation during which a 30-mile stretch of the New York State Thruway was closed for 24 hours).

[5] United States v. Kagama, 118 U.S. 375, 384 (1886).

[6] *See generally* HELEN M. UPTON, *The Everett Report in* HISTORICAL PERSPECTIVES: THE INDIANS OF NEW YORK (1980) (discussing the struggles of the New York Indians with the State).

[7] Throughout this essay, the word "State," when capitalized, will refer exclusively to the State of New York.

State assertions of power have been the *Haudenosaunee*, often referred to as the "People of the Longhouse" or Six Nations Iroquois Confederacy,[8] who are comprised of people from the Mohawk,[9] Oneida,[10] Onondaga,[11] Cayuga,[12] Seneca,[13] and Tuscarora[14]

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[8] *See* ROBERT W. VENABLES, *Introduction* to THE SIX NATIONS OF NEW YORK: THE 1892 UNITED STATES EXTRA CENSUS BULLETIN, viii (photo. reprint 1995) (1892) (noting the term "Six Nations" was commonly used by the United States government in treaties and other agreements with the nations, but that the nations themselves prefer "*Haudenosaunee*" or "*Iroquois*"); *see id.* at vii (providing a historical explanation of the Extra Census Bulletin). The *Haudenosaunee* also refer to themselves as "Ongwehonweh," or the "Original People" of the land they inhabit. *See Haudenosaunee* Homepage, (visited Oct. 19, 1999) <http://sixnations.buffet.net/Culture/Welcome.html?article=who_we_are>.

[9] The Mohawks refer to themselves as the "Kanienkahagen," which means "The People of the Flint." *See Haudenosaunee* Homepage, (visited Oct. 19, 1999) <http://sixnations.buffet.net/Culture/Welcome.html?article=who_we_are>. Where the name *Haudenosaunee* means "People of the Longhouse," the Mohawks are the keepers of the "Eastern Door" of that house. *See* VENABLES, *supra* note 8, at viii (providing a brief overview of *Haudenosaunee* culture). The enemies of the Mohawks called them "'man eaters,'" and the warriors had a reputation for being overpowering in battle. 1 THE GALE ENCYCLOPEDIA OF NATIVE AMERICAN TRIBES 76 (Sharon Malinowski & Anna Sheets, eds., 1998) [hereinafter "GALE ENCYCLOPEDIA"].

[10] The Oneida refer to themselves as "Onayotekaono," which means "The People of the Upright Stone," or the "standing stone." *See Haudenosaunee* Homepage, (visited Oct. 19, 1999) <http://sixnations.buffet.net/Culture/Welcome.html?article=who_we_are>. This is in reference to a rock which, as legend holds, moves with the people and provides direction wherever they go. *See* GALE ENCYCLOPEDIA, *supra* note 9, at 76; DANIEL K. RICHTER, THE ORDEAL OF THE LONGHOUSE: THE PEOPLES OF THE IROQUOIS LEAGUE IN THE ERA OF EUROPEAN COLONIZATION, I (1992). The Oneida Nation of New York is located on approximately 7000 acres, with a total enrollment of approximately 620 people. *See* Paul Lipkowitz, *Oneida Nation's Holdings Grow; The Tribe Buys 1000 Acres Across Route 46 from the 32-Acre Territory the Oneidas Have Lived on for Centuries*, POST-STANDARD (Syracuse, N.Y.), Sept. 4, 1998, at B3; LAURENCE M. HAUPTMAN, FORMULATING INDIAN POLICY IN NEW YORK STATE, 1970-1986, 165 (1998) (setting forth census statistics of the several tribes of the Six Nations).

[11] The Onondaga refer to themselves as "Onunndagaono," which means "The People of the Hills." *See Haudenosaunee* Homepage, (visited Oct. 19, 1999) <http://sixnations.buffet.net/Culture/Welcome.html?article=who_we_are>. The Onondaga Nation is the "central hearth and fire" of the *Haudenosaunee* longhouse. *See* VENABLES, *supra* note 8, at viii. Onondaga warriors were considered ruthless and in the mid-1600s extinguished the Huron, Erie, Neutral and Susquehannock tribes. *See* GALE ENCYCLOPEDIA, *supra* note 9, at 205. The Onondaga Nation lies near Syracuse, New York, on nearly 7300 acres. *See* HAUPTMAN, *supra* note 10, at 165.

[12] The Cayugas refer to themselves as "Guyohkohnyoh," which means "The People of the Great Swamp." *See Haudenosaunee* Homepage, (visited Oct. 19, 1999) <http://sixnations.buffet.net/Culture/Welcome.html?article=who_we_are>. They are also referred to as "'the people at the landing.'" RICHTER, *supra* note 10, at I. Of the five original tribes of the Six Nations, the Cayugas remain the most anonymous in the eyes of archeologists who have unearthed remains of the tribes presence in the area surrounding Lake Cayuga dating to 1300 B.C. *See* GALE ENCYCLOPEDIA, *supra* note 9, at 25.

[13] The Senecas refer to themselves as "Onondowahgah," which means "The People of the Great Hill." *See Haudenosaunee* Homepage, (visited Oct. 19, 1999) <http://sixnations.buffet.net/Culture/Welcome.html?article=who_we_are>. Where the Mohawks are the keepers

Nations.[15] Originally controlling all of what is now New York State,[16] the *Haudenosaunee* have lived in their aboriginal territory under their own forms of government since time immemorial.[17]

Unlike most Indian nations that continue to exist within the United States, the *Haudenosaunee* have been more influenced by the colonizing activities of the State rather than the federal government.[18] New York's colonial government early on entered into its own treaties with the *Haudenosaunee* and enacted laws designed to carry out its own colonizing objectives.[19] These

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of the "Eastern Door" of the *Haudenosaunee* longhouse, the Senecas are the keepers of the "Western Door." *See* VENABLES, *supra* note 8, at viii. The Senecas now live on several different territories in New York, Ontario, and Oklahoma. The Seneca Nation of Indians is a constitutional republic formed in 1848; it is politically separate from the Confederacy. The nation is comprised of approximately 5500 people, of whom one-half live in Western New York. *See* HAUPTMAN, *supra* note 10, at 165.

[14] The Tuscaroras refer to themselves as "Ska-Ruh-Reh," which means the "Shirt Wearing People." *See Haudenosaunee* Homepage, (visited Oct. 19, 1999) <http://sixnations.buffet.net/Culture/Welcome.html?article=who_we_are>. Some speculate the name means "'those of the Indian hemp.'" RICHTER, *supra* note 10, at I. The Tuscaroras became the sixth nation of the *Haudenosaunee* when, in 1722, they fled North Carolina to escape colonial slave hunters. *See* VENABLES, *supra* note 8, at vii. They were once part of a confederacy of three tribes: the Skarooren, the Akawanteaka, and the Kauutanoh. *See* GALE ENCYCLOPEDIA, *supra* note 9, at 307. They are approximately 1200 in number. *See id.*

[15] *See* VENABLES, *supra* note 8, at vii-viii (providing an in-depth history of the nations which comprise the Confederacy); *see also* Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the* Haudenosaunee, 46 BUFF. L. REV. 805, 806-08 (1998) (discussing further the formation of the *Haudenosaunee* Confederacy).

[16] *See* VENABLES, *supra* note 8, at viii. "The Mohawk Nation is the Keeper of the Eastern Door of this longhouse; the Senecas are the Keepers of the Western Door; the Onondaga Nation is the central hearth and fire, where the Grand Council of the entire Confederacy meets." *Id.*

[17] *See* BASIC CALL TO CONSCIOUSNESS 1 (Akwesasne Notes ed., 4th ed. 1991) (documenting the history of the *Haudenosaunee* through position papers submitted to the Non-Governmental Organizations of the United Nations in Geneva, Switzerland, which organization in 1977 requested documentation on the course of oppression suffered by Native Americans). "But the Native people can probably lay claim to a tradition which reaches back to at least the end of the Pleistocene, and which, in all probability, goes back much further than that." *Id.* at 69; A.W. WALLACE, THE WHITE ROOTS OF PEACE 3 (1946) (stating that estimates put the age of the Confederacy at 400 years old);

[18] Colonization is the process by which a people exploit and/or annex the lands and resources of another people (usually of a different race or ethnicity) without their consent and unilaterally expand political power over them, often displacing, either in whole or part, their prior political organization. *See* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 86 (1993) (providing a definition of the term "colonialism" and noting that over 40 years ago, Felix Cohen, a preeminent figure in federal Indian law, remarked that Indians at that time continued to lose more and more land to the "burgeoning federal bureaucracy" and that the "promises of political and economic autonomy" made to Indians had failed).

[19] *See infra* notes 39-43 and accompanying text (noting briefly the relationship with the Indians before the Articles of Confederation and colonial New York).

activities continued when New York became a state;[20] but despite being in violation of *Haudenosaunee* law, federal law, and the federal treaties with the *Haudenosaunee*, the federal government during the late eighteenth and early nineteenth centuries was usually unable and unwilling to check these illegal assertions of State power over the *Haudenosaunee* and their lands. As a result of the federal government's virtual abandonment of its responsibilities over Indian affairs in New York, the State had considerable latitude to colonize the *Haudenosaunee* and appropriate ownership and control over the remaining *Haudenosaunee* lands.[21] While the United States from time to time during the nineteenth and twentieth century actually exercised its protective responsibilities on behalf of the *Haudenosaunee* (usually when the State was acting in a particularly egregious manner), for most of America's history it has been the State government rather than the federal government that has had the dominant role in influencing the Indian nations within New York.

In the course of expanding its authority over the *Haudenosaunee* during the nineteenth century, New York State, more than any other state in the nation, developed an extensive body of law authorizing and directing its colonizing agenda.[22] Not surprisingly, these laws primarily served State interests, such as authorizing the development of Indian lands and the control over *Haudenosaunee* governments.[23] But the State's interests also included so-called exercise of "beneficial" legislation designed to promote *Haudenosaunee* interests—actions akin to the federal government's trust responsibility—that included the allotment of

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[20] *See New York Facts*, (visited Sept. 11, 1999) <http://www.iloveny.state.ny.us/facts.htm> (stating New York became a state on April 20, 1777); *infra* notes 45-102 and accompanying text (assessing the State's policies and laws toward the Indians following the Revolutionary War and into the 20th Century);

[21] *See* Oneida Indian Nation v. New York, 860 F.2d 1145, 1157 (2d Cir. 1988) (holding the State had authority to take title to more than five million acres of Oneida land and did not violate the Articles of Confederation); *see also* Barbara Graymont, *New York State Indian Policy After the Revolution*, 57 N.Y. HIST. 438, 440 (1976) (explaining the State's policy of acquiring Indian land).

[22] *See infra* notes 39-102 and accompanying text (setting forth a summary of New York's involvement in *Haudenosaunee* affairs). *See generally* Act of May 9, 1840, ch. 254, 1840 N.Y. Laws 201-02 (regulating the roads and bridges within the Allegany and Delaware Creek Reservations); Act of Mar. 31, 1821, ch. 204, 1821 N.Y. Laws 183 (repealed 1909) (purporting to vest authority in county district attorneys to arrest any non-Indian intrusion on reservations); Act of Apr. 2, 1813, ch. 91, 1813 N.Y. Laws 554 (repealed 1909) (purporting to make the cutting of timber on Indian land an illegal act).

[23] *See, e.g.*, N.Y INDIAN LAW §§ 7 (partitioning tribal lands), 8 (intruding on tribal lands), 10 (residing on tribal lands), 11 (trespassing on tribal lands) (McKinney 1950 & Supp. 1999).

tribal lands to individual Indians, the establishment of schools, and the removal of intruders.[24] These laws, while deemed by State officials as furthering to *Haudenosaunee* interests, ultimately were part of a broader State agenda to exterminate them as a distinct people.[25]

Despite its extensive legislative activity in dealing with the *Haudenosaunee*, the State had not been granted authority by the federal government to enact these laws. Nonetheless, federal officials either mistakenly, or delinquently, allowed the State to enact and implement these laws without challenge. As a result, the State's Indian Law,[26] which was originally enacted to serve as the legal infrastructure for implementing the State's nineteenth century assimilationist agenda, gained credence in the eyes of state, federal and even *Haudensaunee* officials. The lasting effect has been the establishment of a modern State role in *Haudenosaunee* affairs that is rooted in the colonialism and paternalism of the eighteenth and nineteenth centuries.

During the last thirty years, the United States Supreme Court has become increasingly involved in resolving state-tribal conflicts[27] and in doing so, has developed doctrinal principles by which to evaluate whether assertions of state power in Indian territory are valid under federal law.[28] While it is still an important presumption that states have no authority over Indian affairs, the Court over the years has modified this "bright-line" rule and defined new standards by which to evaluate whether assertions of state power in Indian territory can be sustained as a matter of federal law.[29]

Viewed against the backdrop of these modern Federal Indian Control Law principles, most of the State's Indian Law purporting to regulate and control the *Haudenosaunee* is invalid.[30] The focus of

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[24] *See infra* notes 232-301 and accompanying text (giving a detailed account of many state laws regulating Indian land, government, and way of life).

[25] *See infra* notes 232-301 and accompanying text (discussing laws designed to regulate Indian conduct).

[26] *See* N.Y. INDIAN LAW §§ 1-153 (McKinney 1950 & Supp. 1999).

[27] *See infra* notes 124-59 and accompanying text (discussing the Supreme Court's recent decisions regarding Indian/state conflicts).

[28] *See infra* notes 128-53 and accompanying text (setting forth the Infringement Test and the Pre-emption/Balancing Test used by the Supreme Court).

[29] *See infra* notes 92-144 and accompanying text (laying out the varied specifics of the now controlling principle that tribal sovereignty is no longer determinative, but merely a "backdrop" to be considered when evaluating the validity of laws applying to Indians).

[30] It also is clear that many of these assertions of State power over *Haudenosaunee* affairs are violations of *Haudenosaunee* law. This legal relationship is foremost characterized by the *Gus-wen-tah*, or the Two Row Wampum, which reflects one of the earliest treaties between the *Haudenosaunee* and the Dutch colonists. *See* Robert B. Porter, *A Proposal to the*

this article is to defend that proposition and to set forth the justification for why these laws should be repealed and/or reformed. In doing so, Part I will provide some historical background regarding the State's role in *Haudenosaunee* affairs during the last 225 years, including how the State's Indian Law came into being.[31] Part II will set forth the federal law principles regulating assertions of State power in Indian territory and analyze why the State's Indian laws relating to the *Haudenosaunee* are invalid in accordance with those principles.[32] In Part III, I will explain some of the implications of retaining illegal Indian laws as a matter of State record.[33] Lastly, I will set forth my recommendation for how New York can reform and modernize its approach for dealing with the *Haudenosaunee* nations.[34]

My purpose in writing this article is to contribute to the discussion surrounding the assertions of *Haudenosaunee* sovereignty that have occurred during the last twenty-five years and to provide some much needed clarification as to the State's power to legislate with respect to *Haudenosaunee* affairs. Today, these assertions have put the State at odds with the *Haudenosaunee* nations over a variety of conflicts. Currently, the State is being sued for millions of acres of land that it illegally obtained pursuant to non-federally ratified treaties entered into over 200 years ago.[35]

Hanodaganyas *to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REF. 899, 987-88 (1999). The Two Row Wampum symbolize[s] two paths or two vessels, travelling down the same river together.

> One a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.

Id. at 988.

[31] *See infra* notes 39-100 and accompanying text.

[32] *See infra* notes 101-301 and accompanying text. In applying Federal Indian Control Law principles to this analysis, it should be realized that much of this body of "law" itself violates *Haudenosaunee* law as reflected in the Two Row Wampum. *See* Porter, *supra* note 30, at 904-945 (setting forth an analysis of the colonial foundation of Federal Indian Control Law and describing its evolution as revolving around one central theme—"how can 'we,' the superior, enlightened, Christian people, help/destroy 'them,' the inferior, uncivilized, pagan people"). Nonetheless, American law requires that the State not act in violation of federal law regardless whether that law itself is in violation of *Haudenosaunee* law. The analysis in this article is necessary because so much of the State's law relating to the *Haudenosaunee* does not even meet this minimum threshold.

[33] *See infra* notes 302-23 and accompanying text.

[34] *See infra* notes 324-26 and accompanying text. There are two Indian nations in the State that are not recognized as sovereigns by the federal government—the *Unkechauge* (*Poospatuck*) and *Shinnecock*—but which are recognized as such by the State. This article is limited to an analysis of the State Indian laws relating to the *Haudenosaunee*.

[35] *See* Fred Kaplan, *A High Stakes Claim; Oneida Suit Seeks 250,000 Acres of Upstate New*

It has sought, unsuccessfully, to force Indian businesses to collect State sales taxes from non-Indians who purchase goods within *Haudenosaunee* territory.[36] And it has assumed a new and powerful role as the gatekeeper on the path to lucrative gaming opportunities for some *Haudenosaunee* nations.[37] These conflicts, however, have occasionally resulted in violence between the State's law enforcement officers and the *Haudenosaunee*.[38] As a result, the lives of both the *Haudenosaunee* and New Yorkers are at risk, as well as millions of dollars of the State and tribal fiscs.

These recent conflicts, as I hope to demonstrate, are all rooted in the State's colonial laws and policies. Because State officials may fail to appreciate the historical context in which contemporary relations with the *Haudenosaunee* take place, they most likely will also fail to appreciate the false security that is reflected by the State's Indian law. This lack of understanding is a significant contributor to the problems now occurring in State–*Haudenosaunee*

York, THE BOSTON GLOBE, May 19, 1999, at A1 (reporting the largest Indian land claim in the United States, wherein the Oneida Indian Nation is demanding, with support from the United States Justice Department, the return of 250,000 acres in Oneida and Madison Counties).

[36] *See* Ellis Henican, *Smoke Clears for Indians*, NEWSDAY, May 25, 1997, at A6 (reporting the abandonment of the state's tax collection efforts); Raymond Hernandez, *In a Shift, New York Won't Try to Tax Sales on Indian Lands*, N.Y. TIMES, May 23, 1997, at B1 (reporting a shift in policy by the Pataki administration); Kyle Hughes, *Pataki Backs Down in Indian Tax Dispute*, GANNETT NEWS SERVICE, May 22, 1997, *available in* 1997 WL 8828991 (same); Agnes Palazzetti, *Indians Win Sales-Tax Battle; Pataki Orders Repeal of Rule on Gas, Cigarette Levy*, BUFFALO NEWS (N.Y.), May 23, 1997, at A1 (discussing the "abrupt about face" by the Pataki administration).

[37] *See generally* Agnes Palazzetti, *Mohawks Put Conflicts Aside to Open New Casino*, BUFFALO NEWS (N.Y.), Apr. 9, 1999, at B1 (reporting the opening of the Akwesasne Mohawk Casino at Hogansburg, New York, and noting it is expected to recognize $100 million in revenue in its first year); Tom Precious, *State, Mohawks Reach Deal on Slotlike Games*, BUFFALO NEWS (N.Y.), May 28, 1999, at A9 (describing the compact entered into between the State and the St. Regis Tribe where the State would receive a percentage of slot machine revenue based on gross revenue, but reporting the casino has been losing money since it opened in April and may have to close); *State to Make Millions on Video Slot Machines*, TIMES UNION (Albany, N.Y.), May 28, 1999, at B2 (reporting that 300 video lottery terminals would be installed in the Mohawk casino by June 15, 1999, and the State could potentially receive $18 million annually of the revenue from the machines); *Today is Opening Day for Casino*, BUFFALO NEWS (N.Y.), July 20, 1993, at A8 (reporting the opening of Turning Stone, the Oneida casino 30 miles east of Syracuse, and noting that it was projected to gross $500 million a year and net approximately $100 million annually for the tribe).

[38] *See* Folster, *supra* note 4, at 707-08 (noting that during a tax enforcement scheme in 1997, 12 New York state troopers were taken to the hospital and numerous patrol cars were destroyed when Senecas defended themselves against the State's taxation efforts); Collison, *supra* note 4, at B1 (alluding to a 1997 confrontation between the State and the Seneca Nation over the imposition of taxes on cigarettes and gasoline sold on the reservation that led to violent demonstrations which closed a 30-mile stretch of the New York State Thruway for 24 hours).

relations and ensures that mutually beneficial solutions will be difficult to achieve. By legalizing, decolonizing, and modernizing New York's law dealing with the *Haudenosaunee*, the State can take important steps to ensuring that a mutually beneficial relationship can be reestablished for the first time in over 200 years.

I. A BRIEF HISTORY OF NEW YORK'S INVOLVEMENT IN *HAUDENOSAUNEE* AFFAIRS

The modern legal and political relationship between the *Haudenosaunee* and the State is deeply rooted in the events and circumstances associated with the colonization of *Haudenosaunee* lands by the Dutch and the British in the seventeenth and eighteenth centuries and by the State itself in the nineteenth and twentieth centuries.

A. Seventeenth and Eighteenth Century European Colonization

As a result of the relative strength of the *Haudenosaunee* during the late seventeenth century,[39] the Dutch (and later British) colonial governors early on developed a practice of entering into treaties and agreements with the *Haudenosaunee*[40] by which to secure the safety of colonial settlements, to define trade relations, and otherwise ensure the alliance of the *Haudenosaunee* to the British, rather than to the French.[41] This relationship was called the "Silver Covenant Chain," and it was frequently "polished" in order to safeguard mutual interests in peace.[42]

Bilateral relations founded upon treaties continued to develop

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[39] *See* WILLIAM N. FENTON, THE GREAT LAW AND THE LONGHOUSE 269-76 (discussing in detail the inability of the Dutch "to push the [then] Five Nations around" and documenting the relative strength of the tribes lying particularly in the Mohawks).

[40] *See The Earliest Recorded Description: The Mohawk Treaty with New France at Three Rivers, in* THE HISTORY AND CULTURE OF IROQUOIS DIPLOMACY 127 (Francis Jennings et al. eds., 1985) (noting the Iroquois made their first treaty with the Dutch in 1643).

[41] *See* FENTON, *supra* note 39, at 13 (alluding to the Anglo-French rivalry, and how the English attempted to keep the French out of negotiations and dealings with the Iroquois).

[42] *See Iroquois Alliances in American History, in* THE HISTORY AND CULTURE OF IROQUOIS DIPLOMACY 37, 38-39 (Francis Jennings et al. eds., 1985) (noting the Covenant Chain was an alliance between member tribes represented by the Iroquois, and the English colonies represented by New York, and was an "aggressive partnership . . . to penetrate the French trading and alliance systems that spread over the Great Lakes and Mississippi valley regions"); VENABLES, *supra* note 8, at x-xi ("The Haudenosaunee and the English spent much of the eighteenth century polishing the covenant chain. . . . As the Haudenosaunee were a separate, independent people, the English continuously had to request, rather then require, their assistance.").

throughout the eighteenth century, but the growing division between the colonists and the crown resulted in the emergence of separate relationships developing between the *Haudenosaunee*, and both the British and the Americans. Both sides were successful in their efforts to curry *Haudenosaunee* favor. Ultimately, when the time came to choose an ally to side with during the Revolutionary War, the *Haudenosaunee* as a confederacy could not agree upon which side to support.[43] The Oneidas and some Tuscaroras sided with the Americans, while the other nations supported the British.[44] As a result of this division, the *Haudenosaunee* were neutralized as a potent political and military force, a result that ultimately favored American interests.

Despite this blow, following the Revolutionary War and the establishment of the United States under the Articles of Confederation,[45] residual *Haudenosaunee* strength induced the federal government to enter into several significant treaties with the *Haudenosaunee* to secure peace and to define the boundaries of *Haudenosaunee* territory.[46] Due to New York's longstanding colonial involvement with the *Haudenosaunee*, as well as a confusing provision in the Articles that preserved a role for the states in Indian affairs,[47] officials on behalf of the new State of New

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[43] *See* BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION 86-103 (1972) (discussing the Indians' alliances with the Americans and British during the American Revolution).

[44] *See* FENTON, *supra* note 39 at 598 (stating the Oneidas and the Tuscaroras, in May 1776, finally decided a policy of neutrality was no longer feasible).

[45] *See* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 239 (1948) (stating the Articles of Confederation were the governing law of the United States from 1781 until 1789).

[46] *See* Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. 15 (defining the geographical boundary of the Six Nation's territory and requiring that six "hostages" be handed over to the federal government until all "white and black" prisoners then in the possession of the nations were released); Treaty of Fort Harmer, Jan. 9, 1789, 7 Stat. 33 (defining further the territory of the Six Nations, and referencing the earlier Treaty of Fort Stanwix); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES, 94-96 (1994). Another such treaty was that brokered by Timothy Pickering in 1794 known as the Canandaigua Treaty. *See id.* at 94. Indian peace was essential to United States policy following the Revolutionary War, and the Seneca were irate following the murder of two of their tribe by whites. *See id.* The treaty acknowledged Seneca title to more than one million acres, and established rights of passage for the benefit of the United States. *See id.* at 96. Despite the United States' gestures towards the Indians, "[i]t was the last treaty with the Iroquois in which the American commissioners followed the ancient forms of the native protocol. After that the United States no longer felt bound to observe the Indian customs." *Id*; *see also Descriptive Treaty Calendar*, *in* THE HISTORY AND CULTURE OF IROQUOIS DIPLOMACY 203 (Francis Jennings et al. eds., 1985) (setting forth a comprehensive list of treaties, written proceedings, and negotiations involving the Iroquois Indians between 1613 and 1913).

[47] *See* THE ARTICLES OF CONFEDERATION, art. IX, § 4 (1781) (stating the United States retained all power over only those Indians "not members of any of the States, provided that

York began to enter into their own treaties with the *Haudenosaunee*. Federal officials, acting on the belief that the United States had superior authority to deal with the Indian nations, sought to thwart these efforts, but State officials viewed the matter to be within their rightful authority and competed directly with federal officials for the right to negotiate with the *Haudenosaunee* for purchase of their lands.[48]

This conflict was resolved as a legal matter with the ratification of the American Constitution in 1789, which vested exclusive authority over Indian affairs in the federal government.[49] Congress acted quickly to implement this authority by passing the Trade and Intercourse Act in 1790, which prohibited the sale of Indian land without the approval of Congress.[50] In significant part, this Act was directed at states like New York that continued to harbor notions of a superior right to control relations with the Indian nations within their borders. Despite the clarity of the Constitution's grant of exclusive authority over Indian affairs to the federal government,[51] and the express mandate of the Trade and Intercourse Act, New York continued to enter into treaties with the Indian nations without federal approval.[52]

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the legislative right of any State within its own limits not be infringed or violated"), *reprinted in* GEORGE ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY 245-55 (1989).

[48] *See* FENTON, *supra* note 39, at 604 (alluding to a 200 year period of confused jurisdiction over the Six Nations with Congress and New York State both asserting authority to regulate them).

[49] *See* U.S. CONST. art. I, §§ 8, cl. 3, 10, cl. 3 (reserving for Congress the authority to regulate trade with Indians and denying States the power to enter into treaties).

[50] *See* Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730-31 (1834) (codified at 25 U.S.C. § 177 (1995)); *see also* John Eduard Barry, Comment, Oneida Indian Nation v. County of Oneida: *Tribal Rights of Action and the Indian Trade and Intercourse Act*, 84 COLUM. L. REV. 1852, 1857 (1984) (stating that nearly 200 hundred treaties were entered into by New York and Indian tribes in violation of the Trade and Intercourse Act).

[51] *See* U.S. CONST. art. I, §§ 8, cl. 3, 10, cl. 3.

[52] *See* Assem. Doc. No. 51, 112th Legis. Sess. app. A (N.Y. 1889) (providing a chronological listing of laws enacted between 1813 and 1888 to regulate Indian affairs, several of which purport to provide for "care of insane Indians" and regulate the practice of medicine). This document is commonly known as the "Whipple Report," after Assemblyman J. S. Whipple of Salamanca, New York, who in 1888 spearheaded a legislative investigation into *Haudenosaunee* life in order to establish justifications for the State's new agenda to eliminate the "Indian Problem." *See infra* notes 72-83 and accompanying text (discussing the conclusions of Whipple's committee report and noting they were simply a near codification of the State's Indian policy in existence for decades). *See generally* Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 537-38 (N.D.N.Y. 1977) (noting that the federal consent required for the Nonintercourse Act was "not obtained before or after the fact").

B. Nineteenth Century State Colonization and the Origins of the State's Indian Law

The State's actions during this formative period of American history set the stage for its later efforts to obtain greater control over *Haudenosaunee* lands and transform the *Haudenosaunee* way of life. Regardless of how the United States Constitution limited state powers, New York State officials believed that they had the absolute right and authority to regulate and control relations with the *Haudenosaunee*. Initially, the State's actions in doing so were focused purely on economic self-interest—obtaining title to the remaining *Haudenosaunee* lands.[53] Even though most of the *Haudenosaunee* lands had been appropriated by the turn of the eighteenth century, all but the Cayugas retained some aboriginal territory. Obtaining control, if not outright title, of these remaining "reservations" was deemed crucial to the State's economic security and remained an important State priority well into the nineteenth century.[54]

In the course of this continued colonial aggression, it eventually became clear to some within the State (mainly missionaries and other social reformers) that the *Haudenosaunee* were not faring well in their transition to reservation life. With the loss of warfare, diplomacy, and a large land base upon which to conduct hunting forays, the men were left virtually unemployed.[55] This was a great shock to the *Haudenosaunee* family structure and it greatly disrupted all aspects of reservation life.[56] The shock was only compounded by the proliferation of alcohol abuse and the despair and social decay associated with it.[57] In response to pressure brought on by these social reformers, the State broadened its colonizing agenda to include activities designed to "help" the *Haudenosaunee* adjust to life on the reservations.

The first State laws enacted for this purpose focused on the

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[53] *See* HAUPTMAN, *supra* note 10, at 8-10 (discussing the roots of the State's Indian policy).

[54] See LAURENCE M. HAUPTMAN, CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE 101-11, 175-90 (1999) (discussing the growth of Buffalo, New York and the development of the Erie Canal as pivotal forces in the dispossession of the Senecas from western New York, culminating in the Treaty of Buffalo Creek of 1838—"one of the major frauds in American Indian history").

[55] *See* FENTON, *supra* note 39, at 104 (noting the substantial and "radical" culture change drove members of both sexes into deep depression).

[56] *See id.* (noting the effects upon political, economic, social, and religious life brought on by federal and State aggression).

[57] *See id.* "Warriors, unable to validate their manhood by hunting and fighting, drank to excess." *Id.*

"protection" of *Haudenosaunee* lands and resources from predatory White entrepreneurs. These laws appear to have been justified on the basis of satisfying commitments made to some *Haudenosaunee* nations pursuant to State treaties.[58] These laws regulated the cutting of timber on Indian lands[59] and banned non-Indians from intruding on the reservations.[60] Eventually, however, the State's agenda expanded to address educational and social welfare matters. In 1846, the State appropriated funds for the establishment of schoolhouses on the Allegeny and Cattaraugus Reservations[61] and, in 1855, it established the State's first Indian boarding school.[62] Also during this time, the State Board of Charities was established with the responsibility of caring for needy Indians, a function that has continued to this day through the State Department of Social Services.[63]

Perhaps the most significant intrusion into *Haudenosaunee* affairs was the State's efforts to transform traditional *Haudenosaunee* governance into a more Americanized form. The first instance of the type of State interference occurred in 1802, when the Legislature enacted a statute establishing a council of three elected chiefs for the St. Regis Mohawk Tribe at *Akwesasne*.[64] The establishment of this elected government was a direct attack on the traditional Mohawk leadership then in place and was not accepted by all Mohawks. Nonetheless, this elected government eventually received official recognition by the State and federal government and has served as the basis for governmental division and instability at *Akwesasne* for nearly 200 years.

In addition to the Mohawks, the State was successful in

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[58] *See, e.g.*, Treaty Between the People of the State of New York and the Onondaga Nation, Sept. 12, 1788, *in* Assem. Doc. No. 51, 112th Legis. Sess. 1 (N.Y. 1889) (providing for the transfer of Onondaga lands to the State of New York pursuant to terms which allowed the Indians to remain on their lands forever, and providing protection to the Indians from non-Indian "intruders" who may come to reside on the ceded land); Treaty Between the People of the State of New York and the Oneida Nation, § 4, Sept. 22, 1788, *in* Assem. Doc. No. 51, 112th Legis. Sess. 1 (N.Y. 1889) (providing the same protection for the Oneidas as to the Onondagas from intrusion and settlement by non-Indians).

[59] *See* Act of Apr. 2, 1813, ch. 91, 1813 N.Y. Laws 554 (repealed 1909).

[60] *See* Act of Mar. 31, 1821, ch. 204, 1820 N.Y. Laws 183 (repealed 1909).

[61] *See* Act of Apr. 30, 1846, ch. 114, 1846 N.Y. Laws 127 (repealed 1909) (setting forth the amount of money appropriated and its intended use).

[62] *See* Act of Apr. 10, 1855, ch. 233, 1855 N.Y. Laws 357 (repealed 1909) (establishing the Thomas Asylum for orphan and destitute Indian children).

[63] *See* HAUPTMAN, *supra* note 10, at 10 (noting the Board of Charities, and later the Department of Social Services, became the premier state agency dealing with Indians for over 120 years).

[64] *See* Act of Mar. 26, 1802, ch. 50, 1804 N.Y. Laws 62 (repealed 1909).

influencing the transformation of the Seneca Nation government. In 1848, the Senecas living at the Allegany and Cattaraugus territories overthrew the traditional government of chiefs and established a constitutional republic.[65] In part, the Seneca Revolution occurred in response to the corruptness of the chiefs in selling all of the remaining Seneca lands in the Treaty of Buffalo Creek in 1838.[66] A so-called "compromise" treaty—that relinquished the Buffalo Creek and Tonawanda territories and preserved the Allegany and Cattaraugus territories—was entered into in 1842.[67] In 1845, the State Legislature enacted laws providing for new officers of the Seneca government to be selected from the existing chiefs—a clerk, a treasurer, six peacemakers and two marshals—and defined the duties of these new officials.[68] While it appears that Senecas disgusted with the traditional government had requested the State to take this action, the State on its own accord amended these laws in 1847 to provide for direct election by the Seneca people.[69] A year later, the Seneca Revolution occurred and the State and federal governments acted quickly to recognize and stabilize the new government.[70]

The State was unsuccessful in its efforts to transform government within any of the other *Haudenosaunee* nations. But because of the urging of discontented and assimilated Mohawks and Senecas, the State was able to interfere directly in the governments of these nations. Laws purporting to establish these new tribal governments symbolized the grandiosity of the State's colonizing agenda. But the State's focus on improving the social condition of the

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[65] *See* Porter, *supra* note 15, at 832 (noting that on December 4, 1848 a Constitution was established at the Longhouse at the Cattaraugus Reservation which formed the Seneca Republic).

[66] *See* Treaty with the New York Indians (also known as Buffalo Creek Treaty), Jan. 15, 1838, 7 Stat. 550 (amended 1838) (establishing a "permanent home for all New York Indians" after the tribes of New York relinquished all claims to land previously held at Green Bay, and setting forth areas of settlement for each of the tribes of the Six Nations).

[67] *See* Treaty with the Senecas (also known as the Compromise Treaty), May 20, 1842, 7 Stat. 586, 587 (surrendering for "a just consideration" the lands of the Buffalo Creek and Tonawanda Reservations to Thomas Ludlow Ogden and Joseph Fellows).

[68] *See* Act of May 8, 1845, ch. 150, 1845 N.Y. Laws 146 (amended 1847) (providing for the protection and improvement of the Seneca Indians residing on the Cattaraugus and Allegany Reservations in this State, granting them the ability to commence an ejectment action to recover possession of any lands unlawfully held from them).

[69] *See* Act of Nov. 15, 1847, ch. 365, 1847 N.Y. Laws 464 (repealed 1909) (setting forth the qualification of voters, the election process for officers, and tenure of office for tribal officials, among other things).

[70] S. Res. of Apr. 6, 1849, 72nd Leg., 1849 N.Y. Laws 731 (concurring in the earlier Assembly resolution); Assem. Res. of Mar. 27, 1849, 72nd Leg., 1849 N.Y. Laws 731.

Haudenosaunee highlights another side to this agenda. In effect, by the mid-nineteenth century the State had adopted a *de facto* Indian policy that was very much like the one evolving at the federal level: pursue the government's economic interests, while at the same time attempt to promote the health and well-being of the Indians.

By the late nineteenth century, however, sentiment raged at both the State and national levels that the Indians were simply a race of uncivilized savages that had become a burden on civilized American society.[71] State officials, perceiving the reservations as the State's "Indian Problem," sought to formulate a new plan that would eliminate the "problem" once and for all. In 1888, an Assembly Committee chaired by Assemblyman J.S. Whipple of Salamanca (the only White city located within *Haudenosaunee* territory) "investigated" each of the different *Haudenosaunee* nations and concluded that every aspect of *Haudenosaunee* life—law, custom, land tenure, domestic relations, and religion—should be condemned and transformed.[72] The Whipple Committee concluded that, for the "good of the Indian," efforts must be taken by the State to "[e]xterminate the tribe and preserve the individual; make citizens of them and divide their lands in severalty."[73] In so concluding, the Whipple Report established the foundation of a virulent new State Indian Assimilation Policy.

This policy development—which was also carried out nationally—was a form of genocide intended to bring about the complete and total destruction of the *Haudenosaunee* through forced assimilation into the State polity.[74] It was focused on four primary policy objectives:

1. *Christianization* - the promotion of missionary activities on reservations "'in order to stamp out 'paganism'";

2. *Compulsory Education* - the indoctrination in White American ways through compulsory education and boarding schools;

3. *Allotment* - the break-up of tribal lands and allotment to individual Indians to instill personal initiative (deemed

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[71] *See, e.g.*, Assem. Doc. No. 43, 78th Leg. Sess. 1, at 7-10 (N.Y. 1855) (discussing the "wild, unreclaimed, untutored state" of Indians and concluding "the time has come when either civilization, expatriation, or extermination must overtake them").

[72] *See* Assem. Doc. No. 51, 112th Legis. Sess. 1 (N.Y. 1889).

[73] *Id.* at 68.

[74] *See id.* at 78 (urging the Assembly to mandate compulsory school attendance by Indians, the allotment of Indian lands in severalty to "radical[ly] uproot[ ] the whole tribal system" and extend laws over the Indians to facilitate "their absorption into citizenship").

necessary for success in the free enterprise system) and as a reward for accepting allotment; and

4. *Citizenship* - the granting of American citizenship to undermine the loyalty to one's Indian nation and to thus weaken tribal sovereignty.[75]

In some respects, the Whipple Report's recommendations were simply a formalization of the State's *de facto* Indian Policy that had long been in place. But in other respects, the Whipple Report evidenced a new policy because it served as a catalyst for motivating State officials to embrace the challenge of eliminating the *Haudenosaunee* as a distinct, autonomous, self-governing people.

By the end of the nineteenth century, it was clear that the laws enacted by the Legislature dealing with Indian affairs would be critical tools in effectuating this radical agenda. Early Indian Law provisions governing the appointment of State officials to negotiate treaties with the Indian nations were repealed;[76] in their stead were enacted provisions relating to the allotment of Indian lands,[77] the control of Indian natural resources,[78] the establishment of Indian boarding schools,[79] the granting of licenses for teachers and missionaries,[80] and the regulation of various forms of Indian and non-Indian conduct.[81] Against the backdrop of this aggressive colonization policy, the State's Indian Law was consolidated and recodified in 1892.[82]

C. Twentieth Century State Colonization

As the twentieth century dawned, the State continued to embark upon its *Haudenosaunee* transformation agenda. In 1909, the State Legislature again (and for the last time) restated and consolidated the various provisions of the Indian Law.[83] Otherwise, State officials continued to embark upon their efforts to obtain greater

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[75] *See* HAUPTMAN, *supra* note 54, at 10 (setting forth these very goals and further noting that the accepted wisdom of the day was that it was entirely possible to "kill the Indian but save the man").

[76] *See* N.Y. INDIAN LAW §§ 125, 126 (McKinney 1950) (setting forth a schedule of laws dating from 1779 through 1908 to be repealed).

[77] *See* N.Y. INDIAN LAW §§ 7, 55, 95, 102 (McKinney 1950).

[78] *See* N.Y. INDIAN LAW §§ 22, 56, 85, 96, 98, 103, 105 (McKinney 1950).

[79] *See* Act of Apr. 10, 1855, ch. 233, 1855 N.Y. Laws 357 (repealed 1909).

[80] *See* N.Y. INDIAN LAW § 10 (McKinney 1950 & Supp. 1999).

[81] *See* N.Y. INDIAN LAW § 8 (McKinney 1950 & Supp. 1999). *See generally* Porter, *supra* note 15, at 824-26 (discussing State legislation aimed at Indians).

[82] *See* Act of May 18, 1892, ch. 679, 1892 N.Y. Laws 1573 (repealed 1909).

[83] *See* Act of May 22, 1909, ch. 458, 1909 N.Y. Laws 1087.

control over *Haudenosaunee* lands. For a variety of reasons, the State was unsuccessful in fully implementing its Assimilation Policy.[84] Having resigned itself to the fact that full allotment of the reservations and elimination of them as a collective landbase would not be possible, State officials refocused their efforts on obtaining jurisdiction over the remaining *Haudenosaunee* lands.[85] In 1915, the State constitutional convention approved a referendum question (later rejected by voters) that would have abolished the Indian courts, transferred jurisdiction to the State courts, and extended all State laws over the *Haudenosaunee* except those prohibited from application pursuant to federal law.[86]

Following this defeat, State officials became increasingly concerned about the legality of the State's activities on *Haudenosaunee* lands in light of several federal and state court decisions that questioned the State's authority.[87] In 1942, the State suffered a major blow when a federal appeals court ruled that "state law does not apply to the Indians except so far as the United States has given its consent."[88] This led to an aggressive effort to convince Congress to grant the State clear authority over *Haudenosaunee* lands. State officials could not have chosen a better time so to do. Spawned by virulent American nationalism following World War II, Congress was increasingly intolerant of the continued sovereign status of Indian nations and were receptive to the State's request for greater authority over the Indian lands within its borders.[89] In

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[84] *See* LAURENCE M. HAUPTMAN, THE IROQUOIS STRUGGLE FOR SURVIVAL: WORLD WAR II TO RED POWER 2 (1986) (stating that, despite continued attempts to assimilate the Indians throughout the twentieth century, the Iroquois "resisted each and every governmental effort to accomplish this objective").

> However divided by geography, historical experiences, political structures, or religion, the Iroquois consistently reaffirmed their distinct and special status as set forth in federal treaties: Fort Stanwix (1784), Jay (1794), and Canandaigua (1794). Even today, the Iroquois—Christian or Longhouse, individual nation or Confederacy—largely define their status and sovereignty based upon agreements made immediately after the American Revolution.

Id.

[85] *See* HAUPTMAN, *supra* note 54, at 12 (stating "[j]urisdictional transfer was the main concern of the New York State Constitutional Convention of 1915").

[86] *See* New York Constitutional Convention, June 23, 1915, proposed amendment number 439.

[87] *See* United States v. Boylan, 265 F. 165, 174 (2d Cir. 1920) (noting New York had no right to extinguish property rights held by the Oneida Indian Tribe); Patterson v. Seneca Nation, 157 N.E. 734, 739 (N.Y. 1927) (holding the supreme court of New York could not control the enrollment of the Seneca Nation); Mulkins v. Snow, 133 N.E. 123, 124 (N.Y. 1921) (noting that internal affairs with Indian tribes may not be regulated).

[88] United States v. Forness, 125 F.2d 928, 932 (2d Cir. 1942).

[89] *See* HAUPTMAN, *supra* note 84, at 6 (noting that early attempts by the Iroquois to avoid

1948, Congress responded by granting the State criminal jurisdiction over *Haudenosaunee* territory[90] and, in 1950, Congress granted the State courts the authority to hear cases involving Indians.[91]

Throughout its history—including to the present day—the State has engaged in a self-interested agenda to obtain control over *Haudenosaunee* lands. In the 1950s and 1960s, three *Haudenosaunee* nations—the Seneca, Mohawk and Tuscarora—lost land as the result of State and federal economic development efforts.[92] The Seneca Nation lost one-third of its Allegany territory—more than 9000 acres—for the construction of the Kinzua Reservoir on the Allegheny River.[93] The Mohawks lost land and had its ecosystem destroyed with the construction of the St. Lawrence power project and the construction of the Reynolds Aluminum and General Motors plants.[94] And the Tuscaroras lost 550 acres of land due to the State's efforts to build a reservoir for the Niagara River power project.[95]

This colonial legacy has spawned considerable conflicts with the *Haudenosaunee* in recent years. In May, 1974, there was a major conflict with the State when Mohawks "reclaimed" a 612-acre site near Moss Lake in the Adirondacks and established a settlement called *Ganienkeh*.[96] The State also unsuccessfully sought to condemn portions of the Seneca Nation's Allegany territory for the

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conscription into the draft during World War II were met with judicial intolerance, unfavorable media coverage, and resentment by the American public as a whole).

[90] *See* Act of July 2, 1948, ch. 809, 62 Stat. 1224 (codified at 25 U.S.C. § 232 (1994)).

[91] *See* Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 (codified at 25 U.S.C. § 233 (1994)).

[92] *See id.* at 20 (noting the Kinzua Dam flooded over 9000 acres of Seneca lands as a result of a vast appropriation of Indian lands by the State and federal government after World War II).

[93] *See* HAUPTMAN, *supra* note 54, at 87-9.

> [T]he building of the 125 million-dollar Kinzua Dam broke a federal-Iroquois treaty, the Canandaigua Treaty of 1794; flooded more than 9,000 acres of Seneca lands (all acreage below 1,365 feet elevation, including the entire Cornplanter Tract); destroyed the Cold Spring Longhouse, the ceremonial center of Seneca traditional life; caused the removal of 130 Indian families from the "take area"; and resulted in the relocation of these same families from widely spaced rural surroundings to two suburban-styled housing clusters, one at Steamburg and the other at Jimersontown adjacent to the city of Salamanca.

Id.

[94] *See id.* at 123-50 (detailing the history and consequences of the Saint Lawrence Seaway project on Native American lands and community).

[95] *See id.* at 151-78 (detailing the consequences to the Tuscaroras of the Niagara Regional Development).

[96] *See id.* at 232 (describing the *Ganienkeh* occupation and the subsequent "careful negotiations" which resulted in the Mohawks relocating their community to another area near the Town of Altona in Clinton County).

construction of the Route 17 expressway on the basis of its highway law,[97] and portions of the Onondaga Nation territory for construction of Route 81.[98] In the 1980s and 90s, the major dispute has been the cigarette and gasoline trade within *Haudenosaunee* lands.[99] And in 1992 and 1997, the State sought, and failed, to shut down tax-free cigarette and gasoline sales to non-Indians occurring within the *Haudenosaunee* territories after massive defensive actions by the *Haudenosaunee* broke a State police supported economic embargo.[100]

II. ASSESSING THE LEGALITY OF THE STATE'S INDIAN LAW

Throughout the State's long history of interaction with the *Haudenosaunee*, State officials have consistently ignored the limitations imposed upon them by federal law. Whether it be the pursuit of purely self-interested objectives—such as obtaining title to *Haudenosaunee* lands—or the "altruistic" provision of assistance—such as protecting the *Haudenosaunee* against White intruders—State officials have usually acted as if they had full and absolute authority to do so.[101] In light of the fact that the United States effectively abandoned its treaty obligations to the *Haudenosaunee* during much of the last 200 years, it is not surprising this attitude developed.

Regardless of this history, the Supremacy Clause of the United

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[97] *See id.* at 97-103. In 1973, the New York State Legislature enacted chapter 31 of the New York State Highway Law, including a provision requiring federal approval for land transactions between the State and the Indians. *See id.* Then Attorney General Louis J. Lefkowitz opposed the legislation, arguing that to require federal approval of pending land sales was a tacit admission that New York's prior exercises of eminent domain without federal approval were unlawful. *See id.*

[98] *See id.* at 96-97 (discussing how the State's unsuccessful attempts at condemnation in 1971 eventually resulted in an agreement between Governor Nelson Rockefeller and the Council of Chiefs, wherein the State agreed to abandon plans for the construction of an acceleration lane on Indian lands, to drop charges against Indians arrested while protesting the expansion of Interstate 81, and to consult with the Council at all stages of the project).

[99] *See, e.g.*, Palazetti, *supra* note 36 at A1 (reporting that the ruling ends a 15-year fight between the Indian Nations and New York State over the taxation of cigarettes and gasoline on Indian reservations).

[100] *See* Tom Precious, *Convenience Store Lobby Targets Pataki on Tobacco Fee*, BUFFALO NEWS (N.Y.), July 24, 1997, at A7 (reporting Governor George Pataki in May ceased attempts to stop tax-free sales of cigarettes and gasoline to non-Indians after "violent episodes between Native Americans and state police").

[101] One notable exception was Assemblyman Edward A. Everett, Chairman of the New York State Indian Commission, who issued a report in 1922 that concluded, among other things, that the "Indians of the State of New York, as a nation, are still owners in fee simple to the territory ceded to them by the Treaty of 1784." UPTON, *supra* note 6, at 103.

State Constitution demands that the State not act in violation of federal law.[102] This maxim has special significance with respect to the lasting embodiment of the State's colonizing activities over the last 200 years—its "Indian Law." State officials have always needed the Indian Law as the legal basis for their actions. Viewed this way, the current Indian Law is thus an historical and legal account of the actions taken by State officials during the nineteenth century to colonize the *Haudenosaunee.* Nonetheless, because State officials frequently acted without regard for the limitations of federal law, much of the State Indian Law that they developed exceeded the State's authority and is thus invalid. This section sets forth the general parameters governing lawful assertions of state power over Indian affairs under federal law and assesses the extent to which the New York State Indian law violates those parameters.

A. Federal Law Governing the Relationship Between the Indian Nations and the States

1. General Principles

As a fundamental proposition, there emerged early on in American law a "bright-line" rule that states had no authority to apply their laws within the Indian territory located within their borders.[103] This is true because the United States Constitution vests exclusive power over Indian affairs in the federal government.[104] Thus, in the absence of an explicit grant of authority by the United States, any assertion of state power within the Indian territory is presumptively unlawful.

Chief Justice John Marshall developed this formulation of the relationship between Indian nations and states in the 1832 case of

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[102] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States . . . shall be the supreme Law of the Land. . . .").

[103] *See* Bryan v. Itasca County, 426 U.S. 373, 379 (1976) (stating that states lack jurisdiction over Indians with some exceptions) (citing H.R. REP. NO. 83-848, at 5-6 (1953)); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973) (stating that state laws generally do not apply to Indians unless Congress so authorizes); Williams v. Lee, 358 U.S. 217, 220 (1959) (stating that "States have no power to regulate the affairs of Indians on a reservation").

[104] *See* U.S. CONST., art I, § 8, cl. 3. The Commerce Clause rests full power over Indian affairs in Congress. *See id.*; *see also* Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996) (noting in dicta that Indian commerce is under the exclusive control of the federal government but the Eleventh Amendment prevents Congress from authorizing suits by private persons against nonconsenting states).

Worcester v. Georgia.[105] In *Worcester*, the Supreme Court was presented with the question whether Georgia had the authority to regulate the conduct of a non-Indian who had been living within the territory of the Cherokee Nation. Georgia, which for many years had aggressively sought control over Cherokee territory, had enacted legislation making it a crime for any non-Indian to reside within the Cherokee territory without its permission.[106] Worcester was a missionary living in the Cherokee territory without a Georgia permit who had been arrested by Georgia authorities, convicted, and sentenced to four years in prison for violating the Georgia law.[107] The legal issue was whether Georgia law applied within the Cherokee territory.[108]

In finding that Georgia's laws were inapplicable in Cherokee territory, Marshall reasoned that the Constitution, the treaties with the Indian nations and the federal laws enacted dealing with Indian affairs required that the relationship with the Indians be of a uniquely federal character.[109] He concluded that state laws "can have no force" within Indian territory by virtue of the unique and exclusive power of the federal government to manage relations with the Indian nations.[110]

Since 1832, however, the Supreme Court has departed from the "bright-line" rule laid down in *Worcester*. While the Court has continued to give weight to such reasoning, it has concluded that state laws may apply within Indian country when Congress has authorized it, or when such laws do not infringe upon Indian self-government or are not preempted by federal law.[111]

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[105] 31 U.S. (6 Pet.) 515 (1832).

[106] *See id.* at 541 (stating the Georgia statute made unlicensed residence by non-Indians on Cherokee land a high misdemeanor, punishable by a minimum of four years imprisonment).

[107] *See id.* at 537; *see also Williams*, 358 U.S. at 219 (reinforcing the principle of *Worcester* that suits by Indians against "outsiders" in state courts are permissible).

[108] *See Worcester*, 31 U.S. at 538 (stating the defendant, a missionary unauthorized by the state, contended that Georgia lacked the jurisdiction to prosecute him for residing on Cherokee lands).

[109] *See id.* at 560-61.

[110] *Id.*

[111] *See* New York v. Dibble, 62 U.S. (21 How.) 366, 371 (1859) (holding valid a New York statute because it did not conflict with any act of Congress or provision of the Constitution); *see also* DENIS BINDER ET AL., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 277-79 (1982 ed.) (stating if Indian country lacks an organized self-government, it may be governed by state law).

2. Assertions of State Power in Indian Country Authorized by Congress

While not supported by any treaty entered into between the Indian nations and the United States, the Supreme Court has developed the legal doctrine that Congress has plenary power to manage and regulate Indian affairs.[112] Fundamentally, the Plenary Power Doctrine means that Congress may legislate in any manner regarding Indian affairs so long as the action bears a reasonable relationship to its legislative purpose.[113] In almost all instances, this has meant that Congress may take whatever action it wishes with regard to Indian affairs.[114]

Congress has exercised its plenary power widely. The Supreme Court has concluded that the plenary power authorizes Congress to unilaterally break Indian treaties,[115] take Indian land,[116] and even terminate the federal relationship with an Indian nation by no longer recognizing it as a sovereign.[117]

One specific application of Congressional plenary power has been to grant authority to the states to apply their laws within the Indian territory located in the state. Usually, this has been done when Congress has sought to undermine Indian sovereignty and assimilate the Indian population into American society by subjecting Indians to the laws governing citizens. Notable examples include the General Allotment Act of 1887,[118] which facilitated the

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[112] *See* United States v. Kagama, 118 U.S. 375, 376-78 (1886) (addressing whether Congress can validly create criminal laws applicable on Indian land); *see also* Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (discussing Congress' plenary authority over the Indians and describing such power as "a political one, not subject to be controlled by the judicial department of the government").

[113] *See* Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977) (stating that while plenary, Congress' power is not absolute).

[114] *See, e.g.*, 25 U.S.C. § 231 (1994) (applying state health and quarantine regulations on Indian territory); 25 U.S.C. § 357 (1994) (condemning Indian land); 25 U.S.C. §§ 398, 398c, 401 (1994) (taxing gas, oil, and minerals extracted from Indian lands).

[115] *See Lone Wolf*, 187 U.S. at 566 (recognizing that Congress has the power to abrogate treaties with the Indians, providing that they display good faith in so doing).

[116] The exercise of such a power obligates the Government to provide just compensation to the Indians. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 424 (1980) (ordering the Government to compensate the Sioux Nation for the taking of its land); Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 123-24 (1960) (holding that upon payment of just compensation to the Indians, the Federal Power Act authorizes licensees of the Federal Power Commission to take Indian lands needed for a project).

[117] *See* Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1994)) (stating that no Indian tribe will be acknowledged as an independent nation with whom the United States may contract by treaty).

[118] *See* 25 U.S.C. §§ 331-58 (1994) (giving the President of the United States authority to

transfer of communal Indian lands to individual Indians and non-Indians, and the Termination Acts,[119] which severed the federal relationship and subjected Indian people to the full panoply of state laws and obligations.[120]

While in many instances Congress has specifically authorized states to exercise authority within Indian country,[121] it has long recognized that states present special threats to Indian nations and thus should be carefully scrutinized when they seek to exercise their authority over the Indian nations.[122] As a result, states have never been viewed as having authority over a wide range of regulatory activities with the Indian territory located within their borders, such as environmental regulation, taxation, zoning and child welfare and domestic relations.[123]

3. Assertions of State Power in Indian Country Absent Congressional Authorization

a. The Infringement and Pre-emption/Balancing Tests

The *Worcester* decision established a bright-line rule governing Indian-state relations that was based upon the territorial integrity of Indian lands. In the 170 years since *Worcester* was decided, however, the Court has succumbed to increasing political pressure

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survey and allot land to individual Indians if it is deemed in the best interest of agriculture and irrigation).

[119] *See* Act of Aug. 15, 1953, Pub. L. No. 281, 67 Stat. 588, 590 (codified at 25 U.S.C. § 1162 (1994)).

[120] *See* 18 U.S.C. § 1162 (1994) (granting criminal jurisdiction to the states); 25 U.S.C. § 564 (1994) (terminating federal supervision of the trust and restricted property of the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians); 25 U.S.C. § 722 (1994) (providing for the transfer to the State of Texas the lands held by the United States in trust for the Alabama and Coushatta Tribes); 28 U.S.C. § 1360(a) (1994) (granting civil jurisdiction to six states, excluding New York, over civil suits involving Indians); *see also* Rice v. Rehner, 463 U.S. 713, 733 (1983) (noting that through the enactment of 18 U.S.C. § 1161 (1994), Congress divided its authority between the tribes and the states "so as to fill the void that would be created by the absence of the discriminatory federal prohibition").

[121] Other examples of Congressionally authorized state power in Indian country include: the application of state health and quarantine regulations, 25 U.S.C. § 231 (1994); the condemnation of allotted Indian land, 25 U.S.C. § 357 (1994); and the taxation of gas, oil, and minerals extracted from Indian lands, 25 U.S.C. §§ 398, 398c, 401 (1994).

[122] *See, e.g.*, 25 U.S.C. § 1901 (1994) (finding that with respect to Indian child welfare, states "have often failed to recognize the essential tribal relations of Indian people . . . prevailing in Indian communities and families") and 25 U.S.C. § 1902 (1994) (providing for the establishment of minimum standards with respect to child welfare, adoption, and child and family service programs).

[123] *See* 25 U.S.C. §§ 1901, 1902 (addressing child welfare and domestic relations).

to sustain assertions of state power within the Indian territory and has thus abandoned the bright-line rule.[124] While the backdrop principle that states do not have any power in Indian country without Congressional authorization still applies, in instances in which a state seeks to regulate the conduct of non-Indians within the Indian territory, or seeks to address on-reservation conduct that has a significant off-reservation effect, the Court on occasion has been willing to sustain the application of state power.[125] As a result, there has developed under federal common law a new doctrinal approach for evaluating whether state law can apply in the Indian territory within a state's boundaries.

Rather than recognizing that the inherent sovereignty of an Indian nation is sufficient to serve as bar to the application of state power within its territory, the analysis whether a particular application of state power is valid simply takes place against the "backdrop" of tribal sovereignty.[126] Notwithstanding this change in focus, however, any state attempt to regulate conduct within Indian territory without congressional approval is inherently suspect given Congress's "'overriding goal' of encouraging tribal self-sufficiency and economic development."[127]

In the modern era, the Supreme Court has developed two separate tests by which a state law may be allowed to apply within Indian territory absent Congressional consent: (1) the Infringement Test[128] and (2) the Pre-emption/Balancing Test.[129] Both tests must

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[124] *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156-57 (1980) (stating the "principle of tribal self-government, grounded in notions of inherent sovereignty . . . seeks an *accommodation* between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other") (emphasis added); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1215 (1995) (stating that it was an "acceptance of some inherent state authority over Indian affairs in Justice Rehnquist's own opinion in *Moe v. Confederated Salish and Kootenai Tribes* which necessitated the *Colville* majority to abandon the *Worcester* bright-line dormant Indian Commerce Clause test in favor of an undue discrimination test . . . involving some balancing").

[125] *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176 (1988) (utilizing a "flexible preemption analysis" which attempts to harmonize the particular state, federal, and tribal interests at stake in each instance).

[126] *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973) (noting the "Indian sovereignty doctrine" is relevant to the limits of state power because it provides a foundation against which federal laws must be read and further noting that the Indian's "claim to sovereignty long predates that of our own Government").

[127] California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987).

[128] *See* Williams v. Lee, 358 U.S. 217, 220 (1959) (stating that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them"); Jackson County Child Support Enforcement Agency v. Swayney, 352 S.E.2d 413, 419 (N.C. 1987) (applying the

be satisfied for the state law in question to apply.[130]

Infringement Test. The "infringement" test provides that a state law purporting to apply within Indian territory will be held invalid where such law "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."[131] The Court has applied the Infringement Test to conclude that an exercise of state court jurisdiction over a civil dispute between an Indian and a non-Indian arising within Indian territory "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[132] It has also applied the Infringement Test to strike down an exercise of state court jurisdiction over a child custody proceeding involving only Indians on the grounds that permitting state jurisdiction in such a case "plainly would interfere with the powers of [tribal] self-government . . .[and] would subject [the] dispute . . . to a forum other than the one they have established for themselves."[133]

Pre-emption/Balancing Test. The Pre-emption/Balancing Test provides that state laws purporting to apply within Indian country are inapplicable if they are pre-empted by federal law.[134] This test logically follows from the predominance of federal law required by the Constitution's supremacy clause.[135]

Despite the apparent simplicity of the Pre-emption Test, it is difficult to apply as a practical matter. Modern state legislatures usually do not enact laws that are clearly violative of federal law and so clear instances of federal law violations are rare. To assist courts in determining when a particular state law purporting to

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Infringement Test and holding that where all parties involved were Indians living on a reservation, an infringement on tribal self-governance had occurred).

[129] *See* Blunk v. Arizona Dep't. of Transp., 177 F.3d 879, 881-82 (9th Cir. 1999) (stating "the federal government's exclusive authority over relations with Indian tribes may preempt state authority" either explicitly or implicitly).

[130] *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (intimating where a state law does not satisfy one of the "barriers," such failure can be the basis for holding a state law inapplicable). *See generally* Stephen Paul Sherick, *State Jurisdiction over Indians as a Subject of Federal Common Law: The Infringement-Preemption Test*, 21 ARIZ. L. REV. 85, 89-100 (1979) (describing the two tests and their historical background).

[131] *Williams*, 358 U.S. at 220.

[132] *Id.* at 223.

[133] Fisher v. District Court, 424 U.S. 382, 387-88 (1976).

[134] *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973) (stating the "trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption").

[135] Federal Indian Control Law pre-emption is unlike other forms of constitutional pre-emption. "Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other." *Bracker*, 448 U.S. at 143.

apply in Indian country will be pre-empted, the Court has refined the Pre-emption Test to require that a "balancing of interests" analysis be conducted.[136] Thus, "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[137]

The Court has said that the "pre-emption/balancing" test is a "particularized inquiry into the nature of the state, federal and tribal interests at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law."[138] Thus, for example, in those instances in which a state law purports to regulate an activity already extensively regulated by the federal government, the federal interests are deemed to predominate because "no room remains for state laws imposing additional burdens" on the regulated activity.[139] Once it has been determined that Congress has taken a matter "fully in hand," the state is not permitted to "disturb or disarrange" the federal plan.[140]

In the absence of situations where Congress has taken a matter "fully in hand," the Court has articulated a number of principles to apply in conducting the pre-emption/balancing analysis. In addition to the "backdrop" of sovereignty, the Court presumes that federal and tribal interests are inextricably linked.[141] The extensive body of federal legislation enacted to recognize, improve and strengthen tribal self-government evidences this link.[142] The Court construes

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[136] *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983) (stating that where sufficient state interests are at stake, pre-emption will not occur and that pre-emption analysis rests on the consideration of competing interests); *Bracker*, 448 U.S. at 145 (discussing the necessary inquiry into the State, federal, and tribal interests at stake).

[137] *Mescalero*, 462 U.S. at 334.

[138] *Bracker*, 448 U.S. at 145.

[139] Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 690 (1965).

[140] *Id.* at 691.

[141] *See* BINDER ET AL., *supra* note 112, at 207 ("The [federal-tribal] relationship is . . . distinguished by special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians.").

[142] Federal legislation respecting the United States' relationship with Indians has its roots in 1789, the first year of the new Congress under the Constitution. The second statute referring to Indians, but the first through which Congress used its "plenary" power over Native Americans, was an act which, *inter alia*, provided a government for the Northwest Territory. *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (1789). This Act contained the following provision regarding Indian relations:

> The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time

these federal statutes broadly and has thus not required that Congress explicitly declare that such laws have pre-emptive effect.[143] Finally, the Court has crafted a number of canons of construction favorable to tribal interests that must be applied in the course of conducting a pre-emption/balancing analysis.[144]

In contrast to the conceptual clarity of the *Worcester* bright-line rule,[145] the pre-emption/balancing analysis allows for the consideration of state interests. The Court has concluded that a state must have a *compelling* interest to sustain a law that interferes with tribal self-government.[146] Specifically, a state's interest is considered "substantial if the State can point to off-reservation effects that necessitate state intervention."[147] In addition, if non-Indians are involved in reservation activity, the Court has indicated that a state's interest will rise to challenge an assertion of tribal power over the same activity.[148] However, if the on-reservation conduct only involves Indians, "state law is generally

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to time be made, for preventing wrongs from being done to them, and for preserving peace and friendship with them.

Id. at art. 3, 1 Stat. 50, 52; *see also* Ordinance 59 Ass'n v. United States Dep't. of Interior Secretary, 163 F.3d 1150, 1155 (10th Cir. 1998) (stating the purpose of the Indian Civil Rights Act is to "strengthen[ ] the position of individual tribe members vis-à-vis the tribe and promoting Indian self-government").

[143] *See Bracker*, 448 U.S. at 143-44 ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.").

[144] *See* BINDER ET AL, *supra* note 112, at 274.

Treaties and other bilateral agreements with the Indians are interpreted as the Indians would have understood them. Treaties and federal Indian statutes are interpreted in favor of retained tribal self-government and property rights as against competing claims under state law. Doubts or ambiguities in treaties or statutes are resolved in the Indians' favor. Federal Indian laws are interpreted liberally toward carrying out their protective purposes.

Id. (footnotes omitted).

[145] *See supra* notes 104-12 and accompanying text (discussing the genisis of the "bright-line" rule and the Article I powers of the federal government in contrast to State attempts to reach in and regulate Indian territory).

[146] *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341-44 (1983) (holding the "absence of state interests which justify the assertion of [state] authority" warrants pre-emption by federal law).

[147] *Id.* at 336; *see* Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 173-75 (1977) (holding the tribe's treaty right to fish is subject to reasonable regulation by the state pursuant to its power to conserve an important natural resource).

[148] *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (holding that state taxes applicable to non-Indians doing business on Indian land are not pre-empted by federal law); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215-216 (1987) (addressing whether the state could prevent a tribe from making available high stakes bingo games to non-Indians coming from outside the reservations); *Mescalero Apache Tribe*, 462 U.S. at 342-43 (holding the state intervention was not warranted because the involvement of non-tribal members was too small).

inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."[149]

Instances in which the Court has applied the pre-emption/balancing analysis to invalidate purported applications of state law include preempting a state law which made it illegal for Indians to hunt on former Indian reservation land.[150] Another involved a case in which it was held that Indians do not need to purchase state fishing licenses when exercising their treaty fishing rights.[151] However, the Court has upheld the application of state law when the state regulation did not interfere with a comprehensive federal plan[152] and where the tribe had no history of federal regulation.[153]

b. State Authority to Treat Indians Differently Than Other State Citizens

A related question to whether state laws can apply in Indian country in the absence of federal authorization is whether a state can treat Indians differently than other citizens of the state.[154] In

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[149] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980).

[150] *See* Antoine v. Washington, 420 U.S. 194, 195-99 (1975). The federal treaty entailed the sale of Indian land to the federal government with the understanding that nothing in the agreement would be construed to the Indians' prejudice. *See id.* at 197-99. This was interpreted to mean that Indians could still hunt on the land. *See id.* at 205-06.

[151] *See* Tulee v. Washington, 315 U.S. 681, 685 (1942) (holding the federal treaty of May 29, 1855 superceded state fishing laws). *See generally* BINDER ET AL., *supra* note 111, at 441-50 (discussing the hunting, fishing, and gathering rights of Indians in relation to treaties and state laws).

[152] Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 431 (1989) (addressing county zoning authority's jurisdiction over tribal land); South Dakota v. Bourland, 39 F.3d 868, 870-71 (8th Cir. 1994) (addressing tribal authority's exclusion of non-Indian hunters and fishermen); *see also Cotton Petroleum*, 490 U.S at 186 (holding a federal law did not preempt New Mexico's oil and gas severance taxes).

[153] *See* Rice v. Rehner, 463 U.S. 713, 733 (1983) (holding California could require the respondent to obtain a state license in order to sell liquor for off-premises consumption because "Indians [have] never enjoyed a tradition of tribal self-government insofar as liquor transactions were concerned"); *see also Cotton Petroleum*, 490 U.S. at 182 (noting a lack of tribal independence from state taxation was a factor in deciding a state law was not pre-empted by a federal law). However, the lack of a tribal history of regulation is not dispositive as to state jurisdiction. *See* Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1052-62 (9th Cir. 1997) (implying that although a history of regulation is lacking in the area of simulcast wagering in horse racing, the state did not have jurisdiction).

[154] Indians are citizens of the United States by virtue of the Citizenship Act of 1924, 8 U.S.C. § 1401(b) (1978), and thus citizens of the states in which they reside. *See* Goodluck v. Apache County, 417 F. Supp. 13, 16 (D. Ariz. 1975) (describing how Congress granted citizenship to the reservation Indians).

the absence of any federally granted authority to do so, state legislation of this kind is racial discrimination violative of the Constitution's Due Process and Equal Protection Clauses.

The leading case in this area is *Morton v. Mancari*,[155] in which the Supreme Court held that the federal government could establish a hiring preference for Indians in federal employment. The Court held that Indians could be treated differently than other citizens because doing so recognized them as members of a "political" class—the Indian nation—rather than as members of a "racial" class.[156] As a result, under federal law, "it is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive."[157]

The Court has stated, however, that "[s]tates do not enjoy this same unique relationship with Indians."[158] Thus, state legislation singling Indians out for special treatment can only be "enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction"over them.[159]

4. Specific Principles Applicable in New York State[160]

It has been held by the United States Supreme Court that the general Federal Indian Control Law principles governing the application of state law in Indian country apply with equal effect within the State of New York.[161] In addition to these general principles, however, there are three unique provisions influencing the scope of the State's jurisdictional authority over the

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[155] 417 U.S. 535 (1974).

[156] *See id.* at 555. "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.*

[157] Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 500-01 (1978).

[158] *Id.* at 501.

[159] *Id.*

[160] *See generally* Robert B. Porter, *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 HARV. J. LEG. 497, 512-42 (1990) (setting forth the primary sources on which New York relies for its jurisdiction over the Indians).

[161] *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1973) ("But this reality [that the United States never had title in fee to Indian lands] did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law."); Seneca Nation of Indians v. New York, 397 F. Supp. 685, 687 (1975) (rejecting New York's argument that it is immune from any federal ban on State appropriation of Indian land for highway use).

Haudenosaunee.

a. Grant of Criminal Jurisdiction

In 1948, Congress granted the State criminal jurisdiction over the Indian territory located in the State to the same extent it had such jurisdiction elsewhere within the State.[162] United States Code section 232 was enacted at the State's request to clarify its *de facto* assertions of criminal jurisdictional authority that it had appropriated over the years.[163] Coming at the beginning of the federal government's Termination Policy,[164] the request was consistent with Congress' desire to transfer more responsibility over Indian affairs to the states. Despite this broad policy rationale, the narrow justification for section 232 was to maintain law and order within the *Haudenosaunee* territory by vesting such authority in the State.[165] While the United States retained its criminal jurisdiction and thereby established a system of concurrent federal-tribal-state jurisdiction over certain offenses, the practical effect of section 232 was to give the State the primary responsibility for criminal law enforcement within *Haudenosaunee* territory. Section 232 has been upheld as a valid exercise of Congress's plenary power.[166]

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[162] *See* 25 U.S.C. § 232 (1995) (giving New York State jurisdiction over offenses committed on reservations within the State).

> The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within the State as defined by the laws of the State: *Provided*, That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights.

Id. (citation omitted) (emphasis in original).

[163] *See* H.R. REP. NO. 80-2355 (1948), *reprinted in* 1948 U.S.C.C.S. 2284 (citing as one reason for this bill that some Indian tribes do not enforce the laws covering offenses committed by Indians, and although it grants jurisdiction to the State of New York, the use of such jurisdiction is permissive, not mandatory).

[164] *See* Organized Village of Kake v. Egan, 369 U.S. 60, 73-74 (1962) (explaining "[a] new shift in policy toward termination of federal responsibility and assimilation of reservation Indians resulted in the abolition of several reservations during the 1950's").

[165] *See* H.R. REP. NO. 80-2355 (stating that, under the bill, it is not mandatory for the State to enforce the criminal laws, but it may do so when deemed proper and necessary).

[166] *See* People v. Cook, 365 N.Y.S.2d 611, 619 (Onondaga Co. Ct. 1975) (stating that section 232 was a "valid exercise of Congressional power," and proudly suggesting that its purpose was not to suffocate Indian self-government, but end federal and state conflict "in the hope that energies might be diverted from the jurisdictional disputes to the furtherance of Indian welfare").

b. Grant of Civil Adjudicatory Jurisdiction

In 1950, Congress granted New York State courts civil jurisdiction to hear all cases involving Indians.[167] Consistent with the Termination Policy,[168] section 233 was enacted primarily for the purpose of facilitating the assimilation of the *Haudenosaunee* into the State citizenry.[169] It was reasoned that assimilation would be facilitated if the State courts could exercise jurisdiction over civil disputes involving Indians because the full panoply of the State laws could apply to modify and conform Indian behavior to White behavior over time.[170]

Section 233 established a scheme of concurrent jurisdiction between the State and tribal courts.[171] State courts have exercised jurisdiction over a wide range of cases involving the *Haudenosaunee*. Moreover, the federal courts have interpreted

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[167] *See* 25 U.S.C. § 233 (1994).

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to the effective date of this Act, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall . . . thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, . . . *Provided further*, That nothing in this Act shall be construed to require . . . the members . . . to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty or custom: *Provided further*, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation, . . . [nor] to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: . . . *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to [the effective date of this Act].

Id.

[168] *See generally Village of Kake*, 369 U.S. at 73-74 (alluding to the federal policy of ending the government's trust responsibility toward the Indians).

[169] *See* Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 (1950) (codified at 25 U.S.C. § 233 (1994)).

[170] *See* H.R. REP. NO. 81-2720, 1950 U.S.C.C.S. 3731 (explaining the legislation was meant to "lead to the gradual assimilation of the Indian population into the American way of life").

[171] *See* Bowen v. Doyle, 880 F. Supp. 99, 116 (W.D.N.Y. 1995) (stating that section 233 is not meant to abrogate the Indian's treaty rights to self-government and exclusive jurisdiction over its internal affairs and that the legislative history itself disclaims a desire to affect such rights).

section 233 as precluding the subject matter jurisdiction of the State courts over matters involving self-government.[172]

c. *Judicially Authorized Assertions of "Beneficial" State Power over Indian Affairs*

In addition to authority explicitly granted to the state by Congress, there has also been common law development upholding State interference in *Haudenosaunee* affairs. Generally, this interference has related to instances in which the State has sought to single out the *Haudenosaunee* for "beneficial" treatment.

The leading case in this area is *People ex rel. Cutler v. Dibble*[173] in which the United States Supreme Court was asked to assess the validity of a New York State statute authorizing the Sheriff to remove intruders from Indian territory located in the State.[174] The law made it "unlawful for any persons other than Indians to settle and reside upon lands belonging to or occupied by any tribe of Indians, and declared void all contracts made by any Indians, whereby any other than Indians should be permitted to reside on such lands."[175]

In *Dibble*, a district attorney filed suit against three real estate developers who had purchased land within the Tonawanda Reservation.[176] The issue before the Court was whether the New York law violated the United States Constitution or the will of Congress.[177] With respect to the statute's constitutionality, the Court upheld the statute as a valid exercise of the state's police power.[178] The Court characterized the law as a "prudent and just policy" meant to both "preserve the peace" and to protect the state's "feeble and helpless bands" of Indians from White interlopers.[179] Though the Court noted the "peculiar relation" which the Indians had with the federal government,[180] it nonetheless ruled that New

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[172] *See id.*

[173] 62 U.S. 366 (1858).

[174] *See* N.Y. INDIAN LAW § 8 (McKinney Supp. 1999) (authorizing the sheriff to place trespassers in the county jail for 30 days if the trespasser has been removed from such lands on a previous occasion).

[175] *Dibble*, 62 U.S. at 368.

[176] *See id.*

[177] *See id.* at 370 (noting the statute in question is a police regulation to protect Indians from trespassers).

[178] *See id.*

[179] *Id.*

[180] *Id.* (noting that the Indians exist as a separate "nation" within the United States).

York's sovereign prerogative to preserve the peace was "absolute."[181]

The Court did not find the statute to be in conflict with any Congressional enactment.[182] The Court held that the developers could only possess reservation land with the express approval of Congress.[183] Finding no law authorizing such possession, the Court upheld the statute.[184] The Court noted that under the statute, tribes need not prove ownership of reservation lands.[185] As long as tribes remained in "peaceable possession" of their lands, the statute would protect them against outside interference.[186]

Dibble is a peculiar case because it stands for the proposition that a state can apply its laws within Indian territory if such laws are designed to "protect" Indian interests. In essence, the case sustains some notion of a *state*, as opposed to *federal*, trust responsibility for the safeguarding of Indian interests. Oddly, although *Dibble* was decided only twenty-six years after *Worcester*, which concluded that states have *no* power over Indian affairs—the *Dibble* court makes no mention of the *Worcester* decision. In sustaining this particular State law, however, the Court ignored every fundamental principle of Federal Indian Control Law dealing with the federal-tribal-state relationship existing then as well as now.

Because the particular law at issue in *Dibble* was triggered by a tribal request for the district attorney to remove the White intruders,[187] the case raises a number of additional questions both narrow to the case and broader with respect to other issues. Does *Dibble* mean that states, in addition to the federal government, can broadly apply their laws to regulate non-Indian conduct on Indian lands without federal authorization when it seeks to "protect" Indian interests? And because it was the Indian nation that asked for the non-Indians in *Dibble* to be removed, does it mean that the Indians can determine what is "beneficial" state law and thus have states apply their laws on Indian lands at their request?

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[181] *Id.*

[182] *See id.* at 370-71 (noting New York reserved the right to eject any non-Indians unless those seeking a claim to the land had a right so to do—which they did not).

[183] *See id.* at 371 (stating the developers may only be granted a right of entry by way of treaty).

[184] *See id.*

[185] *See id.* (stating possession, not ownership, is the requirement under the New York statute).

[186] *Id.*

[187] *See id.* at 368 (explaining the case was instituted by the district attorney and the county judge had a duty to remove white intruders upon a complaint made to him); *see also* People v. Dibble, 16 N.Y. 203, 213 (1857) (stating it is the duty of the district attorney to report white intruders to the governor who thereafter directs the sheriff to remove them).

As to the first question, Federal Indian Control Law has evolved since *Dibble* was decided so as to further erode geographic limitations on a state's power in Indian country and to thus sustain assertions of state power regardless whether the subject of the regulation is Indian or non-Indian. For example, the Court has said that if non-Indians kill other non-Indians, or if non-Indians seek to avoid state taxes by purchasing tax-free goods from Indians, the state will be acknowledged as having the authority to, in effect, "reach into" the Indian territory to regulate the non-Indian conduct.[188] As a result, it is entirely possible that the narrow holding in *Dibble*—that the State can remove "intruding" non-Indians from Indian territory—could be upheld by the Court if a similar case were brought today. But, given that both the Infringement and Pre-emption/Balancing Tests incorporate deference to tribal interests in promoting self-government, it is unlikely that such an assertion of State power could be sustained over the objection of the Indian nation sought to be "protected."

Moreover, subsequent treatment of this issue by the Supreme Court strongly suggests that *Dibble* has been effectively overruled or, at the very least, limited to its holding. In *The New York Indians*,[189] a case decided only eight years following *Dibble*, the Court struck down a State statute authorizing the taxation of Seneca Nation lands for highway construction.[190] The Court held that "these reservations a[re] wholly exempt from State taxation, and . . . the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations."[191] In sweeping terms, the Court concluded that it would be a "mistake" to believe that the State "might enter upon the reservations in the exercise of its internal police powers, and deal with [the Indians] as with any other portion of its territory."[192] In concluding that the State had no legislative authority in *Haudenosaunee* territory, the Court held that "the

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[188] *See* New York v. Martin, 326 U.S. 496, 499 (1946) (stating New York has jurisdiction over the murder of one non-Indian by another non-Indian committed on a reservation within the State). *Martin* followed United States v. McBratney, 104 U.S. 621, 624 (1881), by holding the State of Colorado retained jurisdiction over the murder of a white man by another white man on an Indian reservation within the State. *See also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980) (stating it was not the intention of the federal government to allow Indian tribes the ability to market their tax-exempt goods at non-Indians, who would normally shop elsewhere).

[189] 72 U.S. (5 Wall.) 761 (1866).

[190] *See id.* at 771-72.

[191] *Id.* at 771.

[192] *Id.* at 767.

rights of the Indians do not depend on this or any other statutes of the State, but upon treaties, which are the supreme law of the land."[193]

Because *The New York Indians* dealt with a State taxation statute—a "hostile" law—and not an "intruder removal" statute like that at issue in *Dibble*—a "friendly" law—one might be tempted to conclude that *The New York Indians* does not limit *Dibble*'s precedential value. While the Courts' broad and sweeping condemnation of the State action taken in *The New York Indians* seems conclusive enough on the question, the Court criticizzed *Dibble* and expressed its view that the "intruder removal" statute in *Dibble* was "a very free, if not extraordinary, exercise of power over these reservations and the rights of the Indians, so long possessed and so frequently guaranteed by treaties."[194]

In the modern era, the Court has affirmed the determination that, at best, *Dibble* stands only for its narrow holding: "It is apparent that by the later decision in *The New York Indians* . . . [that] the Court did not consider the potential implications of the dictum expressed in *Dibble* applicable in situations where the State's power was exercised other than for the protection of the Indians on their tribal lands."[195] While this dicta might be construed to suggest that *Dibble* has broader application, any State "protection" effort taken on behalf of the *Haudenosaunee* must be carefully scrutinized to ensure that tribal self-government is not infringed upon. Most certainly, Indian objection to such a "protective" state law would preclude applicability.

As to the second question, whether Indian nations can authorize applications of "beneficial" state power, the fact that an Indian nation might deem it "beneficial" to accept an application of state law over its affairs and in its territory should in no way legitimize the exercise of such authority. The Court has made it clear that only Congress can alter the jurisdictional relationship between Indian nations and states.[196] Thus, in *Fisher v. District Court*,[197] the Court struck down the state court's exercise of child custody jurisdiction within the Indian territory even though the Indian

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[193] *Id.* at 768.

[194] *Id.* at 766.

[195] Oneida v. County of Oneida, 414 U.S. 661, 672 n.7 (1974).

[196] *See* Kennerly v. District Court, 400 U.S. 423 (1971) (interpreting § 402(a) of Title IV of the Civil Rights Act of 1968 to require a majority vote of the enrolled members of the Blackfeet Reservation in order for the reservation to consent to state jurisdiction, rather than simply submitting to jurisdiction by action of the tribal government).

[197] 424 U.S. 382 (1976).

nation affected had made a request to the state to do so.[198] Moreover, as held in *Bowen v. Doyle*,[199] State courts also cannot interfere in internal political disputes of an Indian nation even when some of the Indian nation's leaders desire it.[200] Thus, there does not appear to be any basis in federal law to sustain assertions of state power on the basis of Indian consent.

One twist on the question whether an Indian nation can "consent" to the application of State law within its territory arises within the context of State treaties with the *Haudenosaunee* entered into prior to the adoption of the Constitution. For example, in the State treaty with the Onondagas of September 12, 1788, the State agreed to remove any intruders from Onondaga lands.[201] Because it has been determined that the State had power over Indian affairs under the Articles of Confederation sufficient to extinguish Indian land title,[202] it might be concluded that any residual commitments made by the State to an Indian nation under such a treaty could survive the adoption of the Constitution. Given the manner in which all state power over Indian affairs was vested in the federal government under the Constitution, however, it is not reasonable to conclude that the State retained sufficient power to carry out such treaty obligations within *Haudenosaunee* territory without explicit federal authorization. To the extent that the United States supplanted the

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[198] *See id.* at 383 (noting that the respondents, members of the Northern Cheyenne Tribe, initiated the adoption proceeding in the District Court).

[199] 880 F. Supp. 99 (W.D.N.Y. 1995)

[200] *See id.* at 138 (asserting "state courts are courts of limited jurisdiction and can only act pursuant to Act [sic] of Congress"). However, states have periodically upheld assertions of state power. *See, e.g.*, New York Ass'n of Convenience Stores v. Urbach, 699 N.E.2d 904, 906 (N.Y. 1998) (stating that while collection of state sales taxes on goods sold on Indian land to Indians is preempted by federal law, such taxes may be collected where the purchaser is a non-Indian).

[201] Among other things, the treaty provided for a cession of all Onondaga lands except those reserved and included the following provision:

> *Sixth.* The people of the State of New York, may in such manner as they shall deem proper, prevent any persons except the Onondagas from residing or settling on the lands so to be held by the Onondagas and their posterity, for their own use and cultivation. And if any person, shall, without the consent of the people of the State of New York, come to reside or settle on the said land, or on any other of the lands so ceded, as aforesaid, the Onondagas and their posterity, shall forthwith give notice of such intrusion, to the Governor of said State for the time being.

Treaty Between the People of the State of New York and the Onondaga Nation, Sept. 12, 1788, *in* Assem. Doc. No. 51, 112th Legis. Sess. 191 (N.Y. 1889); *see also* Treaty Between the People of the State of New York and the Oneida Nation, Sept. 22, 1788, § 4, *in* Assem. Doc. No. 51, 112th Legis. Sess. 239 (N.Y. 1889).

[202] *See* Oneida Indian Nation v. New York, 860 F.2d 1145, 1161-62 (noting the doctrine of "external sovereignty" did not prevent states from acquiring Indian title to land without the consent of Congress during the period of confederation).

State role in Indian affairs upon the adoption of the Constitution, such an obligation should then vest in the federal government.[203]

Viewed against the totality of modern Federal Indian Control Law principles, the most generous interpretation of relevant law is that the State has authority to remove non-Indians from Indian territory, but little else. Beyond that, there does not appear to be any basis in federal law to justify the broader application of State laws in Indian territory in any case in which the State, or the Indians themselves, deem the exercise of such state power would be "beneficial." Under Federal Indian Control Law, states have limited powers over Indian affairs, and unless New York can prove it has both a "compelling" governmental interest in applying its laws in the *Haudonsaunee* territory and can do so without "infringing" tribal self-government, such laws are invalid.[204]

Different considerations apply when the State is not seeking to apply its laws within the *Haudenosaunee* territory but is instead attempting to single out the *Haudenosaunee* nations for special benefit. In *New York Ass'n of Convenience Stores v. Urbach*,[205] the Court of Appeals[206] held that the State's policy of not collecting taxes on the purchase of cigarettes and gasoline made by non-Indians within *Haudenosaunee* territory did not constitute racial discrimination in favor of the *Haudenosaunee*.[207]

Plaintiffs in *Urbach* sought to compel the State Tax Commissioner to collect fuel and cigarette taxes on retail transactions occurring within *Haudenosaunee* territory and to thus eliminate the competitive advantage that *Haudenosaunee* retailers enjoyed.[208] For over twenty years, federal law has authorized states to collect sales and excise taxes on goods sold to non-Indians within the Indian territory located within their borders.[209] However, given

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[203] There are a few instances in which the State made commitments to *Haudenosaunee* nations following the adoption of the Constitution. *See, e.g.*, Treaty Between the State of New York and the Onondaga Nation, March 11, 1793, § 4, *in* Assem. Doc. No. 51, 112th Legis. Sess. 196 (N.Y. 1889) (authorizing the State to "have full power and authority to lay out and open roads through any part of the lands appropriated"). These commitments, by their lack of federal authorization, are invalid on their face.

[204] *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983)) (discussing the proper analysis for claims of unwarranted state interference with Indian affairs).

[205] 699 N.E.2d 904 (N.Y. 1998).

[206] In New York, the highest court is the Court of Appeals, below which is the Appellate Division of the Supreme Court. The trial court is the "supreme court," a name which in many states connotes the highest court. –Ed.

[207] *See Urbach*, 699 N.E.2d at 908.

[208] *See id.* at 905-06.

[209] *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134

the immunity of the *Haudenosaunee* nations from suit and the willingness of the *Haudenosaunee* to fight aggressively against the State's collection efforts, the State has never been able to implement a scheme by which these taxes could be collected.[210] In recognition of this formidable problem, State officials reversed course, withdrew its enforcement regulations, and adopted a policy in which the Tax Department would make no effort to collect such taxes on transactions taking place within the *Haudenosaunee* territory.[211] In doing so, the Tax Department stated that "[t]he decision to repeal the regulations was based on both the inability of the regulations to achieve the purposes of the Tax Law and also the State's respect for the Indian Nations' sovereignty."[212]

In the mandamus action brought to throw out the states' policy, the Court of Appeals, in *Urbach*, acknowledged the general federal law principles set forth in *Morton v. Mancari*[213] and *Washington v. Yakima Indian Nation*[214] that "'States do not enjoy th[e] same unique relationship'" with the Indian nations as does the federal government.[215] However, the court also acknowledged that states "may adopt laws and policies to reflect or effectuate Federal laws designed 'to readjust the allocation of jurisdiction over Indians' without opening themselves to the charge that they have engaged in race-based discrimination."[216] The court thus concluded that "[t]he Tax Department's specialized treatment of on-reservation cigarette and motor fuel sales is clearly such a policy, since it is predicated on the Department's sensitivity to both tribal sovereignty issues and the complex restrictions imposed by the Indian Trader Laws."[217]

Given this finding, the court was left to determine whether the Tax Department's "policy of forbearance" was sustainable on a

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(1980) (holding that State efforts to collect sales tax for reservation purchases by non-Indians "do[ ] not infringe the right of reservation Indians [to govern themselves]"); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 483 (1976) (holding requiring tribal merchants to collect sales tax on purchases by non-Indians is a "minimal burden" designed to prevent non-Indians from avoiding a "concededly lawful tax").

[210] *See* Folster, *supra* note 4, at 704-09 (discussing New York's history of non-enforcement of tax laws on Indian reservations).

[211] *See* N.Y. St. Reg., Apr. 29, 1998, at 22-24 (repealing regulations authorizing the collection of sales tax on purchases of cigarettes, motor fuel, and diesel fuel produced on reservation land by non-Indians).

[212] *Id.*

[213] 417 U.S. 535 (1974).

[214] 439 U.S. 463 (1978).

[215] New York Ass'n of Convenience Stores v. Urbach, 699 N.E.2d 904, 908 (1998) (quoting *Yakima*, 439 U.S. at 501).

[216] *Id.* (citing *Yakima*, 439 U.S. at 501).

[217] *Id.*

"rational basis" standard.[218] Because it viewed the factual scenario as changed significantly from when the litigation first commenced, it remanded the case back to the supreme court for a determination whether the Tax Department had acted rationally.[219] On remand, the supreme court concluded that "the determinations of the Respondents were eminently reasonable in all respects."[220]

Urbach affirms the proposition that a state can single out Indians for special treatment outside of Indian territory only when doing so would further federally protected tribal interests.[221] In *Urbach*, the State supreme court, on remand, upheld the Tax Department's determination that respect for federally protected tribal sovereignty justified the adoption of a tax forbearance policy regarding on-reservation retail transactions involving non-Indians.[222] In doing so, the court adhered to the general rules governing the application of state power in Indian affairs that: (1) state laws can apply *within* Indian territory only when Congress has expressly so authorized, or in the absence of such Congressional authorization, only when doing so does not infringe upon Indian self-determination or is not preempted, and (2) state laws can apply *outside* of Indian territory to single Indians out for special treatment only when doing so would further federally protected interests in Indian self-determination.[223]

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[218] *Id.*

[219] *See id.* at 909.

[220] New York Ass'n of Convenience Stores v. Urbach, No. 95-ST6026, 1999 NY. Misc. LEXIS 316, at *11 (N.Y. Sup. Ct. July 9, 1999).

[221] *See Urbach*, 699 N.E.2d at 908 (stating it is the unique status of Indian tribes as "quasi-sovereign" groups which allows for their special treatment).

[222] *See Urbach*, 1999 N.Y. Misc. LEXIS 316 at *11.

[223] Recorded instances in which states have provided this preference are rare. In *Livingston v. Ewing*, 455 F. Supp. 825 (D.N.M. 1978), *aff'd on other grounds*, 601 F.2d 1110 (10th Cir. 1979), the court addressed whether the New Mexico state museum's policy of permitting only Indians to sell hand-made goods under the portal of the Palace of Governors in Sante Fe violated the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 827. Echoing the reasoning in *Morton*, the court held that Indians were not given "special or preferential treatment, from the federal and state governments" on the basis of race, but were singled out on the basis of "their unique cultural, legal and political status." *Id.* at 830. It concluded:

> Because the federal government and the State of New Mexico are committed to insure the political separateness and cultural survival of Indian tribes, and because Indians who live on or near a reservation are members of distinctive cultural communities which would be gradually destroyed if some protection were not given against forced assimilation, Indians have gained unique status in the law which no other group, racial or otherwise, can claim.

Id. at 831. Unfortunately, the court simply assumed as fact, without fully explaining, how it is that the states are justified in furthering federal policies promoting Indian autonomy and self-determination.

B. Assessing the Validity of the State's Indian Law

Determining which of New York State's laws affecting the *Haudenosaunee* are valid requires an analysis into whether a particular statute violates federal law. As a threshold matter, this requires an inquiry into whether the State statute being scrutinized has been authorized by, or is otherwise consistent with, an act of Congress.[224] Even if Congress has not acted with respect to the subject matter of the statute, however, it still might withstand scrutiny if it can be validated under the Federal Indian Control Law principles governing the application of state power in Indian country, vis-à-vis the Pre-emption/balancing and Infringement Tests.[225]

When one applies such an analysis to each of the State Indian law provisions relating directly to the *Haudenosaunee*, seventy-one statutes (85%) are either wholly or partly in violation of federal law (Table 1). And of those fourteen (15%) statutes that most likely are not violative of federal law, several of them implicate outmoded policy justifications that make their continued reliability subject to question (Table 2).

The invalid State Indian laws dealing with the *Haudenosaunee* fall into four main categories. First, there are the statutes which purport to establish and regulate the conduct of *Haudenosaunee* governments.[226] This category is by far the largest, with fifty-one statutes falling into this category.[227] Second, there are the statutes purporting to regulate individual Indian conduct.[228] There are ten of these statutes.[229] Third, there are statutes that purport to regulate

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[224] *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 340 (1983) (noting the Secretary and the Tribal Council, which are charged with the task of managing the reservation, would not have initiated plans were it true that such plans must ultimately yield to a more restrictive state law, as such an outcome "would seriously 'undermine [their] ability to make the wide range of determinations [needed]'").

[225] For an analysis to be fully comprehensive, such laws should also be evaluated with respect to their continued *policy* justification. Given that most of the State's Indian laws originated in the 19th century, even those that can sustain legal scrutiny might very well be discarded on the basis of an outmoded policy rationale. *See id.* at 341 (stating concurrent state jurisdiction would be inconsistent with federal law); *see also* Williams v. Lee, 358 U.S. 217, 220 (1959) ("[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.").

[226] *See* N.Y. INDIAN LAW §§ 73, 75 (outlining the general powers and duties of the council and the procedure when vacancies occur in elective office).

[227] *See id.*

[228] *See id.* §§ 2, 3 (addressing the right of Indians to contract to marry, and to divorce).

[229] *See id.*

individual non-Indian conduct. Seven statutes fall into this category.[230] And finally, there are the statutes that regulate the conduct of State and local government officials. There are twelve of these statutes.[231]

1. Laws Establishing and Regulating *Haudenosaunee* Governments

State Indian laws purporting to establish and regulate *Haudenosaunee* governments are the clearest examples of illegal State action in *Haudenosaunee* affairs.[232] Perhaps the boldest example of such a statute is section 41, which provides:

> The government of the Seneca nation by chiefs is abolished. Each nation shall have as officers a clerk and a treasurer. The Tonawanda nation shall have a marshal and three peacemakers. The Seneca nation shall have a marshal, three peacemakers, and eight councilors for each of its reservations, and a president. Each officer of each nation now in office shall continue in office until the expiration of the term for which he was chosen and until his successor shall be chosen.[233]

By virtue of its self-claimed plenary power, Congress could theoretically authorize the state to set up a new Seneca Nation government. But there is no act of Congress so authorizing the State to act. Moreover, applying both of the federal common law tests relevant to this inquiry fails to validate the statute. The Infringement Test,[234] which invalidates state laws if they infringe on the right of the Indians to govern themselves, is violated *per se*.[235] So too does the pre-emption/balancing analysis fail to validate this state statute. Examining the tribal, federal, and state interests at stake, there simply is no interest that favors the State's

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[230] *See id.* §§ 8, 11 (concerning intrusions and trespass on tribal lands).

[231] As counted here, the number is greater than the number of actual laws due to the fact that some statutes have multiple parts and thus fall into more than one category.

[232] *See* N.Y. INDIAN LAW §§ 5-a (justices of the peace), 17 (disqualification of women from voting), 40-51 (election procedures and descriptions of positions within the Seneca Indians), 53 (duties of the marshal), 72-75 (duties of the president, council, attorney, and procedures to fill vacancies in elective offices of the Seneca nation), 80 (general powers and duties of the council), 82 (procedures regarding vacancies in Tonawanda elective offices), 89 (Court of Impeachment), 101 (powers and duties of attorneys), 106-13 (description of offices and powers within the St. Regis nation) (McKinney 1950).

[233] *Id.* § 41.

[234] *See* Williams v. Lee, 358 U.S. 217, 220 (1959) (defining the inquiry where there are no governing Acts of Congress).

[235] *See id.* at 223 (stating the Court has consistently guarded the authority of Indian governments over their reservations).

involvement in establishing the Seneca Nation government. The Seneca Nation has had a constitutional form of government in effect for 150 years[236] and there is no evidence that the Seneca People wish to have the State involved in establishing their government. In any event, even if the Seneca Nation desired State involvement in its government affairs,[237] the federal government's interests in ensuring the autonomy of Indian nations strongly weighs in favor of supporting Seneca self-determination.[238] Federal law and policy have strongly favored Indigenous self-determination for over thirty years.[239] This has included respect and support for the right of Indigenous people to establish their own governments.[240] Thus, there is an overwhelming combination of tribal and federal interests at play that uphold the right of the Seneca people to establish their own form of government and thus invalidate State Indian Law section 41. This is further affirmed by the fact that the State currently has no expressed policy interest in interfering with Seneca Nation government. Even though the State courts have recently had occasion to interfere with Seneca governance,[241] there is no evidence that the State has a formal policy favoring such interference.

Quite simply, section 41 exists because the State did have such a policy interest in the 1840s when the Seneca Nation was undergoing considerable internal turmoil.[242] In direct response to the sale of all

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[236] *See* Porter, *supra* note 15, at 833 ("For 150 years, the Seneca Nation Constitution has remained the primary mechanism by which the Seneca People have handled official government affairs.").

[237] *See* Bowen v. Doyle, 880 F. Supp. 99, 105 (W.D.N.Y. 1995) (indicating several past and present officials of the Seneca Nation's Council sought State court involvement in remedying the internal political dispute with the Nation's president).

[238] *See id.* (granting injunction to Seneca Nation president precluding New York from interfering in internal tribal disputes).

[239] *See* 25 U.S.C. §§ 450, 450n (1994) (noting "the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people"); Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-21 (1994); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-92 (1988); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-41 (1988); Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543 (1988); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-50n (1988); *see also* Porter, *supra* note 15, at 506 (stating the United States' current policy toward Indians is one of self determination).

[240] *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (noting that cases addressing Indian rights and autonomy before the Court have "consistently guarded [such] authority").

[241] *See generally* Bowen v. Doyle, 880 F. Supp. 99 (W.D.N.Y. 1995) (seeking an injunction to prevent interference with internal affairs of the Seneca Nation by State judges).

[242] *See* Porter, *supra* note 15 at 830-31 (explaining certain Senecas were dissatisfied with the traditional leadership and in turn urged the State to "pass[ ] a law that fundamentally altered the Seneca government").

Seneca lands under the Treaty of Buffalo Creek in 1838,[243] there developed considerable disaffection with in the Seneca Nation with the traditional government of chiefs. Combined with allegations that the chiefs had accepted bribes and misappropriated treaty annuities, revolutionary activity within the Seneca Nation began to occur.[244] The State was intimately involved in this process, acting upon the request of a few Senecas to enact laws to establish a new form of government.[245] This happened in 1845,[246] and again in 1847,[247] but in 1848 the Senecas established a constitutional government of their own that has been in place until the present day.[248]

In addition to the laws purporting to establish the Seneca Nation government, the State Indian law also purports to establish governments within the Tonawanda Band of Senecas[249]—the so-called "Tonawanda Nation"—and the St. Regis Mohawk Tribe.[250] For similar reasons, these laws are also invalid on their face.

Not only did State officials in the nineteenth century believe that they had authority to establish *Haudenosaunee* governments, they also believed that they had the authority to direct *Haudenosaunee* governments—including those that it didn't "create"—to take action.[251] In seeking to regulate *Haudenosaunee* governments, it appears that State officials were driven by a number of competing interests. One objective was to further the assimilation of the *Haudenosaunee*.[252] Thus, the most significant laws of this type

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[243] *See id.* at 830-31 (discussing the Treaty of Buffalo Creek).

[244] *See id.* (discussing allegations of tribal leadership misconduct).

[245] *See id.* (noting these State laws provided for the popular election of various officials).

[246] *See* Act of May 8, 1845, ch. 150, 1845 N.Y. Laws 146 (repealed 1909).

[247] *See* Act of Nov. 15, 1847, ch. 365, 1847 N.Y. Laws 464 (amending the 1845 law) (repealed 1909).

[248] *See* SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS, 104 (1989) (discussing the adoption of the Constitution of 1848 at the Cattaraugus Reservation in December of that year); *see also* Porter, *supra* note 15, at 833 (stating the 1848 law has been in existence for over 150 years); Thomas Abler, Factional Dispute and Party Conflict Within the Seneca Nation 1845-1890: An Ethnohistorical Analysis 121 (1969) (unpublished Ph.D. thesis, University of Toronto) (on file with author).

[249] *See* N.Y. INDIAN LAW § 80 (McKinney 1950).

[250] *See id.* §§ 101, 106-13 (McKinney 1950 & Supp. 1999).

[251] *See id.* § 9 (McKinney 1950) (authorizing the leaders of "any nation, tribe or band of Indians other than the Seneca nation" to permit Indians other than the Senecas to reside on their reservation); *see also* HAUPTMAN, *supra* note 54, at 3-4 (noting the paternalistic approach taken by New York State in dealing with the Indians, consistent with the State's goal to take Indian land); Porter, *supra* note 15, at 824 (explaining how New York State began to legislate with respect to *Haudenosaunee* internal affairs).

[252] *See* Assem. Doc. No. 51, 112th Legis. Sess. 1, 78 (N.Y. 1889) (discussing the assimilation of the *Haudenosaunee*).

"authorize" tribal governments to allot tribal lands to individual Indians.[253] Other laws focused more on the States' self-interest, such as those laws "authorizing" tribal governments to lease tribal land to individual Indians and non-Indians[254] and to sell tribal natural resources such as timber, oil, natural gas, and stone.[255] A few of these laws "authorize" tribal government to take action to protect tribal interests, such as granting permission to tribal leaders to sue in State court to protect tribal lands,[256] to regulate residency and trespass by Indians of other tribes and non-Indians,[257] and to establish fire corporations.[258] Finally, a number of these laws simply direct the carrying out of various tribal governmental functions, including defining the powers and duties of government officials,[259] setting forth electoral procedures and voter eligibility,[260] outlining the powers and jurisdiction of the tribal courts,[261] and requiring that records be turned over during changes in government administration.[262]

There is a logical explanation why laws such as these were enacted. The State has had a long history of colonizing the *Haudenosaunee*.[263] The enactment of laws such as these in the

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[253] *See* N.Y. INDIAN LAW §§ 7 (providing generally for the allotment of Indian lands), 55 (dealing specifically with the Seneca and Tonawanda nations), 95 (providing for the allotment of Tuscarora lands), 102 (dealing specifically with the St. Regis nation) (McKinney 1950 & Supp. 1999).

[254] *See id.* §§ 24 (authorizing Onondaga leases to non-Indians), 78 (authorizing Seneca leases), 83 (authorizing Tonawanda leases).

[255] *See id.* §§ 56 (authorizing Seneca timber sales), 85 (providing for the sale of mined materials by the Tonawanda nation) (repealed 1972), 98 (authorizing Tuscarora timber sales), 105 (authorizing St. Regis timber sales).

[256] *See id.* §§ 11 (authorizing actions against non-Indian trespassers), 54 (bestowing, upon the Seneca, legal remedies for the loss of property).

[257] *See id.* §§ 9 (generally), 87 (Tonawanda Seneca), 88 (Tonawanda Seneca), 97 (Tuscarora), 104 (St. Regis).

[258] *See id.* §§ 18, 19 (empowering the Seneca Nation of Indians to establish corporations that provide fire protection).

[259] *See id.* §§ 24 (mandating the payment of surety bonds by the incoming Seneca treasurer, to ensure the "faithful performance" of the duties of his office), 45 (listing duties of the Seneca clerk), 53 (listing duties of the Seneca marshal), 72 (listing duties of the Seneca president), 73 (listing duties of the council of the Seneca nation), 80 (listing duties of the Tonawanda council), 107 (listing duties of the St. Regis council), 109 (listing duties of the St. Regis officers).

[260] *See id.* §§ 42 (laying out guidelines for the Seneca elections), 43 (outlining voter qualifications).

[261] *See id.* §§ 46-50 (establishing the Seneca peacemaker courts), 51 (providing for appeals of peacemaker decisions).

[262] *See id.* § 5-a (generally).

[263] *See* Porter, *supra* note 15, at 824 ("One of the most significant effects on the *Haudenosaunee* following the Revolutionary War was the emergence of New York State as the primary colonizing influence.").

nineteenth century are classic demonstrations of the State's historic efforts to obtain control over the *Haudenosaunee*. By the mid-nineteenth century, State officials viewed the traditional *Haudenosaunee* governments as obstacles to their efforts to fully assimilate the *Haudenosaunee* into State society.[264] By that time, the *Haudenosaunee* were relatively weak following the loss of lands following the Revolutionary War and from the influx of missionaries and other assimilating influences.[265] Thus, for example, "helping" to transform Seneca governance upon the request of a few disgruntled Senecas was a rare opportunity for the State to seize greater influence and control over the Seneca Nation that could potentially lead to future land cessions.[266] Similar opportunities existed when the State interfered in the internal governance of the Tonawanda Senecas and the St. Regis Mohawks.[267] Nonetheless, the State's actions, purporting to establish *Haudenosaunee* governments were, and are, violations of federal law. These laws, however, remain a part of the State's official record.

2. Laws Regulating Indian Conduct and Lands

The next major category of invalid State Indian laws relates to the control and regulation of individual Indian conduct. One

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[264] *See id.* at 833 (stating that to officials in Washington and Albany, the republican form of government was "progress" over the hereditary chief's counsel) (quoting Thomas Abler, Factional Dispute and Party Conflict Within the Seneca Nation 1845-1890: An Ethnohistorical Analysis 121 (1969) (unpublished Ph.D. thesis, University of Toronto) (on file with author)); *see also* Assem. Doc. No. 51, 112th Legis. Sess. 73-74 (N.Y. 1889).

> The present forms of government among these Indians are no longer adequate to their changed condition and circumstances. Their laws and forms were made for other times, when there was no attempt or desire to accumulate property, when individual holdings of land were unknown and unneccessary, and no longer offer protection to rights and property. . . . Their rights should be protected and preserved with the most exact justice, but whenever any conditions of existing treaties stand in the way of their welfare and progress, such conditions should be set aside; . . . No harm can come from this course, because if past history is any guide, whatever may have occurred or is likey to happen elsewhere, there is little danger that the State of New York will do any injustice to its Indians.

Id.

[265] *See id.* at 822-23 (discussing how the creation of reservation communities effectively destroyed the Iroquois social structure).

[266] *See* N.Y. INDIAN LAW §§ 42-51, 72-73 (McKinney 1950 & Supp. 1999) (setting forth various provisions of Seneca government, such as the time and place of elections, voting qualifications, the duties and responsibilities of several elected officials, and establishing the Peacemaker's Court).

[267] *See* HAUPTMAN, *supra* note 54, at 17 (outlining the process by which Congress transferred to New York State civil jurisdiction over the Tonawanda Seneca, despite their protests).

example of this kind of law is section 2, which provides:

> An Indian shall be liable on his contracts not prohibited by law. An Indian may take, hold and convey real property the same as other citizens, but no land owned or occupied as the common property of any nation, tribe or band of Indians shall be conveyed otherwise than as provided in section seven. Upon becoming a freeholder to the value of one hundred dollars an Indian shall be subject to taxation.[268]

The Constitution and laws of the United States do not allow the State to treat individual Indians differently than other citizens of the State unless federally acknowledged rights are at stake.[269] Since 1924, the *Haudenosaunee* have been recognized as citizens of the United States[270] (albeit over their objection) and so are thus considered to be citizens of the state in which they reside. While federal law continues to recognize individual Indians as having special protected status—which includes such benefits as immunity from state taxation for income earned within tribal territory—states are not allowed to single out Indians for special treatment unless in furtherance of federal policy.[271] In short, states must afford Indians the same degree of equal treatment afforded other citizens. Accordingly, a statute like section 2, which singles out Indians for special legal treatment, is akin to a racial segregation law. In the absence of a compelling State interest—of which there is none—such a law violates federal law.[272]

Section 2 is a statute rooted in the State's colonial history, during which time the state viewed Indians as dependent wards and not as citizens. There were several reasons for this law. First, because Indians were not viewed as fully equipped to carry out the affairs of

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[268] N.Y. INDIAN LAW § 2 (McKinney 1950 & Supp. 1999).

[269] *See* Morton v. Mancari, 417 U.S. 535, 551-53 (1973) (noting the Constitution itself gives Congress the right to craft legislation which "singles Indians out as a subject for separate legislation"); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 499-501 (1979) ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, [but] . . . . States do not enjoy this same unique relationship.") (quoting Morton v. Mancari, 417 U.S. 535, 551-52 (1974).

[270] *See* 8 U.S.C. § 1401(b) (1988).

[271] *See Yakima*, 439 U.S. at 501 (upholding a Washington statute which gave the state partial jurisdiction over the Indian's reservation challenged on equal protection grounds); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973) (striking down an Arizona income tax as it applied to reservation Navajo Indians regarding income derived soley from reservation sources).

[272] *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983) (stating the state has to have an interest to justify an assertion of state authority in the face of conflicting or incompatible federal and tribal interests reflected in federal law).

"civilized" men, this statute ensured that contracts entered into by Indians could not be voided on the grounds that the Indian was incompetent.[273] Second, the statute promoted the State's agenda of assimilating the Indian population. Requiring liability on contracts ensured that Indians would be subject to the State's contract law. Over time (it was thought), they would thus be required to conform their behavior in the manner of civilized men. Similarly, "allowing" Indians to hold real property served the assimilating purpose of transforming the "uncivilized" behavior of holding lands in common, to the "civilized" behavior of holding lands in one's own name. And finally, taxing Indians meant that they had achieved a degree of assimilation such that they could then begin to assume a share of the burden of maintaining a "civilized" society.Other invalid State laws regulating individual Indian conduct purport to require Indians to comply with the State law governing marriage and divorce,[274] to authorize them to lease their own lands,[275] and to regulate the selling of timber.[276] These laws violate the Infringement Test on their face.[277] They also violate the Pre-emption/Balancing Test because tribal and federal interests favor self-government and the application of tribal law to such activities. Moreover, the State has no legitimate interest in regulating Indian conduct within the Indian territory.[278]

3. Laws Regulating Non-Indian Conduct

The third major category of invalid State laws applying to the *Haudenosaunee* are those regulating individual non-Indian conduct. Perhaps the most invasive of these laws is section 90, which provides:

> Any company may erect poles and wires, and other necessary fixtures thereto, across the lands of the Seneca Indians on the Tonawanda reservation, provided the company shall pay to the Indians to whom allotments have been made, and on

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[273] In some respects, this statute seeks to avoid, with Indians, the modern problem one might have in entering into a contract with a minor.

[274] *See* N.Y. INDIAN LAW § 3 (McKinney 1950 & Supp. 1999).

[275] *See id.* §§ 24 (Onondaga), 83 (Tonawanda Seneca).

[276] *See id.* §§ 22, (Onondaga), 56 (Seneca), 96 (Tuscarora), 103 (St. Regis).

[277] *See* Williams v. Lee, 358 U.S. 217, 220 (1959) (noting the question has always been whether state action infringed on the right of reservation Indians).

[278] *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1979) (noting the tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law).

> whose premises telephone or telegraph poles for the purpose of supporting wires have been or may hereafter be erected, damages therefor, which in case of inability to agree thereon, shall be ascertained in the manner provided in the eminent domain procedure law.[279]

Federal Indian Control Law prohibits the unilateral alienation of *Haudenosaunee* land interests by the State.[280] Section 90 allows for "any company" to unilaterally assume a right-of-way for its "poles and wires" without the approval of the Tonawanda Seneca government.[281] Such a law is an alienation of an Indian land interest by the State without federal approval, and is thus invalid. Moreover, such a law violates the Infringement Test on its face. It also violates the Pre-emption/Balancing Test because tribal and federal interests combine to support the right of the Tonawanda Seneca government to regulate non-Indian conduct within their territory. There is no legitimate State interest in having the unilateral authority to allow "any company" to "erect poles and wires" within the Tonawanda Seneca territory.

Another type of State law regulating non-Indian conduct relates to laws that purport to "protect" *Haudenosaunee* interests. An example is section 22, which provides in part:

> No person other than an Onondaga Indian shall cut or remove from the Onondaga reservation any tree, timber, wood, bark or poles . . . nor shall sell, remove, cause to be removed or aid in the removal from such reservation of any trees, timber, wood, bark or poles, except upon written permission of the majority of the chiefs of the Onondaga tribe. . . .[282]

Federal Indian Control Law does not explicitly authorize the State to regulate the conduct of non-Indians engaging in timber cutting within Indian lands.[283] Thus, section 22 is presumptively invalid. However, it is possible to argue that a law such as this is similar in design to section 8[284] ("Intrusions on Indian lands") that

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[279] N.Y. INDIAN LAW § 90 (McKinney 1950 & Supp. 1999).

[280] *See* 25 U.S.C. § 177 (1988) (invalidating any purchase, lease, grant, or other form of conveyance of Indian land unless such a transfer is facilitated by a treaty or convention pursuant to the Constitution).

[281] *See* N.Y. INDIAN LAW § 90 (McKinney 1950 & Supp. 1999).

[282] N.Y. INDIAN LAW § 22 (McKinney 1950).

[283] *See Bracker*, 448 U.S. at 136, 150-51 (stating prior Court decisions held that state authority over non-Indians acting on tribal reservations is pre-empted by federal law, notwithstanding Congressional silence on the matter).

[284] *See* N.Y. INDIAN LAW § 8 (McKinney 1950 & Supp. 1999).

was upheld by the U.S. Supreme Court in *Dibble*.[285] Section 8, like section 22, also focused on protecting Indian interests by regulating non-Indian conduct on Indian lands.[286] The problem with such a comparison, however, aside from *Dibble's* infirmities discussed previously, is that validating the application of laws such as section 22 would be an application of state power in Indian territory that violates the Infringement and Pre-emption/Balancing Tests.[287]

Section 22 violates the Infringement Test because it interferes with "the right of reservation Indians to make their own laws and be ruled by them."[288] This occurs in at least two ways. On the one hand, to the extent that section 22 has any practical effect, it discourages the Onondaga Nation from enacting its own laws to deal with the problem of non-Indians who might illegally cut their timber. If the law is enforced, it might very well be the case that the Onondaga Nation will not legislate to deal with the problem at all. In such a case the State, by taking on this "protective" function, has clearly interfered with the ability of the Onondagas to make their own laws, and be ruled by them. Alternatively, if the Onondagas do have their own laws prohibiting such conduct, then there arises the potential conflict associated with having a scheme of concurrent Onondaga-State law enforcement. Competition with another sovereign—the State—over such critical spheres of self-government like law enforcement undermines Onondaga self-determination.

"Protective" laws like section 22 also cannot withstand scrutiny under the pre-emption/balancing analysis, although the question is much closer than with respect to "hostile" State legislation. It is conceivable that an Indian nation might want a law like section 22 to apply and would thus have a confluence of interest with the State. In this situation, the Indian nation has decided that it prefers to have the State deal with the problem of regulating intrusive non-Indian conduct. Such a position could be easily

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[285] *See* New York v. Dibble, 62 U.S. 366, 371 (1958) (holding the 1821 precursor to section 8 constitutional).

[286] *See id.* at 368 (stating language that was the precursor to the codification of section 8).

[287] *Compare* N.Y. INDIAN LAW § 8 (McKinney Supp. 1999) (providing the means by which an unauthorized individual residing on Indian land may be removed by state authorities), *with* Williams v. Lee, 358 U.S. 217, 223 (1958) (illustrating that allowing state courts to retain jurisdiction over matters occurring on Indian lands, including matters involving non-Indians, would undermine Indian authority and would ultimately infringe on their right to govern themselves), *and Bracker*, 448 U.S. at 143 ("The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.").

[288] *Williams*, 358 U.S. at 220.

rationalized on the belief that non-Indians are the problem of the non-Indian government and thus the Indian nation should not have to expend energy and resources dealing with such problem. But such a weak sovereign position—one which wholly concedes to the state the geographic component of protecting one's own territory—does not comport with the federal interest in ensuring Indian self-determination. Some might argue that this is counterintuitive—that an Indian nation's expressed preference to have State law apply is itself an act of self-determination and thus should be sustained. But federal law does, and has, interceded in these instances of extreme weakness by tribal officials to preclude the application of State law even when it might be desired.[289] Accordingly, "protective" State laws purporting to apply within Indian territory should be held invalid.

4. Laws Regulating State and Local Officials

The last category of invalid State laws dealing with the *Haudenosaunee* are those regulating the conduct of State and local officials.[290] Several of these laws provide for State officials to serve as agents and advocates to represent the interests of a particular *Haudenosaunee* nation.[291] Thus, there is established is the office of "agent of the Onondaga Indians"[292] whose duty is to distribute "annuity moneys payable by the state" and to "protect the rights and interests of the tribe of which he is agent, and perform such other duties in relation to them as may be required by the department of social welfare."[293] Similarly, a provision is made for the Department of Social Services to appoint an attorney for the "Tonawanda Nation"[294]

State laws that provide for either agents or advocates for any of the *Haudenosaunee* nations clearly violate both the Infringement and Pre-emption/Balancing Tests. While the State obviously has an

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[289] *See, e.g.*, Bowen v. Doyle, 880 F. Supp. 99, 136-37 (W.D.N.Y. 1995) (illustrating that there is a strong federal policy which promotes tribal self-government and self-sufficiency, and noting further that to allow state court jurisdiction over the internal disputes seen here could all but destroy the sovereignty of the Indians and the power of their courts).

[290] *See, e.g.*, N.Y. INDIAN LAW § 21 (McKinney 1950 & Supp. 1999) (listing the duties of tribal agents).

[291] *See id.* § 20 (outlining the appointment, term of office, and qualifications of an agent of the Onondaga Indians).

[292] *See id.*

[293] *Id.* § 21; *see also* N.Y. INDIAN LAW § 23 (requiring an agent's approval for certain contracts).

[294] *See id.* § 81.

interest—if it can get away with it—in providing one of its own employees as a legal representative for an Indian nation, tribal and federal interests weigh heavily in favor of invalidating such a law. Again, even if an Indian nation desired such an advocate, the conflict of interest of such an official would be so great that federal interests in promoting Indian self-determination should preclude its application. Holding so does not mean that there might not be some role for a State appointed agent responsible for dealing with Indian affairs. To the extent that such officials are carrying out State responsibilities provided for under treaty or agreement, federal law would not preclude the appointment and activities of that official.[295]

Other examples of invalid laws relating to State and local officials are those which anticipate the carrying out of certain duties within *Haudenosaunee* lands in furtherance of the State's assumed responsibilities. Thus, there are laws authorizing local judges to license the residence of teachers and missionaries on *Haudenosaunee* lands[296] and to enforce Seneca peacemaker's court decisions by land seizures and/or imprisonment.[297] In addition, there are laws that, *inter alia*, grant town highway commissioners "power and jurisdiction" over *Haudenosaunee* land,[298] require the Departments of Social Welfare and Education to exercise trust authority over any moneys belonging to a *Haudenosaunee* nation or individual citizen,[299] and authorize the Franklin County attorney or sheriff to preside over and count the votes in the St. Regis Tribe elections.[300] These laws are invalid because they both infringe upon *Haudenosaunee* self-determination and are pre-empted by federal law.[301]

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[295] *See id.* § 100 (McKinney 1950 & Supp. 1999) (stating the Department of Social Welfare shall annually pay an annuity to the St. Regis Tribe members eligible for such funds).

[296] *See id.* § 10 (McKinney 1950).

[297] *See id.* § 52.

[298] *See id.* § 12.

[299] *See id.* §§ 13, 13-a. It is unknown whether, in fact, any state agency currently retains custody over any *Haudenosaunee* collective or individual monies.

[300] *See id.* §§ 111, 112 (McKinney Supp. 1999).

[301] *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) ("The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law."); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556 (1832) (reinforcing a treaty which purported to grant the Cherokees self-government); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831) (stating an Indian tribe is "capable of managing its own affairs and governing itself").

III. IMPLICATION OF RETAINING INVALID STATE INDIAN LAW

Given the ancient and outmoded policy justification for most of the State's illegal laws relating to the *Haudenosaunee*, it might be easy to conclude that these laws are disregarded by both Indians and non-Indians, and are unenforced by State officials. While this might be true in some respects, the State's Indian Law—despite its illegal underpinnings—continues to have legal and policy effects in practice.

Perhaps the most significant legal impact of the State's Indian Law has been the historic reliance of the St. Regis Mohawks on those provisions of the Indian Law that purport to establish and regulate the conduct of the "St. Regis Tribe."[302] Until 1995, when they adopted their own constitution, Mohawks have relied upon these laws as the basis of their federally recognized government.[303] This has special significance, not just because the St. Regis Mohawk Tribe may have been the only federally-recognized tribal government in the United States organized under State law,[304] but because the State's actions in doing so originated in its efforts to wrest control of the Mohawks away from the traditional *Haudenosaunee* Confederacy. For almost 200 years, the Mohawks at *Akwesasne* have been deeply divided over their legitimate form of government, and the State has played a critical role in nurturing that division.[305] Many Mohawks at *Akwesasne* continue to adhere to the traditional government and maintain that the Mohawk Nation Council of Chiefs is the only legitimate government, not the St.

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[302] *See* William A. Starna, *The Repeal of Article 8: Law, Government, and Cultural Politics at Akwesasne*, 18 AMER. INDIAN L. REV. 297, 298-99 (1993) (discussing section 8 of the New York Indian Law which sets forth the elective system of government for the St. Regis Mohawks, which arose from a series of nineteenth century statutes beginning in 1802).

[303] *See* Porter, *supra* note 15, at 851-52 (stating the newly drafted constitution replaced State Indian law "as the legal basis for the Saint Regis Mohawk Tribal Council"). Recently, a federal district court judge concluded the BIA has acted in an "arbitrary and capricious manner" in recognizing the Mohawk constitutional government. *Ransom v. Babbitt*, No. 98-1422, 1999 WL 825126 (D.D.C. Sept. 30, 1999).

[304] The only other example in which state law has played a significant role in Indigenous governance has been the establishment of Alaska Native corporations under state law. *See* Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629(e) (1994)); *see also* Martha Hirschfield, *The Alaska Native Claims Settlement Act: Tribal Sovereignty and the Corporate Form*, 101 YALE L.J. 1331, 1334 (1992) (describing the "Alaska Native experience" as unique in the history of the federal government's relationship with Indigenous peoples due to the state's remoteness in relation to the contiguous 48 states and the fact there are no clear lines demarcating the jurisdiction of Alaska Native Governments).

[305] *See id.* at 827-28 (discussing the State's role in the establishment of the St. Regis Mohawk Tribal Council).

Regis Mohawk Tribe.[306] And yet other Mohawks, those living on the Canadian "side" of *Akwesasne*, adhere to still another form of government, the Canadian law established "Mohawk Ban Council of Akwesasne."[307] But for the State's laws establishing "the St. Regis Tribe" and its officials, the history of governance at *Akwesasne* would very likely have been very different.

With the adoption of the St. Regis Mohawk Tribe's own constitution in 1995, the people of the St. Regis Mohawk Tribe recognized—as has always been the case legally—that State law cannot serve as the basis for their governmental authority.[308] This has long been true in the Seneca Nation, which has the largest number of State laws purporting to establish and regulate its government.[309] While the State's history of facilitating the Seneca Revolution of 1848 is clear, no responsible leader presently within the Seneca Nation believes that the State's Indian Law is the basis for Seneca sovereignty or the source of the laws governing the operation of the Seneca Nation government. Instead, and rightly so,

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[306] *See* Porter, *supra* note 15, at 849-50. The Mohawk Nation Council strenuously asserts that it is the only legitimate government at *Akwesasne*.

> The Mohawk Nation Council, its Chiefs, Clanmothers and Faithkeepers are not to be confused with the St. Regis (Mohawk) Tribe Council.
>
> The St. Regis Tribe Council is a form of government that was forceably [sic] imposed upon the Akwesasne Mohawk people by New York State in 1892. Our people have consistently resisted and rebuked this form of government throughout its history. It has only shown significant consideration since 1972, when it gained federal recognition, and it began to administer much needed health, welfare and social service programs to this community.
>
> The St. Regis Tribal Council exists because the United States Government has chosen to recognize "a government that it created," instead of the one that was given to the Mohawk People by the Creator. It is unfortunate that it has become the government recognized by New York State and the Federal Government as the legal entity at Akwesasne. . . .
>
> The St. Regis Tribal Council government that was created by New York State is not a sovereign nation. It is merely a creation of New York State. New York cannot create sovereign nations nor can it take away Sovereignty that is vested in the Mohawk Nation Council. The Mohawk Nation Council is the real government of the Mohawk People. We urge anyone associated or dealing with the Mohawk Nation to be aware of any misrepresentation or impersonations of the Mohawk Nation Council.

Mohawk Nation Council of Chiefs Homepage, (visited Oct. 24, 1999) <http://www.slic.com/mohawkna/mncc.htm>.

[307] *See* Mohawk Council of Akwesasne, (visited Nov. 1, 1999) <http://www.glen-net.ca/mca/index.html> (providing information on the Mohawk Council of Akwesasne's (MCA) administration, and economic, health, and education facilities); *see also* St. Regis Mohawk Tribe Enviroment Division, (visited Nov. 1, 1999) <http://thames.northnet.org/earth/index.html> (providing a map of the Mohawk territory and noting it is "literally bisected by the United States-Canada Border").

[308] *See* Porter, *supra* note 15, at 852-53 (discussing the intra-tribal dispute over the validity of the new constitution).

[309] *See* N.Y. INDIAN LAW §§ 40-90 (McKinney 1950 & Supp. 1999).

Senecas look to the Seneca Nation Constitution and Seneca laws and court decisions for guidance regarding those matters.[310]

But the same is not true in every instance in which the State has purported to establish and regulate *Haudenosaunee* government. In recent years, the Tonawanda Band of Senecas has undergone considerable turmoil relating to the regulation of economic activity within its territory and the accountability of the tribal government leadership.[311] These conflicts have spawned a revolutionary movement that, in part, has been predicated upon the existence of State Indian laws purporting to establish certain "Tonawanda Nation" officials separate and apart from the traditional chiefs of that Nation.[312] These individuals have "elected" themselves as the "Tonawanda Nation" leaders and have sought to overthrow the traditional government.[313] Thus, at Tonawanda, the State Indian Law has served as a kind of "weapon" to be picked up by those who have been in conflict with the traditional leadership. While revolution may or may not be the right thing for the Senecas at Tonawanda, such a decision is an exclusively internal one in which State law should have no part. Because these vestiges of the nineteenth century colonialism continue to exist on the State's books, and thus serve as an apparently "official" source of authority, they have come back to life in exactly the manner that federal law forbids.

Misplaced reliance on the State Indian Law not only has the periodic effect of disrupting internal *Haudenosaunee* relations, it greatly contributes to the confusion of non-Indians who must interact with any of the *Haudenosaunee* governments. This confusion could affect the lawyer for any defendant sued in the Seneca Nation's Peacemakers Court,[314] the would-be investor looking to establish a business relationship with *Haudenosaunee* businessman, or simply the average citizen looking to find out more

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[310] In 1992, a referendum was held in which the Seneca Nation electorate eliminated the long dormant provisions of the Nation's Constitution that required that the Nation Council not enact laws in conflict with federal or State laws.

[311] *See* Poodry v. Tonawanda Band of Senecas, 85 F.3d 874, 877 (2d. Cir. 1996) (discussing how allegations of misconduct by the ruling Council of Chiefs led to the creation of an insurgent government and the subsequent banishment of the tribal members who established the new system).

[312] *See* N.Y. Indian Law § 8 (McKinney 1950) (abolishing the traditional Seneca government and establishing new governmental officers within the Tonawanda Nation).

[313] *See* Porter, *supra* note 15, at 877-78 (discussing the banishment for treason of five tribal members who attempted to overthrow the traditional government).

[314] *See* N.Y. INDIAN LAW § 46 (McKinney 1950 & Supp. 1999) (outlining the duties and jurisdiction of a peacemaker court).

information about the legal status of the increasingly prominent *Haudenosaunee* nations within the State's borders. Because the Indian law is contained in the code reporters,[315] the rational conclusion to be drawn is that these laws are accurate, up-to-date, and lawful. The lawyer representing the defendant in the Peacemakers Court action will be extremely disconcerted (or worse) when she realizes that the State Indian law provisions governing the Seneca Peacemakers Courts are significantly different from the Seneca Constitution and laws actually governing actions in the Peacemakers Courts. This will happen because the actual constitution and laws, not surprisingly, have been amended several times since 1845 when the State first "established" the Seneca Nation court system.[316]

Unfortunately, this misrepresentation is not simply a matter of people being confused as they try to understand the law relating to the Indian nations within New York. In very real ways, the continued representation of these illegal and invalid State laws, as "gospel", has dramatic consequences for modern State-*Haudenosaunee* relations. As almost anyone in upstate New York knows, there have been contentious and violent conflicts between the State and the *Haudenosaunee* in recent years.[317] In 1992 and 1997, the State's efforts to tax commerce within the Indian territory were met with significant opposition from the *Haudenosaunee* nation, which precipitated massive defensive actions by the *Haudenosaunee* people, and extreme applications of State power to suppress them. The action taken included large-scale mobilization of State troopers, and contemplation of the use National Guard troops to invade certain *Haudenosaunee* territories.[318] Moreover, there are also significant land claim cases brought by the Oneidas, Cayugas, Mohawks, and Senecas, that jeopardize several million acres of upstate New York, and have precipitated near violent reactions from non-Indian residents in those claim areas who fear

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[315] *See id.* New York Indian Law is compiled in Book 25 of The Consolidated Laws of New York.

[316] *See id.* The statutory history shows that section 46 was amended in both 1953 and 1981.

[317] *See* Folster, *supra* note 4, at 705 (detailing recent taxation disputes between New York State and Native American Indians).

[318] *See id.* at 708 (stating protests over State attempts to collect taxes on items sold to non-Indians while on Indian territory led to numerous arrests, injuries to twelve state troopers as well as property damage); *see also* Billy House & Kirk Spitzer, *N.Y. Guard Envisioned Assault on Reservations*, USA TODAY, Nov. 6, 1995, at 1A (discussing plans for possible "military-style" assault on Indian reservations if protests turned violent over State collection efforts).

that they will lose their homes to the Indians.[319]

Unfortunately, the existence and public availability of such an extensive body of invalid State "Indian Law" is a major destabilizing factor in preventing the stabilization of government-to-government relations between the State and the *Haudenosaunee* nations. Stabilization of this relationship is critical to any peaceful and lasting resolution of these conflicts. Whatever law might govern this relationship—whether it be tribal, federal, or State—should be rooted in objective and mutually agreed upon principles that can allow tribal officials, State officials, and the citizenry of both sovereigns to approach resolution of these major problems from a shared perspective. Put simply, the State Indian Law relating to the *Haudenosaunee* is based upon the faulty assumption that the State has power *over* the *Haudenosaunee* nations. While in the nineteenth century the State might have been able to get away with this because of relative *Haudenosaunee* weakness, in the modern era, both *Haudenosaunee* and federal law and will make it clear that the State has no such power.

The consequences of this faulty assumption are tremendously significant. Perhaps the best recent example occurred in 1997 when Governor Pataki sought to collect State sales taxes on cigarettes and gasoline transactions occurring within the *Haudenosaunee* territories.[320] With no apparent knowledge that Governor Cuomo had attempted the same enforcement action in 1992 without success,[321] Governor Pataki imposed a trade embargo on the importation of cigarettes and gasoline into the *Haudenosaunee* territories unless State sales taxes were paid by retailers in advance.[322] Six weeks later, having failed to intimidate the *Haudenosaunee* people sufficiently to succeed at this effort, he abandoned his plan with new-found respect for *Haudenosaunee* sovereignty.[323]

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[319] *See* Mary Pasciak, *Grand Island Briefing on Seneca Land Claim Draws More Than 200 Residents*, BUFFALO NEWS (N.Y.), June 11, 1999, at 16C (discussing how local residents are organizing to oppose the Indian land claims); *Property Owners Protest Land Claims by Indians*, N.Y. TIMES, Feb. 1, 1999, at B5 (reporting over 550 vehicles from as far away as Michigan and Canada paraded past the Turning Stone Casino in protest of the Oneida Nation's 250,000 acre land claim).

[320] *See* Folster, *supra* note 4, at 708 (discussing Governor Pataki's decision to not enforce New York's taxation scheme in Indian territory).

[321] *See id.* at 700-04 (discussing the factual background of the New York/Indian dispute over taxation).

[322] *See id.* at 704 (discussing New York's policy of enforcement of taxes on Indian territory).

[323] *See id.* at 704-08 (discussing protests over Governor Pataki's initial plans to collect taxes on Indian territory and his subsequent decision to not enforce the tax rules on Indian

I can easily imagine that most, if not all, of Governor Pataki's closest advisors had absolutely no prior experience dealing with Indian nations and little, if any, knowledge of Indian law. I can also imagine these advisors knowing that Federal Indian Control Law does allow for states to collect its sales taxes on transactions within Indian country, and embracing the thrill that "their" governor would finally be the one to bring the Indians under control. And maybe, throughout all their planning and researching, someone might have looked at the State's Indian Law and concluded, either consciously or unconsciously, that the *Haudenosaunee* nations are firmly under the State's wing and, therefore, it should not be too hard for the State to exercise its authority and roll over them. The risk to persons and property associated with the Governor's reckless act, as well as the bill for state police overtime and the cost of his own political embarrassment, were the direct consequences of not having adequate law and policy in place to guide the Governor's decision-making.

Given the turnover in State government associated with the State's democracy, there will always be new elected and appointed State officials entering office who will have the responsibility of interacting with the *Haudenosaunee*. Instead of serving as the historical record of the State's nineteenth century efforts to colonize the *Haudenosaunee* and obtain greater control over *Haudenosaunee* lands, and thus serve as a misleading indicator of the State's power over Indian affairs, the State Indian Law should reflect policies and laws designed to foster strong government-to-government relationships with the *Haudenosaunee* nations. Unlike the State, a few of the *Haudenosaunee* nations are not elected democracies and thus have longstanding leadership that are extremely knowledgeable about how to develop and approach State-*Haudenosaunee* relations from a historical perspective. The State and the *Haudenosaunee* nations will best be served if the State can develop and maintain a mechanism allowing its officials to carry forward consistent policy objectives from administration to administration.

There is one other implication of retaining illegal State Indian Law that warrants mention, namely, that the existence of the State Indian law may have the continued effect of promoting State colonization and transformation of the *Haudenosaunee* over time.

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territory purchases); Palazzatti, *supra* note 36, at A1 ("Let me make my message to all Indian nations clear. . . . It is your land. We respect you soveriegnty . . . .").

Some assertions of State power over the *Haudenosaunee* and their territory, required by the Indian law, may be thwarted by the Indian nations, or otherwise be ignored and of no effect. There may be instances, however, in which the *Haudenosaunee* continue to rely on exercises of State authority to their long term detriment. It does not matter whether or not these State actions are authorized by state treaty, or Federal Indian Control law. If, for example, a *Haudenosaunee* nation relies on the State to remove intruders, or if a *Haudenosaunee* nation relies on the State police for criminal law enforcement, dependence on the State will have the long-term effect of undermining *Haudenosaunee* self-determination and identity as a distinct people. If the State does, in fact, seek to promote *Haudenosaunee* self-determination, this policy justification also serves as a basis for legislative reform.

IV. RECOMMENDATIONS AND CONCLUSION

Redressing 300 years of New York colonial involvement in *Haudenosaunee* affairs is not a simple task that can be done quickly. This article has argued that most of the State's laws dealing with the *Haudenosaunee* are invalid and thus do not have the force and effect of law.[324] Cleansing these laws from the State code, however, and thus ensuring that they no longer have practical effect, is a matter that will require a concerted and deliberate effort on the part of State officials.

Modernizing the State Indian law will first require shedding the mindset that the State has power *over* the *Haudenosaunee* nations. Such a mindset should be replaced with an acceptance of the view that the *Haudenosaunee* are sovereigns of equal stature that just so happen to be located within the State's borders. In doing so, New York can not only re-establish a constructive base for mutually beneficial relations, it can also rekindle the spirit of the *Gus-wen-tah*, or Two Row Wampum, that characterized its approach to relations with the *Haudenosaunee* for almost 100 years prior to its establishment as a State. The Two Row Wampum requires that "We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel."[325] Adopting such a policy approach will not only help the State resolve many of its contemporary conflicts with the *Haudenosaunee*, it will also

[324] *See supra* text accompanying notes 224-301 (discussing the invalidity of several types of State and local laws).

[325] Porter, *supra* note 30, at 988.

contribute to the development of a framework by which future problems can be more easily addressed.

Reestablishing a policy approach founded upon the Two Row Wampum will require that the State recast its laws dealing with the *Haudenosaunee*. In doing so, the State has the choice to simply conform its laws to that authorized by Federal Indian Control Law or move beyond such law towards the establishment of a decolonized government-to-government relationship in conformance with *Haudenosaunee* law. Even though federal laws dealing with the Indigenous nations are themselves fraught with the baggage of colonialism,[326] the State must, at the very least, engage in this minimum effort to ensure that its laws are in compliance with the federal Constitution and laws. But the State's long term interests require that it move beyond this colonial paradigm and embrace the seemingly visionary, but actually quite reactionary, policy of approaching *Haudenosaunee* relations in accord with the Two Row Wampum.

Thus, the State should rid itself of the colonization-rooted notion of the "Indian Law" and replace it with the modern concept of a State "Indigenous Relations Law". This conceptual reorientation will ensure that the State approach relations with a consistent policy direction and thus help avoid unnecessary, and wasteful and potentially dangerous conflicts. As a practical matter, a new State Indigenous Relations Law might include provisions that simply recognize the sovereign status of the *Haudenosaunee* nations and disclaim any authority over *Haudenosaunee* lands that is not expressly authorized by federal treaty. It might also express a policy preference for dealing with the *Haudenosaunee* relations by agreements rather than unilateral assertions of power. In accord with that principle, the Indigenous Relations Law might establish a standing mechanism within State government for the negotiation and approval of intergovernmental compacts by the governor with or without legislative involvement. It could also define the circumstances under which the State will recognize assertions of *Haudenosaunee* power within the State, such as a recognition of tribal court judgment provision.

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[326] *See generally* Porter, *supra* note 30, Parts I & II.

> Because of its deep foundation, colonization remains firmly embedded in the body of modern federal Indian control law and policy. . . . Only since the ushering in of the Self-Determination Policy in the early 1970's, has the United States avoided using the language of subjugation and assimilation . . . [to] carry[ ] out its policy. . . .

Id. at 938.

A new New York State Indigenous Relations Law need not be extensive. Indeed, given the limited State powers recognized by *Haudenosaunee* and federal law, it most likely could not be. But the future of the State-*Haudenosaunee* relationship requires that the State shed the vestiges of its colonial past, at the very least conform its laws to the mandates of Federal Indian Control Law, and ideally, embrace a legal approach to *Haudenosaunee* relations that is rooted in mutual respect.

To embark upon this task, the State Legislature should begin the task of empanelling a joint task force or committee for the purpose of revising the entirety of the State Indian Law. While I would like to believe that this article alone would be a sufficient basis to justify the repeal of most of this body of law, the initial phases of this committee's work should consist of legal research and review so that State officials and staff can draw their own conclusions regarding the legitimacy of the State's Indian Law. The next phase should incorporate policy considerations geared toward the goal of redrafting a new and comprehensive set of laws dealing with Indian affairs. Only then should the process consider input from the *Haudenosaunee* nations and other interested parties. There may, in fact, be certain laws that violate Federal Indian Control Law but that the *Haudenosaunee* nations wish to preserve. The reality, however, is that State officials are not at liberty to violate federal law to accommodate the interests of a *Haudenosaunee* nation. Doing so in the past is the main reason why much of the invalid State Indian law exists in the first place.

For too long the State has ignored federal law and illegally imposed its will on the *Haudenosaunee*. This has had the caustic effect of transforming *Haudenosaunee* society and furthering the assimilation of the nation as a distinct people. Even if the continued existence of the *Haudenosaunee* is not a State priority, the logical conclusion to be drawn after all these years of conflict is that the *Haudenosaunee* will very well be a "problem" for the State far into the next millenium. Accepting that reality and reflecting it in a new body of laws will contribute greatly to the possibility that a mutually beneficial State-*Haudenosaunee* relationship can be reestablished for the first time in over 200 years.

TABLE 1
FEDERALLY INVALIDATED NEW YORK STATE INDIAN LAWS
DEALING WITH THE *HAUDENOSAUNEE*

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
§ 2. Power to Contract.	1813	To ensure the liability of Indians for contracts, to "allow" Indians to engage in real property transactions and to authorize taxation.	Violates Equal Protection Clause of Federal Constitution. Violates Infringement and Preemption/ Balancing Tests.
§ 3. Marriage and Divorce.	1813	To apply State law to Indian marriage and divorce. To authorize Seneca Peacemakers to solemnize marriages.	Violates Infringement and Preemption/ Balancing Tests.
§ 5-a. Surrender of tribal records.	1857	To require elected or customary tribal officers, trustees, chiefs or headmen to turn over tribal records to their successor.	Violates Infringement and Preemption/ Balancing Tests.
§ 7. Partition of tribal lands.	1849	To authorize division and partition of tribal lands "in severalty and in fee simple."	Violates Preemption/ Balancing Tests, Infringement test, and 25 U.S.C. § 177.[1]
§ 7-a. Purchase of lands of Indians.	1962	To invalidate Indian land contracts not authorized by the State legislature.	Violates Infringement test, Preemption/ Balancing Tests, and 25 U.S.C. § 177.
§ 9. Residence of other Indians on	1845	To authorize tribal leaders to issue permits to Indians of other tribes to live within their	Violates Infringement and Preemption/

[1] Since 1970, federal law has prohibited the alienation of Indian law interests by non-Indians. 25 U.S.C. is the codified version of the Non-Intercourse Act.

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
tribal lands.		territory.	Balancing Tests.
§ 10. Licenses to reside upon tribal lands.	1825	To authorize county judges, at the request of tribal leaders, to grant licenses to schoolmasters, teachers, ministers or priests, or agricultural tradesmen to live on Indian land, so long as such licensee has not "sold or given away to any Indian spirituous liquor or intoxicating drink."	Violates Infringement and Preemption/ Balancing Tests. Also prohibited by *Worcester v. Georgia*.[2]
§ 12. Highways on tribal lands.	1845	To grant town highway commissioners "power and jurisdiction" over Indian land within the town and, with tribal consent, to lay out highways.	Violates Infringement and Preemption/ Balancing Tests.
§ 13. Powers of departments of charities and education in relation to Indians.	1927	To authorize Departments of Social Welfare and Education to exercise authority over moneys belonging to any Indian nation or individual Indian for said purposes, including making "treaties, contracts and arrangements."	Violates Infringement and Preemption/ Balancing Tests.[3]
§ 13-a. Payments for Indians.	1936	To authorize payments to incompetent or infant Indians to be made to the Indian attorney or agent.	Violates equal protection clause of federal constitution. Violates

[2] While this provision is invalid, the State nonetheless retains authority delegated under federal law for the construction and maintenance of roads on Indian lands.

[3] Subject to the State constitution and laws, it would not be a violation of federal law for the State to authorize any of its officials to enter into agreements with Indian nations.

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
			Preemption/ Balancing Tests.
§ 14. Trust funds for Indians.	1927	To authorize departments of social welfare and education to receive Indian monies in trust provided that the interest on such trust funds be used for the "promotion of education" and the "encouragement of religion" among the Indians.	Violates establishment clause of federal Constitution. Violates Infringement and Preemption/ Balancing Tests.
§ 17. Disqualification of women from voting.	1957	To prohibit disqualification of female tribal members from voting once they have been recognized by the tribe to vote.	Violates Infringement and Preemption/ Balancing Tests.
§ 18. Fire corporations.	1969	To authorize Senecas to establish a state fire corporation upon approval by the Seneca Nation Council, recognizes authority of such corporations outside of Seneca territory, and extends state benefits to Seneca firefighters.	Violates Infringement and Preemption/ Balancing Tests to the extent Seneca Nation authority is granted and not just recognized.[4]
§ 19. Fire protection contracts.	1969	To authorize Seneca Nation and any state municipality to enter into fire protection contracts to provide services in Seneca	Violates Infringement and Preemption/ Balancing Tests to the extent Seneca Nation authority is

[4] The State cannot authorize application of the Membership Corporation Law on Indian lands, but can recognize a Seneca fire department to perform services outside of Seneca territory and extend benefits to Seneca firefighters.

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
		territory.	granted and not just recognized.[5]
§ 20. Appointment; term of office; agent qualifications. (Onondaga)	1843	To authorize commissioner of social welfare to appoint agent for Onondagas under his "supervision, direction and control" at an annual salary of $1,200.	Violates Infringement and Pre-emption/Balancing Tests.
§ 21. Duties of agent. (Onondaga)	1843	To authorize Onondaga agent to count Onondaga population, to distribute annuities to "heads of family" and to "protect the rights and interests of the tribe."	Violates Infringement and Preemption/ Balancing Tests.
§ 22. Cutting and removing timber.	1873	To prohibit non-Onondagas from cutting and removing Onondaga timber, and prohibits Onondagas from cutting and removing Onondaga timber for sale, without permission of chiefs.	Violates Infringement and Preemption/ Balancing Tests.[6]
§ 23. Consent of agent to certain contracts. (Onondaga)	1855	To invalidate any contract between a non-Indian and an Onondaga for stone, wood, timber, or bark that has not been approved by the Onondaga agent.	Violates Infringement and Preemption/ Balancing Tests.
§ 24. Leases. (Onondaga)	1873	To authorize Onondagas to lease their land to "white persons." To authorize chiefs to lease their lands for stone	Violates Infringement test, Preemption/ Balancing Tests, and 25 U.S.C.

[5] The State can authorize municipalities to enter into agreements with an Indian nation, but has no authority over the Seneca Nation with respect to its powers to enter into such agreements.

[6] In accordance with *Cutler v. Dibble*, the State most likely has authority to prohibit non-Indians from cutting and selling Onondaga timber.

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
		quarries and stipulates how proceeds are to be distributed by agent.	§ 177.
§ 28. Keeping or pasturing of cattle; damages; penalty. (Onondaga)	1915	Prohibits non-Indians from allowing animals to graze on Onondaga land and to define punishments for violation.	Violates Infringement and Preemption/ Balancing Tests.
§ 40. Use of terms. (Seneca)	1878	To clarify statutory designations of the Allegany, Cattaraugus, and Tonawanda Seneca communities and designate residents of the Cornplanter Reservation as residents of the Allegany Reservation for purposes of voting and holding office.	Violates Infringement and Preemption/ Balancing Tests.
§ 41. Enumeration of officers. (Seneca)	1847	To abolish the traditional government by chiefs. Establishes clerk, treasurer, marshal and three peacemakers for the Tonawanda Nation." Establishes clerk, treasurer, marshal, three peacemakers, sixteen councilors, and president for the Seneca Nation.	Violates Infringement and Preemption/ Balancing Tests.
§ 42. Time and place of annual election. (Seneca)	1847	To define electoral procedures for the Seneca Nation.	Violates Infringement and Preemption/ Balancing Tests.
§ 43. Qualifications of voters and eligibility to office. (Seneca)	1847	To define qualifications to vote in Seneca elections and eligibility to hold office in the Seneca Nation or	Violates Infringement and Preemption/ Balancing Tests.

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
		"Tonawanda Nation."	
§ 44 The treasurer. (Seneca)	1847	To define powers and duties of the treasurer of the Seneca Nation and the "Tonawanda nation."	Violates Infringement and Preemption/ Balancing Tests.
§ 45. The clerk. (Seneca)	1847	To define powers and duties of the clerk of the Seneca Nation and the "Tonawanda nation."	Violates Infringement and Preemption/ Balancing Tests.
§ 46. Peacemakers' courts. (Seneca)	1847	To define powers and duties of the peacemakers of the Seneca Nation and the "Tonawanda nation."	Violates Infringement and Preemption/ Balancing Tests.
§ 47. Record of peacemakers. (Seneca)	1847	Requires that the peacemakers be provided a record book by the council and that the clerk record all matters heard.	Violates Infringement and Preemption/ Balancing Tests.
§ 48. Costs and fees. (Seneca)	1847	Requires that the council fix the fees for surrogates, peacemakers, and marshals. Requires that costs always be awarded to prevailing party.	Violates Infringement and Preemption/ Balancing Tests.
§ 49. Incompetency of peacemakers. (Seneca)	1847	To define when and how peacemakers must recuse themselves from cases.	Violates Infringement and Preemption/ Balancing Tests.
§ 50. Appeals to council of Seneca Nation.	1847	Provides for appeals from the peacemakers courts to the council.	Violates Infringement and Preemption/ Balancing Tests.
§ 51. Appeals from peacemakers' court of the	1863	Provides for appeals from the peacemakers courts to the council.	Violates Infringement and Preemption/ Balancing Tests.

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
Tonawanda Nation.			
§ 52. Enforcement of judgments. (Seneca)	1847	To authorize enforcement of a money judgment rendered by a peacemakers' court by the justice of the peace (or other competent court), including seizure of the defendant's land and imprisonment.	Violates Infringement test, Preemption/ Balancing Tests, and 25 U.S.C. § 177.[7]
§ 53. The marshal. (Seneca)	1847	To define powers and duties of the marshal.	Violates Infringement and Preemption/ Balancing Tests.
§ 54. Prosecution of actions and disposition of recovery. (Seneca)	1845	To authorize the Seneca Nation and "Tonawanda Nation" to file suits in state courts, and to define subject matter jurisdiction and procedural requirements for such suits.	Violates Preemption/ Balancing Tests. Pre-empted by 25 U.S.C. § 233.
§ 55. Allotment of lands. (Seneca)	1847	To designate and proscribe use of common lands within the Allegany, Cattaraugus and Tonawanda territories, including allotment of Indian land to individuals.	Violates Preemption/ Balancing and Infringement tests, and 25 U.S.C. § 177.
§ 56. Trees and timber on reservations. (Seneca)	1847	To prohibit sale of timber from Allegany, Cattaraugus, or Tonawanda territories unless the timber is located on land owned by an Indian. To authorize	Violates Infringement and Preemption/ Balancing Tests.

[7] The portion of this law recognizing the legitimacy of tribal court decisions for enforcement within the State would not only not violate federal law, but may even be required by it. *See* 28 U.S.C. § 1738 (1994).

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
		the Seneca Nation Council to sell timber on its "wild lands."	
§ 70. Confirmation of nationality. (Seneca)	1845	To acknowledge that the Senecas at the Allegany and Cattaraugus territories "hold and possess" such lands as a "distinct community" "subject to the limitations provided by law."	Violates Infringement and Preemption/ Balancing Tests.[8]
§ 71. Exclusion of villages from reservations; lease of lands therein; certification of copies of leases granted by the Seneca Nation of Indians and recording thereof.	1881	(a) To authorize application of State law within those villages established by Congress in 1875, except no authorization to tax Indians not citizens of the U.S. (b) To treat leasehold interests in said villages as freehold estates under State law, unless held by an Indian, in which case Seneca Nation law shall apply. (c) To allow lessee to request a replacement copy of a lease lost by Seneca Nation clerk and to require said clerk to provide a new copy. (d) To validate copies of said leases recorded by county clerk.	(a) Violates *U.S. v. Forness*, 125 F.2d 928 (2d Cir. 1942); *John v. City of Salamanca*, 845 F.2d 37 (2d Cir. 1988). *See also* People v. Martin, 326 U.S. 496 (1946). (b) Authorized by *Hoag v. Cattaraugus County*, 667 N.Y.S.2d 520 (App. Div. 1997). (c) Violates Infringement and Preemption/ Balancing Tests. (d) Simply recognizes actions of Seneca Nation clerk and is thus lawful.
§ 72. The	1892	To define the powers and	Violates

[8] Enacted three years prior to the establishment of the Seneca Nation of Indians constitutional republic in 1848, this statute reflects the State's effort to facilitate the Seneca revolution by prohibiting any other government, i.e. the *Haudenosaunee* Confederacy, from having any authority over the Allegany and Cattaraugus territories.

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
president. (Seneca)		duties of the Seneca Nation president.	Infringement and Preemption/ Balancing Tests.
§ 73. General powers and duties of the council. (Seneca)	1892	To define the powers and duties of the Seneca Nation council.	Violates Infringement and Preemption/ Balancing Tests.
§ 75. Vacancies in elective offices. (Seneca)	1847	To define procedure for filling vacancies in Seneca Nation offices.	Violates Infringement and Preemption/ Balancing Tests.
§ 78. Leases and rights of way. (Seneca)	1961	To authorize the Seneca Nation and individual Senecas to lease lands in which it, or they, have an interest.	Violates Preemption/ Balancing and Infringement tests, and 25 U.S.C. § 177.
§ 80. General powers and duties of council. (Tonawanda Seneca)	1871	To define powers and duties of the Tonawanda Nation council.	Violates Infringement and Preemption/ Balancing Tests.
§ 81. Attorney. (Tonawanda Seneca)	1863	To authorize the Dept. of Social Services to appoint an attorney for the "Tonawanda Nation."	Violates Infringement and Preemption/ Balancing Tests.
§ 82. Vacancies in election offices. (Tonawanda Seneca)	1863	To define procedures for filling vacancies in "Tonawanda Nation" offices.	Violates Infringement and Preemption/ Balancing Tests.
§ 83. Leases for agricultural purposes. (Tonawanda Seneca)	1863	To authorize Tonawanda Senecas to lease land, with council approval, to non-Indians for agricultural purposes and to define penalties for violation.	Violates Infringement and Preemption/ Balancing Tests.

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
§ 84. Leases for the extraction of minerals, oil or natural gas. (Tonawanda Seneca)	1892	To authorize "Tonawanda Nation" council to lease land to non-Indians to extract minerals, oil, or natural gas.	Violates Infringement and Preemption/ Balancing Tests.
§ 86. Payment of annuity. (Tonawanda Seneca)	1863	To authorize payment of proportionate share of annuity payable under treaty of Sept. 12, 1815.	The obligation incurred under this treaty was not authorized by federal law.[9] *See* 25 U.S.C. § 177.
§ 87. Indian trespasses on common land. (Tonawanda Seneca)	1863	To authorize removal of Tonawanda Senecas from "Tonawanda Nation" common lands.	Violates Infringement and Preemption/ Balancing Tests.
§ 88. Encroachment by Indians on occupied lands. (Tonawanda Seneca)	1863	To define procedures for the removal of Indians on the Tonawanda territory by the peacemakers.	Violates Infringement and Preemption/ Balancing Tests.
§ 89. Court of impeachment. (Seneca)	1892	To define procedures for impeachment proceedings within the Seneca Nation.	Violates Infringement and Preemption/ Balancing Tests.
§ 90. Poles and wires on reservation. (Tonawanda Seneca)	1892	To authorize "any company" to "erect poles and wires, and other necessary fixtures" across Tonawanda Seneca lands.	Violates Preemption/ Balancing and Infringement tests, and 25 U.S.C. § 177.
§ 95. Allotment of lands. (Tuscarora)	1854	To authorize council of chiefs of Tuscarora Nation to allot tribal lands.	Violates Preemption/ Balancing and Infringement tests, and 25 U.S.C.

[9] The legality of this treaty is currently subject to litigation in federal court. *See* Seneca Nation of Indians v. New York, 178 F.3d 95 (2d Cir. 1999).

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
			§ 177.
§ 96. Consent of chiefs to sale of timber. (Tuscarora)	1854	To authorize Tuscarora Indians to sell timber on their allotments for purposes of cultivation.	Violates Infringement and Preemption/ Balancing Tests.
§ 97. Indian trespassers. (Tuscarora)	1854	To prohibit Indians from cutting timber on Tuscarora lands subject to a penalty of twice the value of the timber.	Violates Infringement and Preemption/ Balancing Tests.
§ 98. Illegal sales of timber and trees. (Tuscarora)	1854	To invalidate timber sales not authorized by the Tuscarora Nation chiefs. To authorize chiefs to sell timber located on "wild lands." To define penalties for violations.	Violates Infringement and Preemption/ Balancing Tests.
§ 101. The clerk. (St. Regis Tribe)	1956	To define powers and duties of the clerk of the "St. Regis Tribe."	Violates Infringement and Preemption/ Balancing Tests.
§ 102. Allotment of lands. (St. Regis Tribe)	1892	To authorize council of chiefs of "St. Regis Tribe" to allot tribal lands.	Violates Preemption/ Balancing Tests and Infringement test, and 25 U.S.C. § 177.
§ 103. Consent of chiefs to sale of timber. (St. Regis Tribe)	1892	To authorize "St. Regis" Indians to sell timber on their allotments for purposes of cultivation.	Violates Infringement and Preemption/ Balancing Tests.
§ 104. Indian trespassers. (St. Regis Tribe)	1892	To prohibit Indians from cutting timber on "St. Regis" tribal lands subject to a penalty of twice the value of the timber.	Violates Infringement and Preemption/ Balancing Tests.
§ 105. Illegal sales of timber, trees and	1892	To invalidate timber and stone sales not authorized by the chiefs	Violates Infringement and Preemption/

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
stone. (St. Regis Tribe)		of the "St. Regis Tribe." To authorize chiefs to sell timber located on "wild lands." To define penalties for violations.	Balancing Tests.
§ 106. Jurisdiction of council to determine disputes. (St. Regis Tribe)	1892	To authorize chiefs of the "St. Regis Tribe" to hear trespass cases and to define conflicts of interest.	Violates Infringement and Preemption/ Balancing Tests.
§ 107. General powers of council. (St. Regis Tribe)	1892	To define the powers and duties of the council of the "St. Regis Nation."	Violates Infringement and Preemption/ Balancing Tests.
§ 108. Qualifications of voters. (St. Regis Tribe)	1892	To define qualifications of voters to elect officials of "St. Regis Tribe" who, e.g. must live on the "American side of the line dividing the United States and Canada."	Violates Infringement and Preemption/ Balancing Tests.
§ 109. Officers of tribes. (St. Regis Tribe)	1892	To provide for the continuation of officials of the "St. Regis Tribe" and to define powers and duties of subchief.	Violates Infringement and Preemption/ Balancing Tests.
§ 110. Election of officers. (St. Regis Tribe)	1892	To define time and location of election of officials of the "St. Regis Tribe" and to establish officials to be elected.	Violates Infringement and Preemption/ Balancing Tests.
§ 111. Conduct of elections. (St. Regis Tribe)	1892	To define procedures governing the election of officials of the "St. Regis Tribe," e.g. for the Franklin County attorney or sheriff and the sitting chiefs to serve as presiding officers.	Violates Infringement and Preemption/ Balancing Tests.

STATUTE (25 N.Y. INDIAN LAW § ___)	YEAR ENACTED	PURPORTED PURPOSE	REASON FOR INVALIDATION
§ 112. Canvass of votes. (St. Regis Tribe)	1892	To direct the Franklin County attorney or sheriff and the sitting chiefs to count the votes cast in the election of the officials of the "St. Regis Tribe."	Violates Infringement and Preemption/ Balancing Tests.
§ 113. Vacancies. (St. Regis Tribe)	1892	To define procedures for filling vacancies in "St. Regis Tribe" offices.	Violates Infringement and Preemption/ Balancing Tests.

TABLE 2
FEDERALLY VALIDATED NEW YORK STATE INDIAN LAWS
DEALING WITH THE *HAUDENOSAUNEE*

STATUTE (25 N.Y. INDIAN LAW § ___)	DATE ENACTED	PURPORTED PURPOSE	REASON VALID
§ 5. Actions in state courts.	1813	To authorize actions involving Indians to be brought in state court.	Authorized by 25 U.S.C. § 232.
§ 6. Exemption of reservation lands from taxation.	1857	Prevents taxation on Indian land so long as it is owned by the Indian nation affected.	Regulates non-Indian conduct outside of Indian territory. Federal law prevents state taxation on Indian land.[10]
§ 8. Intrusions on tribal lands.	1821	Prevents settlement on Indian lands and authorizes county judges, sheriffs and district attorneys to remove intruders.	Regulates non-Indian conduct on Indian land and violates Infringement test. However, authorized by *Cutler v. Dibble.*
§ 11. Trespasses on tribal lands.	1841	To authorize district attorney to bring actions against non-Indians for trespass on Indian lands.	Regulates non-Indian conduct on Indian land and violates Infringement test, however, most likely authorized by *Cutler v. Dibble.*
§ 11-a. Recovering possession of reservation land.	1958	To authorize tribal leaders to maintain action to recover possession of their land from non-Indians.	Authorized by 25 U.S.C. § 233 and *Oneida Nation v. Burr.*
§ 12-a. Indian	1971	Protects cemeteries not	Regulates conduct

[10] *See The New York Indians*, 72 U.S. (5 Wall.) 761 (1866).

STATUTE (25 N.Y. INDIAN LAW § ___)	DATE ENACTED	PURPORTED PURPOSE	REASON VALID
cemetery or burial grounds.		located within any Indian territory as places of "historic interest."	outside of Indian territory.[11]
§ 15. Freedom from toll or ferriage.	1813	Allows *Haudenosaunee* to pass freely on any "turnpike" between Canandaigua and Buffalo Creek and on any ferry across the Niagara River.	Regulates conduct outside of Indian territory, most likely in satisfaction of a treaty or agreement obligation.
§ 26. Plank-road on reservation. (Onondaga)	1848	Allows Onondagas to pass freely on the Syracuse and Tully plank-road.	Regulates conduct outside of Indian territory, most likely in satisfaction of a treaty or agreement obligation.
§ 57. Offering or giving bribes prohibited. (Seneca)	1880	To prohibit the taking of bribes by Seneca Nation officials and to impose a punishment of five years in prison and/or a fine of $1,000.	Authorized by 25 U.S.C. § 232.
§ 58. Acceptance of bribes prohibited. (Seneca)	1880	To prohibit the acceptance of bribes by Seneca Nation officials and to impose a punishment of forfeiture and disqualification from office, one year in jail and/or a $1,000 fine.	Authorized by 25 U.S.C. § 232.
§ 59. Conveying bribes prohibited. (Seneca)	1880	To prohibit third parties from facilitating the bribing of Seneca Nation officials.	Authorized by 25 U.S.C. § 232.

[11] This statute may be affected by federal cultural preservation law. *See* Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048.

STATUTE (25 N.Y. INDIAN LAW § ___)	DATE ENACTED	PURPORTED PURPOSE	REASON VALID
§ 60. Offenders competent witnesses; witnesses' immunity. (Seneca)	1880	To establish that any person in violation of §§ 57-59 is a competent witness against any other person so charged. To authorize grants of immunity from prosecution.	Authorized by 25 U.S.C. § 232.
§ 77. Policemen at annual fair. (Seneca)	1863	To authorize board of commissioners of the "Niagara Frontier Police District", upon the written request of five Seneca Nation councilors, to detail policemen to "preserve peace and good order" at the annual fair held at Cattaraugus, subject to payment of expenses by the Nation.	Authorized by 25 U.S.C. § 232.
§ 100. Payment of annuity. (St. Regis Tribe)	1956	(a) To authorize Department of Social Welfare to pay to clerk of the St. Regis Tribe "any amount due . . . pursuant to the terms of existing agreements." (b) To require bond in favor of Tribe and allow Tribe to file action in the event of misconduct by clerk. To require clerk to prepare a tribal roll.	(a) Authorized to the extent such agreements are lawful in accordance with federal law. (b) Violates Infringement and Preemption/ Balancing Tests.