

LEGAL PLURALISM AND TRIBAL CONSTITUTIONS

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I. INTRODUCTION

What do pigs roaming the streets of New York City during the first half of the nineteenth century and tribal constitutions have in common? The most obvious (and often the most correct) answer is, undoubtedly, “absolutely nothing.” However, tribal advocates,¹ particularly those concerned with the role of a constitution within a tribal community, may wish to reconsider their answer and might turn their attention to New York’s early nineteenth century pigs in order to better understand the legal and political contexts in which they, and the tribal nations they serve, operate.

The pigs, or, more precisely, the pigs’ owners and the city of New York offer an example of legal pluralism; an idea that should be familiar to those who operate within the wide field of Indian law. The

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1. I use the term “tribal advocate” to denote any person or entity that seeks to expand tribal sovereignty and benefit the lives of Native peoples. The term is not meant to exclude any person or thing on the basis of race or tribal affiliation. Rather, it is meant to be a broadly inclusive term that encompasses, but is not limited to, lawyers, legal historians, other academics, and, of course, tribal nations and tribal members.

concept of legal pluralism, as explained by legal historian Hendrik Hartog, is the recognition that there is not one uniform, monolithic American law to which all of us ascribe but rather that the law can be defined differently by different people and that it can hold more than one meaning at a time. By gaining a greater appreciation of the multiplicities of perspectives on the law, one can more readily understand how the law actually operates in the world in which we live and what it means for us today.

Multiple and contested meanings of law and legal texts are not rare in Indian law. In fact, the starkest examples that such contestations are par-for-the-course are the Indian canons of construction. In the case of treaties (and in other instances such as tribal court decisions), lawyers for tribal nations argue passionately and vehemently in favor of a tribal perspective of legal events which often differ greatly from the perspective of other players in those events. Tribal advocates, whether they use the particular terminology of legal pluralism or not, are constantly engaged in the process of seeking to get courts, politicians, and others to recognize the pluralism of Indian law and to privilege tribal understandings of that law. Additionally, those seeking to become tribal advocates are constantly reminded by scholars and others that it is vitally important for the neophyte to learn as much about a community and its history as possible.

A notable exception exists. Tribal constitutions, while receiving a growing amount of scholarly attention recently, have generally been ignored or dismissed when considering the legal histories of tribal nations. Most often, tribal constitutions are treated as remnants of the Indian Reorganization Act of 1934 (IRA)² and are, depending on one's perspective, yet another colonial imposition or a positive move away from the assimilationist policies of the past. This casual attitude toward these important documents is unfortunate because it neglects both the tribal agency that was expressed in the decision to adopt a constitution (whether it be an IRA constitution or not) and the consequences of that decision. A legal pluralist reexamination of tribal constitutions, one that seeks to understand a tribal community's decision to adopt (or reject) a constitution, can help to better explain the place of a constitution within a tribal community, its legacy, and its potential for the future. Tribal advocates and others need to begin seriously considering tribal constitutions not just as functional tools

2. Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984-88 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2006)).

that seek to address present-day concerns (which, of course, they are), but also as historical documents which open a new perspective on a tribal community and the challenges it faces in its governance.

One particular tribal nation's journey can help illuminate this path. This article will examine the adoption of the first tribal constitution of the Turtle Mountain Band of Chippewa Indians. A legal pluralist reading of the ratification of the document in 1932 will reveal several important facets about the birth of constitutionalism within the community that help to explain both why the tribal constitution has held such promise within the community and also why it has been so frustrating.

II. A LEGAL PLURALIST APPROACH

In a notable 1985 law review article, legal historian Hendrik Hartog examined the presence of pigs in the streets of New York in the first half of the 1800s.³ He noted that, at the time, “[p]igs were an ordinary part of the American urban landscape.”⁴ The owners of the animals would let them roam the streets of the city to fatten up for future use.⁵ In one sense, the pigs and the people of New York existed in a relationship that had mutual benefits; the pigs performed as street cleaners, eating the refuse and waste of the city streets, and the people of the city ate the pigs.⁶ While there were benefits to this arrangement, there were several disadvantages to letting the animals freely roam the streets. They were destructive, ill-tempered, and uncontrollable.⁷ According to Hartog, the pigs “systematically destroyed pavements, occasionally killed children, and behaved in public in ways that were inconsistent with even the relaxed standards of cleanliness and propriety of early modern urban street life.”⁸

Eventually, the negatives of allowing pigs to roam the streets began to outweigh the positives for many people. In 1809, the city began attempting to regulate and control the animals, and in 1816, the city began a more forceful effort to criminally sanction owners who continued the practice of letting their pigs walk about freely.⁹

3. Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899 (1985) (analyzing the inadequacies of conventional legal theory in explaining the 19th century criminalized pig problem in New York City).

4. *Id.* at 901.

5. *Id.* at 902.

6. *Id.* at 901.

7. *Id.* at 902.

8. *Id.*

9. *Id.* at 903.

The culmination of these efforts resulted in a court case that occurred in late 1818 when the mayor of New York initiated court proceedings against pig owners.¹⁰ The mayor's traditional duties at the time included serving as the judge of the Quarter Sessions Court which allowed him to hear a case against two individuals charged with allowing their pigs to run the streets.¹¹ One defendant did not offer a defense, was convicted, and was forced to pay a nominal fine.¹² The other defendant, a butcher named Christian Harriet (or Harriot), hired an attorney and sought to assert his presumptive right to keep his pigs in the streets.¹³ Despite his efforts, Harriet was found guilty¹⁴ and, one might naturally assume, a legal precedent was established.¹⁵

Regardless of the newly minted ruling, pigs continued to roam the street for years in the wake of the decision.¹⁶ Hartog states that, even into the late 1840s pigs were a presence on the city streets and were not fully removed until the cholera epidemic of 1849.¹⁷ It is this gap of time that interests Hartog. "It will, of course, surprise no one that the delegalization [sic] of keeping pigs in the streets did not eliminate pigs immediately from American city streets. But thirty years?"¹⁸

Hartog uses two different approaches to understand the Harriet case and the legality of the pigs during the first half of the nineteenth century. The first, which I will refer to as the traditional approach, is one that is most familiar to lawyers and those doing legal research. According to Hartog, this approach is, "the ordinary practice of American legal history writing, [which] regards the case—and cases generally—as a text expounding and developing legal doctrine."¹⁹ The second, which I will refer to as the legal pluralist approach, is one that should be familiar to tribal advocates who constantly seek to privilege tribal understandings and interpretations. According to Hartog, the legal pluralist approach is "characteristic of the practice of some social anthropology and some social history, [and] visualizes the case as an instance or episode of conflict between contending

10. *Id.* at 904.

11. *Id.* at 904–05.

12. *Id.* at 905.

13. *Id.*

14. *Id.* at 906.

15. *Id.* at 919–20.

16. *Id.* at 921.

17. *Id.* at 920–24.

18. *Id.* at 921.

19. *Id.* at 899.

normative orders.”²⁰ Hartog’s purpose in applying both approaches is not to compare and contrast them in order to declare one superior to the other but rather to show how each can contribute to a greater understanding of the role of law in the lives of individuals.²¹ “I think that each of these strategies reflects a distinctive legal vision, true in part to the ways Americans have experienced and argued about law for the past two centuries. We cannot choose between them without denying important features of our legal culture.”²²

Applying the traditional approach, Hartog dissects the case, noting that Harriet’s lawyer argued the court was overstepping its authority and was seeking to make law in this matter.²³ Nobody seemed much taken with that particular line of reasoning; in fact, the prosecutor emphasized the need to take action and, according to Hartog, stressed that, “[w]ho should decide was less important than that someone should.”²⁴ Hartog also questioned why Harriet’s lawyers did not argue in favor of a customary right to keep the pigs in the street, eventually concluding that such an argument would have been harmful to the case and that the role of custom in the law was shifting at this time.²⁵ Ultimately, Hartog concludes that the purpose of the case was to establish the illegality of allowing one’s pigs to roam the streets.²⁶ “The point was to establish a legal principle”²⁷ Under a traditional approach reading, the efforts of the mayor and the prosecutor were fruitful. “[F]rom the perspective of what most of us think of as law—it may well be that the case succeeded in establishing that principle.”²⁸

And yet, pigs roamed the streets for several decades after the ruling.²⁹ Their continued presence, according to Hartog, was not an example of wanton lawlessness by a few rogue pig owners but rather a fairly regular practice that was tolerated even after it was declared illegal.³⁰ “Keeping [pigs] in the streets was a wrong . . . but also something close to an inevitable fact of municipal life.”³¹ “[A]s far as I

20. *Id.*

21. *Id.* at 900.

22. *Id.*

23. *Id.* at 906.

24. *Id.* at 907.

25. *Id.* at 912–19.

26. *Id.* at 919.

27. *Id.*

28. *Id.*

29. *Id.* at 921.

30. *Id.*

31. *Id.* at 922.

can tell, pigs were kept openly and unashamedly in many parts of New York City throughout the first half of the 19th century.”³²

Hartog again raises the question of how to explain the persistent presence of the pigs.³³ Dissatisfied with the contemporary scholarly explanations,³⁴ Hartog traces the continuing struggle between adamant pig owners and a conflicted city. During the time between the original 1818 decision and the cholera epidemic of 1849 (which finally led to the permanent removal of pigs from the streets) the city of New York had to consider—and reconsider, often more than once—ordinances and plans to remove the pigs from the streets, petitions from pig owners to absolve them from sanctions, and questions as to whether certain wards might legally allow the pigs, among other issues.³⁵

Hartog then explains how a legal pluralist approach will allow historians, lawyers, and others to better understand the complex and variant legal status of pigs in the street.³⁶ This approach begins by reconceptualizing legal thought and the questions that are posed by legal scholars. Instead of seeking an indisputable articulation of the one true definition of the law through a linear analysis of case law, the legal pluralist recognizes the possibility of multiple and contested definitions.

As should be apparent, the question [of the legality of pigs in the street] does not admit a neutral, objective, singular answer, once we begin to think of pig keeping law as an arena of conflict, rather than as an unfolding text. . . . [A]ny attempt by us to answer the question retrospectively inevitably will end with numbers of competing answers.³⁷

Hartog is careful to note that a legal pluralist reading does not open the possibility of any relativist reading of the law that might suit

32. *Id.* at 923.

33. *Id.* at 924.

34. Hartog specifically attacks what he calls “gap analysis.” *Id.* According to Hartog, “gap analysis” assumes a separation between a legal norm and a social fact. *Id.* Hartog finds this type of reasoning unconvincing because it assumes a singular shared legal consciousness. *Id.* “Gap analysis rests on the presumed existence of a norm which in one way or another could have been enforced.” *Id.* He argues that the pigs in the streets of New York City show that such a norm does not exist in this instance (and presumably in many other instances as well). *Id.* at 924–25. “[T]here was no such shared consciousness on the question of the legitimacy of labeling pigs as nuisances throughout the first half of the 19th century.” *Id.* at 925.

35. *Id.* at 925–30.

36. *Id.* at 930–31.

37. *Id.* at 930.

an interested party, stating that “[t]he point is not that participants could make the law into anything they chose. Of course that was not the case. Parts of the law belonged to one’s antagonist.”³⁸ Yet, just exactly what the law was and whose side it favored were questions with different answers in different contexts. To illustrate that point, Hartog offers a hypothetical conversation between Oliver Wendell Holmes’ “bad man”—Hartog offers a pig owning “bad woman”—and a lawyer.³⁹ This “bad woman” is not emotionally invested or ideologically wedded to the idea of owning and raising pigs.⁴⁰ It just happens to be her current occupation,⁴¹ and, according to Hartog, “[a]ll she cares about are the ‘material consequences’ that the law may subject her to if she continues in her occupation.”⁴² Hartog’s synopsis of their hypothetical conversation reveals the diverse and contested nature of supposedly settled law:

What will she learn from her lawyer? On the one hand, he will tell her that her occupation may subject her to a criminal prosecution for maintaining a public nuisance, although he would certainly mention that in the only published prosecution the defendant was fined just one dollar and costs. There remains, as of 1831, a municipal ordinance which gives the almshouse commissioners authority to grab her pigs off the streets. But the common council has on several occasions reimbursed pig keepers for the loss of their property under the ordinance. And, the lawyer would note, a pig keeper whose pigs were snatched has recently successfully sued and been awarded damages for the loss of the swine. Whether or not that damage award could be sustained, the risk of governmental action would be highly dependent on where she lives. Some areas of the city are formally or informally exempted from enforcement. Finally, he might advise (although here he would come close to the boundaries of legal ethics) that her risk of being caught for keeping pigs in city streets is low in any event, because so many of her fellow New Yorkers are doing likewise, and because the resources of government are simply inadequate to the task of eradicating the pigs.⁴³

Thus, the “bad woman’s” decision on whether to keep her pigs

38. *Id.*

39. *Id.* at 930–31.

40. *Id.* at 930.

41. *Id.* at 930–31.

42. *Id.* at 931.

43. *Id.*

on the streets would depend on a variety of factors: her willingness to endure nominal sanctions, her desire to pursue action against the city should it seize her pigs, and the potential inability of the city to enforce its own laws.⁴⁴ In fact, she might not have even suffered those worries depending on what part of the city she lived, as what law there was that applied to pig keeping was, at best, irregularly applied or enforced. As stated by Hartog, “[t]he law did not embody one coherent policy. It constituted a number of conflicting policies, and the information [the hypothetical lawyer] could give his client was necessarily uncertain and incomplete.”⁴⁵ With the minimal resistance offered by the city and the forceful efforts and arguments offered by similarly situated citizens, it becomes clear how a pig owner in the first half of the nineteenth century could believe that she had a right to keep pigs in the streets. According to Hartog:

What made the keeping of pigs in the streets of New York City a right had nothing to do with its objective characteristics or functions. It was, rather, the fact that a politically active and insistent community of New Yorkers believed pig keeping to be their right and, also, that those who opposed the social practice were (for a significant period of time) unwilling and unable to do what was necessary to stop it. The legal right to keep pigs in New York City’s streets was constituted both by the activities of the right’s defenders and by the relative passivity and ineffectuality of its opponents.⁴⁶

A reading of these circumstances under a traditional approach would leave one stuck in 1818 with no way to account for the continued presence of the pigs in the streets for decades afterwards. As Hartog notes, this is a fundamental problem with the way that lawyers and legal scholars approach the law. “The problem is that our conventional legal theory makes it impossible to account for the legal consciousness of a group like the pig keepers of New York City.”⁴⁷ In fact, Hartog essentially states that the appeal of the traditional approach is that it actively suppresses a legal pluralist approach. “[The traditional approach] allows us to maintain our valued vision of law as a (single) text. But in doing so it represses the existence and the relative autonomy of competing and conflicting socially constituted visions of legal order.”⁴⁸

44. *Id.*

45. *Id.*

46. *Id.* at 933.

47. *Id.* at 934.

48. *Id.*

The benefit, of course, of a legal pluralist approach is that it is able to account for the continued presence of the pigs in the streets and the various interpretations of the law asserted by pig owners, the city, and other interested parties. Without neglecting the law that is recognized by the traditional method, legal pluralism as outlined by Hartog is more able and more ready to accept and address the possibility that the law on the books does not and cannot account for various differing and legitimate legal perspectives. Hartog states, “[the legal pluralist method] depends on a recognition of the implicit pluralism of American law—its implicit acceptance of customs founded on multiple sources of legal authority.”⁴⁹

To the tribal advocate, the legal pluralist approach should not only be appealing, it should also be familiar. Tribal advocates have long been calling for an approach to law that more readily encompasses indigenous perspectives, knowledge, and understandings. Scholar and activist Vine Deloria Jr. was an early leader in the vigorous charge to infuse the larger American society (including the law, government, and academia) with a tribal worldview. Over forty years ago, Deloria wrote in his seminal book, *Custer Died For Your Sins*, that “[t]he problems of the Indian have always been ideological rather than social, political, or economic.”⁵⁰ As such, the real challenge for tribal peoples is to win over the minds of non-tribal peoples. Admittedly, he predicted a little too optimistically that, “[i]t would be fairly easy . . . with a sufficient number of articulate young Indians and well-organized community support, to greatly influence the thinking of the nation within a few years.”⁵¹ Nonetheless, the rules of engagement were clear. Native peoples needed to tell their stories, explain their views, and intellectually engage with non-Natives in a direct effort to influence American culture in such a way that it could more fairly and readily respond to and even learn from Indian Country. Tribal advocates must find a way to privilege the tribal perspective. To that end, Deloria also noted that “it is vitally important that the Indian people pick the intellectual arena as the one in which to wage war.”⁵²

Other scholars and tribal advocates have echoed this message, particularly in the context of the law. One particularly strong

49. *Id.* at 935.

50. VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 256 (1969).

51. *Id.* at 257.

52. *Id.*

advocate for a pluralist vision of Indian law has been legal scholar Robert A. Williams, Jr. Williams has argued that incorporating tribal perspectives into Indian law would more easily reveal both the strengths and weaknesses of the field. “Developing a greater appreciation for the contributions of American Indian legal visions to the Indian’s persistence opens up new vistas for understanding and explaining how U.S. law works and does not work to ensure the survival and development of Indian tribalism in modern American society.”⁵³ Williams’ argument does not stop there, however. He stated that infusing American law with tribal perspectives could benefit not just the lives of tribal peoples, it could also benefit American society as a whole. “Just as significant, understanding how these American Indian legal traditions have worked to help perpetuate Indian tribalism in America might also assist us in beginning to understand how U.S. law is enabled to achieve racial justice more generally.”⁵⁴

Deloria and Williams are far from the only tribal advocates to see the potential of incorporating tribal knowledge and understandings into law and academia for Indian Country and beyond. Scholar and activist Taiaiake Alfred argues that tribal perspectives can prevail in the academic realm and that tribal leaders need to take advantage of opportunities that emerge from the scholarly discourse, stating that “indigenous people have succeeded in altering non-indigenous people’s perceptions through dialogue in institutions of higher learning.”⁵⁵ “As a result,” Alfred argues, “empathy for the indigenous experience, and a political space for change” had emerged which he urged that the “Native leaders must capitalize on.”⁵⁶

Law professor and tribal court justice Frank Pommersheim argues that American courts should take guidance from tribal courts as it concerns expressions of tribal sovereignty.⁵⁷ But perhaps, as Pommersheim also puts forth, reassertion of the sovereignty doctrine could be greatly augmented “if the courts pay close attention to the articulation of tribal sovereignty as it emanates from tribal court jurisprudence. This emerging jurisprudence contributes significantly

53. ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800*, at 10 (1997).

54. *Id.*

55. TAIAlAKE ALFRED, *PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO* 132 (1999).

56. *Id.*

57. FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 190 (1995).

in advancing the tribal voice as part of the judicial dialogue on the parameters and contemporary meaning of tribal sovereignty.”⁵⁸

Political scientist David E. Wilkins and anthropologist K. Tsianina Lomawaima perhaps put the tribal advocate’s will to privilege tribal knowledge and understandings in the greater American (in this case, legal) context most succinctly: “mutual respect demands that indigenous perspectives achieve their rightful place in federal Indian policy and law.”⁵⁹ In any case, each of these scholars, and many other tribal advocates, are explicitly arguing for the type of pluralist reading that Hartog demonstrates is necessary to most fully understand and articulate the complex, layered, and contested arena of conflict that is the law.

To a certain extent, tribal advocates have been somewhat successful in their efforts, as Indian law already embraces some form of a legal pluralist approach. The Indian canons of treaty construction are the most prominent example of the limited inroads that tribal advocates have been able to make in Indian law. The three canons—ambiguities in treaties must be resolved in favor of Indians, treaties must be interpreted as Indians would have understood them at the time they were made, and treaties must be liberally construed in favor of Indians⁶⁰—require that American courts adopt the perspective of tribal peoples in making their rulings. This tribal perspective does not come from the case law and precedent favored by the traditional approach; rather it emerges from tribal sources and from methodological approaches from other disciplines that are available under the legal pluralist approach.

Perhaps the most famous treaty case of recent vintage, *Minnesota v. Mille Lacs Band of Chippewa Indians*,⁶¹ offers a clear example of a successful legal pluralist approach to Indian law. The Mille Lacs Band was suing the state in an effort to reclaim the Band’s treaty right to hunt and fish on its ancestral lands, and was confronted with a serious problem: the major sources of evidence, such as treaty journals and other historical records, were written by non-Natives.⁶² Marge

58. *Id.*

59. DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 250 (2001).

60. See Stephen L. Pevar, *THE RIGHTS OF INDIANS AND TRIBES* 35 (American Civil Liberties Union Handbook Series, 1983).

61. 526 U.S. 172 (1999) (holding that land use rights guaranteed to the Chippewa Indians in an 1837 treaty were not extinguished by a later executive order, treaty, or statute which did not specifically address those rights).

62. See Marge Anderson, *Foreword* to *FISH IN THE LAKES, WILD RICE, AND GAME IN*

Anderson, the Chief Executive of the Band during the case, noted about the available evidence that, “[t]hese documents help describe the historical circumstances as non-Indians perceived them, and offer insights into non-Indian intentions, but by themselves offer little insight into Ojibwe understanding of the treaties or surrounding circumstances.”⁶³ To rectify this issue and to offer the tribal perspective, the Band was able to assemble a small army of academics to reinterpret the sources and to add tribal voices to the proceedings. The collection of academics included scholars in the fields of ethno-history, anthropology, the law, and even a linguist who was able to explain how members of the Mille Lacs Band would have understood the legal language of the treaty at the time it was signed.⁶⁴ The impressive efforts of the scholars were instrumental in earning the tribal nation a victory in the Supreme Court and in showing how a legal pluralist approach can succeed in an American court.⁶⁵

III. LEGAL PLURALISM AND TRIBAL CONSTITUTIONS

The legal pluralist approach has long been a model for which tribal advocates have fought and it has proven to be effective in American courts when those courts have been persuaded to move beyond the traditional approach. In fact, one might argue that the central goal of any tribal advocate is to fight for a pluralist approach (legal or otherwise) within the larger society in which tribal peoples and nations live. All of which makes the relatively limited exploration and explanation of tribal constitutionalism all the more baffling.⁶⁶ Whereas the legal pluralist approach has been utilized somewhat effectively as it concerns treaties to explain tribal knowledge and

ABUNDANCE: TESTIMONY ON BEHALF OF MILLE LACS OJIBWE HUNTING AND FISHING RIGHTS, at vii–ix (James M. McClurken ed. 2000).

63. *Id.*

64. *Id.*

65. *Id.*

66. Although far less thorough than it needs to be, the state of scholarship on tribal constitutionalism has been recently expanding. A recent text has been a step in the right direction. David E. Wilkins has compiled several documents of tribal governance that span several centuries into one anthology. Each document has a short introduction that provides some information into the document’s background and origin. *See generally* DAVID E. WILKINS, DOCUMENTS OF NATIVE AMERICAN POLITICAL DEVELOPMENT (2009) (compiling and commenting on various historical Native American documents). Nonetheless, Wilkins notes that the anthology is just a start. “It is only a beginning, however, because the field is so vast, the native nations are so diverse, and the data—both oral and recorded—are not as available as one would like.” *Id.* at 1.

understandings to a broader audience and to create a greater possibility of victory in American courts, it has been underutilized to explore the history and legacy of tribal constitutions.

I have argued elsewhere that the scholarship on tribal constitutionalism exists in a colonialist/revolutionary dialectic.⁶⁷ I hope to expand on this idea in future scholarship; however for the purposes of this article, it is important to understand that the colonialist/revolutionary dialectic has two main, troubling characteristics. First, tribal constitutionalism is treated or is considered almost exclusively as if it emerged from the Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act.⁶⁸ This is simply not true. As noted by Felix Cohen—perhaps the most influential lawyer to have a hand in Indian law in the twentieth century—in the original edition of his famous handbook, “[t]he writing of Indian constitutions under the Wheeler-Howard Act of June 18, 1934, is therefore no new thing in the legal history of this continent.”⁶⁹ The second troubling characteristic of the dialectic emerges from the first. Since the focus of scholarly debate is almost exclusively on the IRA and its progenitor John Collier, such debate has generally settled into a question of the efficacy of the IRA and IRA constitutions. On the “colonialist” side of the dialectic, scholars argue that the IRA has forced a foreign form of government on tribes, and that constitutionalism is another form of colonialism.⁷⁰ On the “revolutionary” side, scholars argue that the IRA was a positive development in Indian Country that was not allowed to fulfill its potential.⁷¹ Even scholars who write about specific

67. See Keith Richotte, Jr., “We the Indians of the Turtle Mountain Reservation...” Rethinking Tribal Constitutionalism Beyond the Colonialist/Revolutionary Dialectic (June 1, 2009) (unpublished Ph.D. dissertation, University of Minnesota) (on file with author).

68. Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984-88 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (2006)).

69. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 129 (1941).

70. For example, historian Graham D. Taylor argues that “[t]he reforms of the Indian New Deal failed to endure because, in the last analysis, they were imposed upon the Indians, who did not see these elaborate proposals as answers to their own wants and needs.” GRAHAM D. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM: THE ADMINISTRATION OF THE INDIAN REORGANIZATION ACT, 1934-45, at xiii (1980).

71. For example, Vine Deloria, Jr. and political scientist Clifford M. Lytle argued that “it is important to recognize that, given the decades of erosion traditional cultures have suffered and the sparsity of viable alternatives available in the twentieth century, the present organization of tribal governments is not necessarily an unreasonable compromise between what might have been and what was possible to accept.” VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 19 (University of Texas Press 1998) (1984).

tribal constitutions and communities fall into this trap.⁷²

The discourse concerning tribal constitutions is unnecessarily limited and would benefit from a legal pluralist approach. The legal pluralist approach would place tribal communities at the center of their constitutional history by asking why a tribal nation voted to adopt a constitution. This vital question is the key to gaining a deeper appreciation of the legacy of these important documents within tribal communities. Under the legal pluralist approach, tribal constitutions would be treated not just as present-day tools to be evaluated on their functionality,⁷³ but also as historical documents with their own lives and origins that tell their own stories about their places within tribal nations and the consequences of their adoptions. The legal pluralist approach also requires an analysis of sources that are generally

72. Two otherwise excellent books that follow this pattern are anthropologist Thomas Biolsi's *Organizing the Lakota* and historian Akin Reinhardt's *Ruling Pine Ridge*. Both Biolsi and Reinhardt make clear the failings of the tribal constitutions adopted under the IRA. Biolsi is particularly adept at revealing the level of control that the IRA maintained both before and after the adoption of constitutional governments on Pine Ridge and Rosebud. Yet, the main focus for both scholars is upon the tribal constitutions themselves and their consequences. Neither Biolsi nor Reinhardt critically examine why the tribal members at the center of their studies chose to ratify their constitutions. At best, they provide perfunctory explanations about tribal behavior. Biolsi states, "Lakota people did not understand the IRA when they went to the polls in 1934 to vote on it. It was probably their (erroneous) belief that generous material benefits would accrue to them which accounted for the positive votes on the IRA on Pine Ridge and Rosebud." THOMAS BIOLSI, *ORGANIZING THE LAKOTA: THE POLITICAL ECONOMY OF THE NEW DEAL ON THE PINE RIDGE AND ROSEBUD RESERVATIONS* 83-84 (1992). Biolsi provides other such glimpses into the possible rationales for ratification but never addresses the issue directly. Reinhardt briefly acknowledges the potential benefit of the IRA, thereby implicitly addressing its appeal for tribal peoples, before quickly refocusing on his criticism of the legislation. "[T]he IRA certainly had its supporters, on Pine Ridge Reservation and elsewhere. This support is understandable, as some important and positive accomplishments have stemmed from the Indian New Deal. Nonetheless, the IRA's flaws, deep and indelible, are undeniably amplified on Pine Ridge." AKIM D. REINHARDT, *RULING PINE RIDGE: OGLALA LAKOTA POLITICS FROM THE IRA TO WOUNDED KNEE* 11 (2007). Neither scholar adequately addresses the agency expressed by tribal peoples in voting affirmatively on the IRA constitutions and consequently on constitutionalism in general.

73. I would hasten to add, as Hartog does, *supra* note 3, that I am not advocating that scholars choose one methodology over another. Studies concerning the functionality of tribal constitutions in a present-day context have become more numerous and are vitally important. See generally *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* (Miriam Jorgensen ed. 2007) (discussing how tribes are rewriting constitutions and organizing new governance structures to generate greater influence over their own tribal affairs). Rather, like Hartog, I am arguing that we need to add the legal pluralist approach to our full range methodological tools to more fully understand the operation of constitutions in tribal communities.

outside of the scope of those operating under the traditional method, including archive records, newspaper accounts, and oral histories, to name a few. Tribal advocates of all kinds, whether they be lawyers, academics, or tribal members, would benefit from this type of analysis because it would give them a greater understanding of what the constitution has meant to the community and how that affects contemporary tribal life.

An analysis of the first tribal constitution of the Turtle Mountain Band of Chippewa Indians illustrates how the legal pluralist method can expand the depth of knowledge about tribal constitutionalism. Turtle Mountain adopted its first constitution in 1932, before the IRA became law. The tribal nation did consider the IRA, but ultimately rejected it. Interestingly, pre-IRA constitutions were not as rare as the colonialist/revolutionary dialectic would leave one to believe. All of which raises the question that sits at the heart of a legal pluralist approach to tribal constitutionalism: why did the people of Turtle Mountain adopt their first constitution in 1932?

IV. PRECURSORS TO THE TRIBAL CONSTITUTION

The Turtle Mountain Band of Chippewa Indians is a community with a present day enrollment of about 30,000 and is located on a small reservation in north-central North Dakota. The small size of the six-by-twelve mile reservation was a contributing factor to the community's decision to adopt a constitution, as was the heavily mixed-blood population of the tribal nation.

The story of Turtle Mountain tribal constitutionalism begins with the origin of the community itself. The Turtle Mountain Band of Chippewa Indians first came into being around the turn of the nineteenth century, as Ojibwe peoples moved westward from the woodlands around the Great Lakes to the prairies.⁷⁴ Although relative newcomers, the Ojibwe who moved to the prairies quickly made the area their home.⁷⁵ The early center of life and activity for this new

74. For a thorough account of this migration that seeks to more fully explore and understand the tribal decision to move westward, see generally LAURA PEERS, *THE OJIBWA OF WESTERN CANADA, 1780 TO 1870* (1994). Although the title of the book ostensibly limits the focus to Canada, the historical time period of the book extends to before there was a clear boundary between the United States and Canada; additionally, it covers a time when Ojibwe peoples moved freely across what was to become that border.

75. There are a number of noteworthy studies that have explored the early history of Turtle Mountain, including the early migration and development of the tribal nation. Those studies include the following: Patricia C. Albers, *Plains Ojibwa, in*

group—who came to be labeled by scholars as Plains Ojibwe—was originally at Pembina, which is located in what is now the far northeastern corner of North Dakota.⁷⁶ Not long thereafter, groups of Plains Ojibwe continued to move farther west.⁷⁷

Pembina became a center of fur trade activity and a cultural space where peoples of different cultures came together.⁷⁸ The Plains Ojibwe who centered around the area came to be known as the Pembina Band, and they were joined by members of other tribal nations, European fur traders, and Métis peoples.⁷⁹ Defined more by who they were not than who they were, the Métis were the product of the blending of European and Native peoples and lifestyles.⁸⁰ They

13 HANDBOOK OF NORTH AMERICAN INDIANS 652 (2001); AUN NISH E NAUBAY (PATRICK GOURNEAU), HISTORY OF THE TURTLE MOUNTAIN BAND OF THE CHIPPEWA INDIANS (9th ed. 1993); Gregory Scott Camp, *The Dispossessed: The Ojibwa and Métis of Northwest North Dakota*, 69 N.D. HIST.: J. N. PLAINS 62 (2000) [hereinafter *The Dispossessed*]; Gregory S. Camp, *The Turtle Mountain Plains-Chippewas and Metis, 1797-1935* (May, 1987) (unpublished Ph.D. dissertation, University of New Mexico) (on file with Zimmerman Library, University of New Mexico); Gregory S. Camp, *Working Out Their Own Salvation: The Allotment of Land in Severalty and the Turtle Mountain Chippewa Band, 1870-1920*, 14 AMERICAN INDIAN CULTURE AND RESEARCH JOURNAL 19 (1990) [hereinafter *Working Out Their Own Salvation*]; David P. Delorme, "Emancipation" and the Turtle Mountain Chippewas, AM. INDIAN, Spring 1954, at 11; John Hesketh, *History of the Turtle Mountain Chippewa*, in 5 COLLECTIONS OF THE STATE HISTORICAL SOCIETY OF NORTH DAKOTA (1923); Harold Hickerson, *The Genesis of a Trading Post Band: The Pembina Chippewa*, 3 ETHNOHISTORY 298 (1956); JAMES H. HOWARD, THE PLAINS-OJIBWA OR BUNGI: HUNTERS AND WARRIORS OF THE NORTHERN PRAIRIES WITH SPECIAL REFERENCE TO THE TURTLE MOUNTAIN BAND (1965) [hereinafter HOWARD, THE PLAINS-OJIBWA OR BUNGI]; Les LaFountain, Orie Richard & Scott Belgarde, *Who I Am: A Guide To Your Turtle Mountain Home*, Turtle Mountain Community College 6-8 (2007), available at <http://www.turtle-mountain.cc.nd.us/community/propeace/resources/WhoIAm.pdf>; Roland Marmon, *A Reservation Is No Refuge: A Story of the Turtle Mountain Chippewa 1800-1900* (August 2001) (unpublished M.A. thesis, University of North Dakota); Stanley N. Murray, *The Turtle Mountain Chippewa, 1882-1905*, 51 N.D. HIST. 14 (1984) [N.D. DEPARTMENT OF PUBLIC INSTRUCTION, THE HISTORY AND CULTURE OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA (1997); MARY JANE SCHNEIDER, NORTH DAKOTA INDIANS: AN INTRODUCTION 151-54 (2d ed. 1994); JOHN TANNER, THE FALCON (Edward Hoagland ed., Penguin Books 1994) (1830); WILLIAM W. WARREN, HISTORY OF THE OJIBWAY PEOPLE (1984); CHARLIE WHITE WEASEL, OLD WILD RICE: THE GREAT CHIEF, GENESIS OF THE PEMBINA/TURTLE MOUNTAIN CHIPPEWA (2nd ed. 1990) (1988); CHARLIE WHITE WEASEL, PEMBINA AND TURTLE MOUNTAIN OJIBWAY (CHIPPEWA) HISTORY (1994).

76. See Murray, *supra* note 75, at 15.

77. *Id.* at 15-16.

78. For a deeper discussion of the cultural intermingling of the peoples who came to make up the Turtle Mountain Band, see Richotte, Jr., *supra* note 67, at 48-59.

79. *Id.*

80. For a general history of the development of the Métis people, see THE NEW PEOPLES: BEING AND BECOMING MÉTIS IN NORTH AMERICA 3-15 (Jacqueline Peterson & Jennifer S. H. Brown eds., Minnesota Historical Society Press 2001) (1985). The

saw themselves as having distinct rights and a distinct culture—which included a strong adherence to Catholicism and a unique brand of fiddle music, among other things.⁸¹ They also had a tremendous influence upon the history of the Turtle Mountain Band.

Turtle Mountain was originally a sub-set of the Pembina Band.⁸² But by the middle of the nineteenth century, the Turtle Mountain Band was coming into its own and recognizing itself as a distinct political entity.⁸³ In 1863, the Pembina Band was a party to a treaty that ceded over eleven million acres of land in western Minnesota and eastern Dakota Territory and that created reservations at Red Lake and White Earth, Minnesota.⁸⁴ The expectation on the part of the federal government was that all of the Plains Ojibwe would be removed to the White Earth Reservation.⁸⁵ The increasingly independent Turtle Mountain Band objected to removal and began claiming their rights to lands in what later became central North Dakota.⁸⁶

Thereafter, the Turtle Mountain Band began a long pattern of attempting to negotiate its own treaty or agreement with the federal government.⁸⁷ Unfortunately, the community could not have picked a worse time to assert its rights, as the federal government was not particularly receptive to the prospect of respecting tribal sovereignty in the final third of the nineteenth century.⁸⁸ During the period of federal policy from approximately 1871 to 1934, known as the “Allotment Era,” the federal government systematically sought to destroy tribalism and tribal ways of life.⁸⁹

The tribal calls for negotiation went unheeded. Additionally, a

Métis have had their own particular history in relationship to the colonizing nations of North America. While the designation or category of “Métis” is largely ignored or unknown in the United States, it carries its own legal distinction in Canada. *Id.* In Canada, Métis peoples are recognized as a separate category of indigenous peoples who hold many of the same rights as Native peoples in that country. *Id.*

81. *Id.*

82. *See Working Out Their Own Salvation, supra* note 75, at 20.

83. *See id.* at 29–31.

84. Treaty with the Chippewa—Red Lake and Pembina Bands, 1863, U.S.-Chippewa, Oct. 2, 1863, 13 Stat. 667.

85. *Working Out Their Own Salvation, supra* note 75, at 24.

86. *See id.* at 20–21.

87. The federal government ostensibly ended treaty-making with tribal nations with a rider to an appropriations bill in 1871. Act of Mar. 3, 1871, ch. 120, 16 Stat. 566 (1871) (codified at 25 U.S.C. § 71 (2006)). However, the federal government continued to negotiate treaty substitutes, called agreements, with tribal nations for several years afterward.

88. *Id.*

89. Richotte, Jr., *supra* note 67, at 64–67.

variety of factors conspired to make the situation even worse for the people of Turtle Mountain.⁹⁰ Settlers poured onto the prairie lands claimed by the Turtle Mountain Band,⁹¹ as did Métis peoples after the Riel Rebellions in Canada.⁹² In fact, as will be detailed below, Métis interests came to dominate tribal politics.

The Métis population of the tribal nation swelled during this time, which led many in American governmental positions and others within the non-tribal community to argue that the people of Turtle Mountain were not really Native and held no rights as Native people. These same outsiders further argued that tribally claimed land should be opened for white settlement.⁹³ One particular example ably demonstrates this position: in March of 1882, the Grand Forks⁹⁴ Chamber of Commerce, through a letter of remonstrance, stated that “[t]he Indian title of occupation is confessedly of the most flimsy character, but is made a cover for throwing the whole vast region open to speculative purchase instead of actual settlement. The Indian occupants number about 250, all told, including their white and half-breed associates.”⁹⁵ Using particularly florid language, the Chamber of Commerce framed the issue as a violation of the rights of, “hardy pioneers and industrious workingmen,” and begged Congress to open the land for settlement “[i]n the interest of justice and equal rights, and in behalf of the toiling millions who are looking to our fair land for a home, and in behalf of the brave settlers who are enduring the hardships of frontier life on the treeless prairies.”⁹⁶

The federal government was not only unwilling to negotiate a treaty, it actively made things worse for the people of Turtle Moun-

90. For the sake of brevity and to maintain focus on the legal pluralist lesson of Turtle Mountain tribal constitutionalism, it is necessary to limit the discussion of the establishment of the reservation and of the tribal agreement to its most necessary and pertinent facts. Nonetheless, it is a compelling story of race, tribal relations, and the federal government’s callousness and those interested in a richer detailing of this history should take heed of the authors cited in Richotte, Jr., *supra* note 67.

91. *Working Out Their Own Salvation*, *supra* note 75, at 21-24.

92. Verne Dusenberry, *Waiting for a Day That Never Comes*, 8 MONTANA: THE MAGAZINE OF WESTERN HISTORY 26, 31-32 (1958).

93. *See, e.g.*, Grand Forks Chamber of Commerce, Amendment Regarding the Disposition of the Pembina Reservation (proposed Mar. 4, 1882) (on file with the Wichita State University Special Collections in Charles “Steve” William Merton Hart Papers, MS92-19, Box 1, FF 5).

94. Grand Forks is a city on the northeastern edge of North Dakota. *See* The City of Grand Forks, North Dakota a place of excellence, <http://www.grandforksgov.com/fgov/home.nsf/Pages/Travel> (last visited Nov. 15, 2009).

95. Grand Forks Chamber of Commerce, Proposed Amendment, *supra* note 93.

96. *Id.*

tain. Most likely bending to the will of those who argued against the identity and rights of the tribal community, the federal government opened tribally claimed land for settlement in October of 1882 without any negotiated agreement with the tribal nation.⁹⁷ Turtle Mountain received some solace in December of that year when President Chester A. Arthur issued an executive order creating a reservation of twenty-four by thirty-two miles.⁹⁸ However, less than two years later, most likely because non-Natives continued to argue against the identity and rights of the people of Turtle Mountain, Arthur executed another executive order on March 23, 1884 that reduced the reservation to just two townships.⁹⁹ On June 3, 1884, some of the reservation land was exchanged (although this action neither enlarged nor reduced the reservation) through another executive order to create the boundaries of the reservation that continue to exist to this day.¹⁰⁰ The end result was that the reservation was reduced by about ninety percent.

The tribal community suffered on a crowded reservation that grew increasingly surrounded by hostile settlers. Nonetheless, the people of Turtle Mountain continued to seek an agreement with the federal government.¹⁰¹ In 1890, the federal government did finally send a commission to negotiate an agreement for the lands that they had already taken from the tribal community and to convince tribal members to relocate to a reservation in Minnesota. The commission was unsuccessful.¹⁰² However, the federal government sent another commission in 1892 and this one found success.

The 1892 commission—nicknamed the McCumber Commission after lead negotiator North Dakota Senator Porter J. McCumber—had two major advantages in the negotiations. First, the pressures of white settlement created by the federal government's decision to open up tribally claimed land ten years earlier caused a tremendous amount of hardship for the people of Turtle Mountain. Second, the traditional leadership structure had been dismantled, leaving the tribal nation

97. *Working Out Their Own Salvation*, *supra* note 75, at 21–24.

98. Exec. Order of Dec. 21, 1882, in ANN. REP. OF THE COMM'R OF INDIAN AFFAIRS TO THE SEC'Y OF THE INTERIOR FOR THE YEAR 1886, at 323 (1886).

99. Exec. Order of Mar. 29, 1884, in ANN. REP. OF THE COMM'R OF INDIAN AFFAIRS TO THE SEC'Y OF THE INTERIOR FOR THE YEAR 1886, at 323 (1886).

100. Exec. Order of June 3, 1884, in ANN. REP. OF THE COMM'R OF INDIAN AFFAIRS TO THE SEC'Y OF THE INTERIOR FOR THE YEAR 1886, at 323 (1886).

101. Letter from John W. Cramsie to the Comm'r of Indian Affairs (Feb. 4, 1886) (on file with Wichita State University Special Collections, in Charles "Steve" William Merton Hart Papers, MS92-19, Box 1, FF 5).

102. Murray, *supra* note 75, at 25.

prone for accommodation.

For several years the people of Turtle Mountain were led by a hereditary chief who governed a council of sub-chiefs.¹⁰³ The primary leadership of the Band more or less passed through the hands of one family, with each successive leader adopting the name of Little Shell (or Little Clam in some of the literature). Until recently, the scholarship on Turtle Mountain uniformly argued that in August 1891 the agent and sub-agent in charge of the reservation appointed a new tribal council consisting of sixteen full-bloods and sixteen mixed-bloods, which came to be known as the “Council of 32.” However, in his 2001 master’s thesis, tribal member Roland Marmon argued that the mixed-blood portion of the Turtle Mountain population was more involved in creating the Council of 32 than were American officials. Marmon stated that by at least 1884 a Grand Council comprised of both a full-blood council and a mixed-blood council was in place and was led by Little Shell III.¹⁰⁴ This Grand Council, particularly because of the large mixed-blood contingent, created levels of complication. According to Marmon, “For Little Shell, the presence of dual councils and the heavy influx of Mitchifs into Turtle Mountain tribal affairs must have been difficult to sort out.”¹⁰⁵ During this tumultuous time the fissures between the groups became deeper and more numerous.

According to Marmon, a three-man delegation consisting exclusively of mixed-bloods went to Washington, D.C. to meet with the Commissioner of Indian Affairs in February of 1889.¹⁰⁶ This was a clear indication that the mixed-blood members of the tribal nation, by far the largest demographic group, were concerned both with the direction of the tribal leadership and with their possible exclusion of

103. According to James H. Howard,

Each Plains-Ojibwa band usually had several chiefs, one of whom was acknowledged to be the head chief. The position on head chief was generally, though not always, hereditary, while a man might become a secondary chief by virtue of a good war record, demonstrated leadership ability, and generosity. Even a head chief, however, was usually only able to maintain his position through his own qualities of leadership and generosity. An incompetent head chief’s son soon found himself without a following after his father’s death. A head chief usually held his office for life, though he could be deposed by the tribal council.

Howard, *THE PLAINS-OJIBWA OR BUNGI: HUNTERS & WARRIORS OF THE NORTHERN PRAIRIES WITH SPECIAL REFERENCES TO THE TURTLE MOUNTAIN BAND*, *supra* note 75, at 59.

104. Marmon, *supra* note 75, at 63–64. Marmon also notes that the Métis on the American side of the border referred to themselves as Mitchifs. *Id.*

105. *Id.* at 73.

106. *Id.* at 96.

any agreement by virtue of their mixed-bloodedness. Additionally, a new council, ready to replace Little Shell and to negotiate with the federal government, was secretly forming. Members of this new council approached American officials about negotiating an agreement for tribal lands, rather than the other way around as previous scholarship has argued. This new council eventually became the Council of 32.¹⁰⁷

Marmon's argument is particularly compelling for a couple of reasons. First, Marmon's thesis addresses areas left unaddressed by the previous scholarship on the issue. Whereas previous writings about Turtle Mountain hint at or even acknowledge some level of divisiveness between the various populations (full-bloods, American mixed-bloods, and Canadian mixed-bloods) during this critical time period, those writings nonetheless uncritically accept the proposition that federal agents assembled the Council of 32. Second, Marmon's argument is compelling because it fits a pattern of tribal activity both before and after the Council of 32 was established. The people of Turtle Mountain as a whole were routinely active in looking to negotiate with the federal government and to secure a reservation. In the wake of the negotiations with the federal government and the diminishment of Little Shell's authority, tribal members eventually sought out constitutionalism to re-establish tribal governmental authority. Whereas previous scholarship readily accepts the federal government as the lone arbiter of influence concerning the Council of 32, Marmon offers a vision that fits the pattern of Turtle Mountain governmental activity and agency.

The McCumber Commission and the Council of 32 met in September of 1892 to negotiate.¹⁰⁸ Little Shell and his followers were promised a place within the discussions, but were effectively shut out for a variety of circumstances. The facts that the meetings took place in a space that was too small to accommodate Little Shell and his representatives, and that they were not given proper documentation were among those circumstances.¹⁰⁹ Little Shell and his followers left the negotiations under protest.¹¹⁰ Nonetheless, on October 22, 1892 an agreement was reached between the McCumber Commission and the council of 32. The agreement paid ten cents an acre for approx-

107. *Id.* at 107-12.

108. Murray, *supra* note 75, at 27.

109. *Id.*

110. *Id.*

imately ten million acres of land,¹¹¹ eventually earning the document the derisive nickname of the “Ten Cent Treaty.” This price was especially egregious not just for its paltry price, but also for the fact that other tribes in the region had been able to secure significantly higher prices for their land, even up to \$2.50 per acre.¹¹²

Little Shell and his followers were able to stave off congressional ratification of the Ten Cent Treaty for over a decade. Yet, during this time, the people of Turtle Mountain continued to suffer economically and socially.¹¹³ Little Shell, who fought vigorously against the implementation of the Ten Cent Treaty, passed away in 1900. While there were those in the community who still opposed the document, active resistance to its ratification essentially ceased.¹¹⁴ The Ten Cent Treaty—more officially known as the McCumber Agreement—was finally ratified by Congress in April of 1904 as an addition to an appropriations bill, almost twelve years after it was originally negotiated and with but a few minor amendments.¹¹⁵ The people of Turtle Mountain voted on the amended agreement yet again, agreeing to the slightly modified terms in a meeting on January 26, 1905. “We voted for the ratification of the amended treaty submitted to us; with a full knowledge of its contents; and are anxious that its stipulations be speedily carried out; the money is badly needed, and the delay in making the expected payment is causing destitution and suffering among us.”¹¹⁶ The community met anew in general council in mid-February and again submitted their approval to the revised agreement.¹¹⁷ It is unclear who voted during these meetings, let alone why they voted the way they did. But it is possible to speculate that without the traditional leadership structure in place, the immediate economic relief that the McCumber Agreement promised was too tempting to pass up during difficult times. Additionally, the mixed-blood members of the community presumably believed that the agreement lent legitimacy to their claims to their rights and identity as Natives.

111. *Id.* at 28.

112. *Id.*

113. *Id.* at 28–29.

114. *Id.* at 30.

115. Indian Appropriations Act of 1904 (McCumber Agreement), Ch. 1402, 33 Stat. 189, 194–96 (1904) [hereinafter McCumber Agreement].

116. Proceedings of a Meeting Held at the Turtle Mountain Reservation, N.D. (Jan. 26, 1905) (on file with the Wichita State University Special Collections, Charles “Steve” William Merton Hart Papers, MS92-19, Box 1, FF6).

117. Answer to the proposed Amended Agreement of April 21, 1904 by the Turtle Mountain Indians (Feb. 17, 1905) (on file with Wichita State University Special Collections, Charles “Steve” William Merton Hart Papers, MS92-19, Box 1, FF 6).

In keeping with the spirit and the policy of the era, the McCumber Agreement stipulated that the Turtle Mountain reservation was to be allotted.¹¹⁸ This process began not long after the Turtle Mountain people finally voted to accept the final version of the Ten Cent Treaty. The tribal population and six-by-twelve mile reservation meant that over half of the enrolled tribal members had to accept allotments outside of the reservation boundaries.¹¹⁹ The McCumber Agreement seemingly addressed this problem in Article 6 by providing for allotments on the public domain.¹²⁰ Yet, this article created more problems than it solved. As a consequence of the General Land Office opening tribal lands to settlement in October of 1882—two months before the establishment of a reservation, ten years before the negotiations for the McCumber Agreement, and twenty-three years before the people of Turtle Mountain finally agreed to accept the final version of the McCumber Agreement—much of the land around the reservation had already been claimed by American settlers. Tribal members were forced to accept allotments near Devils Lake in central North Dakota, in western North Dakota, and even into Montana and South Dakota.¹²¹ Adding to the burden, tribal members often quickly lost their allotments in a variety of ways. By one estimate, nearly ninety percent of tribal landholdings were lost to mortgages, tax sales, or defaults.¹²² Some tribal members sold their allotments with the intention of purchasing land closer to the reservation.¹²³ Additionally, the one million dollar payment stipulated by the McCumber Agreement dissipated almost as quickly as the allotments.¹²⁴ Adding further

118. McCumber Agreement, 33 Stat. at 194.

119. Murray, *supra* note 75, at 32.

120. McCumber Agreement, 33 Stat. at 195.

121. 1911 ANN. REP. OF THE SUPERINTENDENT (Sep. 14, 1910) *microformed on* Microfilm Publication M1011, roll 157, Frame 19 (Nat'l Archives); Turtle Mountain, 1910-1935, Annual Narrative and Statistical Reports From Field Jurisdictions of the Bureau of Indian Affairs, 1907-1938, Record Group 75, Ntl. Archives Bldg., Wash., D.C.

122. *The Dispossessed*, *supra* note 75, at 70.

123. *Working Out Their Own Salvation*, *supra* note 75, at 33. Some of those who were dis-enrolled during the original McCumber Agreement negotiations left the reservation for Montana in search of a new land base and new opportunities. Nonetheless, questions of identity and a rightful claim to the land continue to plague the descendants of those who left for Montana to this day. For perhaps the best detailing of the complicated situation see MARTHA HARROUN FOSTER, *WE KNOW WHO WE ARE: MÉTIS IDENTITY IN A MONTANA COMMUNITY* 167-74 (2006). *See also* Dusenberry, *supra* note 92.

124. Three lawyers who expedited the agreement saw the first fifty thousand dollars. In both 1905 and 1906 the tribal council decided to make per capita payments of fifty dollars to tribal members. This left approximately \$710,000 left over

fuel to the fire, the Department of the Interior handed down an administrative decision in 1916, known as *Voight v. Bruce*, that declared that children born after the congressional ratification of the McCumber Agreement were no longer eligible to receive allotments.¹²⁵ Tribal discontent with the federal government and the Ten Cent Treaty grew ever greater during this time.

During the first decades of the twentieth century, in the final years of the Allotment Era, the greatest source of tribal political authority lay in the hands of the tribal superintendent and the other members of the agency. Yet, despite an environment hostile to tribal sovereignty, the people of Turtle Mountain looked to exercise as much autonomy as possible and eventually sought to maximize their authority through a constitution. During the Allotment Era the federal government allowed a certain measure of local, tribal control in an effort to acclimate tribal peoples to so-called “civilized” life.¹²⁶ For example, in the fall of 1924 the tribal agency at Turtle Mountain organized nine different “farm chapters” to promote an individualistic, agrarian lifestyle on the reservation.¹²⁷ Each chapter was governed by a set of ten bylaws that ranged from the typical (“There shall be a President, Vice-President and Secretary;” “A meeting shall be held once a month; and oftener if necessary upon the call of the President”) to the very specific (“Each member shall get a flock of chickens, and build a good warm chicken house, instead of having the chickens with the stock.”). One bylaw in particular was meant to maintain the focus of the meetings squarely on the farm chapters and away from anything that might distract from the purpose of crafting individual farmers: “these meetings are held for the promotion of farming and stock raising, and there shall be nothing but farming and

the rest of the twenty-year annuity period. After expenses and a couple of per capita payments, enrolled tribal members received an average of \$2.00 in cash and the equivalent of \$14.00 in goods and services for the rest of the annuity period. Murray, *supra* note 75, at 33.

125. *Voight v. Bruce*, Decision of the Dep’t of the Interior, Jan. 15, 1916 (D-26880, Turtle Mountain Subgroup, Record Group 75, Nat’l Archives Cent. Plains Region, Kan. City, Mo.).

126. Two of the most prominent examples are the Indian police and the Courts of Indian Offenses. Although controlled by tribal superintendents, the police forces and courts were staffed by tribal members. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 646–48 (1984).

127. H. J. McQuigg to Hon. Comm’r of Indian Affairs, Circular No. 2171, ch. 5-1142, Jan. 12, 1926 (Central Classified Files, 1907–39, Turtle Mountain, 53924-1931-057 to 57873-1912-110, Record Group 75, Nat’l. Archives Bldg., Wash., D.C.).

stock-raising, with related subjects, discussed at these meetings.”¹²⁸ However, it is possible that the farm chapters had the unintended consequence of reinvigorating the community as a political unit. One superintendent, describing what he saw as the success of the farm chapters, perhaps unintentionally foreshadowed the push toward organization and constitutionalism to shortly occur at Turtle Mountain. “The enthusiasm engendered by these nine chapters among the Indians . . . has kindled the desire among practically all the Indians to take part in such organizations.”¹²⁹ Other opportunities also allowed the people of Turtle Mountain to reestablish a sense of control over their own lives and political situation.¹³⁰

Most importantly, while the events surrounding the McCumber Agreement dismantled the traditional leadership structure, by at least 1911 the community had a tribal council in place.¹³¹ The various writings of the tribal superintendents, the richest source of information about the community at this time, are not careful to trace the continuity, workings, or even the existence of the tribal council. The limited nature of the superintendents’ reports (and the lack of other sources) makes it difficult to paint a complete picture of tribal governance. Nonetheless, the influence of the tribal council, particularly as the community transitioned into constitutionalism, grows clearer with a deeper reading. The various Turtle Mountain superintendents generally found the tribal council (or business council) to be some combination of harmless and useful. Writing in 1917, Superintendent Roger C. Craige provided a typical federal assessment:

There is no real necessity for this council and they do no work, in fact they have nothing to do, but I have had a few meetings with them and thus far have found them to be of considerable assistance in presenting matters to the tribe when it would have been otherwise difficult to do so. I believe the council is a benefit to me rather than a hindrance and I should not like to see it discontinued.¹³²

128. *Id.*

129. *Id.* (emphasis added).

130. Richotte, Jr., *supra* note 67, at 110–12.

131. Janus, *supra* note 121, at frame 22.

132. 1916 ANN. REP. OF THE SUPERINTENDENT (July 31, 1916) *microformed on* Microfilm Publication M1011, roll 157, Frame 183 (Nat’l Archives); Turtle Mountain, 1910–1935, Annual Narrative and Statistical Reports From Field Jurisdictions of the Bureau of Indian Affairs, 1907–1938, Record Group 75, Nat’l. Archives Bldg., Wash., D.C.

Despite this statement, the council did wield influence and did speak on behalf of the community, particularly in its fight to initiate a claim against the federal government for the depredations produced by the Ten Cent Treaty.

Tribal discontent with the McCumber Agreement began almost immediately after it was ratified. That discontent quickly grew into a desire for a claim against the United States in American courts. The people of Turtle Mountain expressed their desire for a lawsuit against the federal government both collectively and individually¹³³ and pushed to initiate the claims process in the 1910s and 1920s. As early as 1911 the council approached the Superintendent several times about a lawsuit. Superintendent Stephen Janus noted, “They have frequently counseled with me on the subject of further claims against the government.”¹³⁴ The Superintendents often tried to discourage the discussion of a lawsuit, but the council persisted in arguing for a claim and stating that the McCumber Agreement had been violated.¹³⁵

Of course, obtaining the right to make a claim at the end of the Allotment Era was a difficult process. The people of Turtle Mountain needed more than the support of their Superintendent; they needed a special jurisdictional act from Congress—the Indian Claims Commission was still decades away at this point. Although Turtle Mountain was able to get bills introduced into Congress, the community did not see any signed into law.¹³⁶

The people of Turtle Mountain were also discontented with their tribal superintendents. One of the main sources of friction between the superintendents and the community was the fact that the superintendents generally did not consider the people of Turtle Mountain to be Native. Janus, the first superintendent, was particularly pointed in his characterization of the community. Writing in 1914,

133. For a discussion of the attempts by individual tribal members to spur action toward a claim against the federal government, see Richotte, Jr., *supra* note 67, at 114–17.

134. Janus, *supra* note 121, frame 22.

135. 1919 ANN. REP. OF THE SUPERINTENDENT (Aug. 6, 1919) *microformed on* Microfilm Publication M1011, roll 157, Frame 264 (Nat'l Archives); Turtle Mountain, 1910–1935, Annual Narrative and Statistical Reports From Field Jurisdictions of the Bureau of Indian Affairs, 1907–1938, Record Group 75, Nat'l. Archives Bldg., Wash., D.C.; 1920 ANN. REP. OF THE SUPERINTENDENT (1920) *microformed on* Microfilm Publication M1011, roll 157, Frames 293, 304 (Nat'l Archives); Turtle Mountain, 1910–1935, Annual Narrative and Statistical Reports From Field Jurisdictions of the Bureau of Indian Affairs, 1907–1938, Record Group 75, Nat'l. Archives Bldg., Wash., D.C.

136. Richotte, Jr., *supra* note 67, at 117–19.

he stated that the reservation population was 3063, only 169 of whom were full bloods.¹³⁷ However, according to Janus, even this was questionable: “a number are not real full-blood Indians, but have more or less white blood and are classified as full-blood Indians, by reason of their affiliation.”¹³⁸ Additionally, Janus’s description of the mixed-blood members of the community echoed the challenges that they faced during the time of the McCumber Commission. “Most of them could not be distinguished from the average citizen were they mixed in a crowd of people. So far as their complexion is concerned, they are not darker than many of the persons of pure French extraction from both sides of the Canadian boundary.”¹³⁹ Remarking upon the history of the tribe, Janus stated, “[t]hey are descendents of the trappers and voyagers . . . who married the Cree and Chippewa women,” and, “since the early days, the tendency has been to get further and further away from the Indian blood.”¹⁴⁰ Ultimately, according to Janus, what little Native heritage within the community there was to begin with was now more or less gone. “The Turtle Mountain Band of Chippewa Indians, therefore, is composed of people, who when the Band was organized under the law in 1892, were of very little Indian blood, and at that time, very few Indian characteristics were preserved.”¹⁴¹ Another superintendent, writing in 1932, stated:

There seems to be a very small percentage of full-blooded Indians enrolled. I have not attempted yet to ascertain the exact percentage but this will show on the Annual Census probably, but the average Indian (?) that I have met since coming here might just as easily be taken for a white man as for an Indian. Some of them might be taken for Swedes; some for Italians; some for Mexicans; but relatively few there are that would necessarily pass for Indians outside of an Indian country, and many of them are quite as white and look just as much like white people as my own daughters do.¹⁴²

137. 1914 ANN. REP. OF THE SUPERINTENDENT (1914) *microformed on* Microfilm Publication M1011, roll 157, frame 77 (Nat’l Archives); Turtle Mountain, 1910–1935, Annual Narrative and Statistical Reports From Field Jurisdictions of the Bureau of Indian Affairs, 1907–1938, Record Group 75, Nat’l. Archives Bldg., Wash., D.C.

138. *Id.*

139. *Id.*

140. *Id.* at frame 77–78.

141. *Id.* at frame 78.

142. 1932 ANN. REP. OF THE SUPERINTENDENT (Mar. 12, 1932) *microformed on* Nat’l Archives Microfilm Publ’n M1011, roll 157, frame 962 (Nat’l Archives); Turtle Mountain, 1910–1935, Annual Narrative and Statistical Reports From Field

Referring to the people of Turtle Mountain as “Indian (?)” and stating that they could pass for Swedes, Italians, and Mexicans was a clear signal from the Superintendent to his superiors that he did not believe that the community had a rightful or complete claim to a Native identity or heritage.¹⁴³ The community had other difficulties with the superintendents as well and sought to maximize its own political authority in as many ways as possible.¹⁴⁴

By the end of the 1920s, at the tail end of the Allotment Era, tribal discontent with the Ten Cent Treaty and its legacy was the major motivating factor of political movement among the people of Turtle Mountain. The community actively and continually sought a claim against the federal government in an American court. Additionally, the community was still fighting the perception that it did not truly consist of Native people; a perception that suggested it was unworthy of the political status of a tribal nation. Finally, the people of Turtle Mountain were seeking to maximize their own authority over their own lives after several decades of stringent federal oversight. The tribal desire to begin a legal claim—to stake a claim to its identity and attempt to reclaim tribal autonomy—led the community to adopt a constitution.

V. THE FIRST TRIBAL CONSTITUTION

As the 1920s gave way to the 1930s, tribal organization and governance, particularly through the means of written documents, was of the utmost importance to the community. In August of 1931, some community members requested that Superintendent James H. Hyde send a copy of the by-laws for a business council to the Secretary of the Interior for approval. The Superintendent obliged, but was dismissive about the proceedings that inaugurated the by-laws in his letter to his superiors.¹⁴⁵ Nonetheless, the community had already begun to move forward. On July 2, 1931, on page four of the local newspaper, the *Turtle Mountain Star*—over a month before Hyde’s letter to his superiors—there appeared a large ad taken out by the

Jurisdictions of the Bureau of Indian Affairs, 1907–1938, Record Group 75, Nat’l Archives Bldg., Wash., D.C.

143. *Id.*

144. Richotte, Jr., *supra* note 67, at 121–28.

145. “In this election only 86 ballots were cast, although there were more than 800 people resident on the reservation who were eligible to vote.” Letter from James H. Hyde, Superintendent, Turtle Mountain Agency, to Comm’r of Indian Affairs (Aug. 12, 1931) (on file with the Turtle Mountain Subgroup, Record Group 75, Nat’l Archives Cent. Plains Region, Kan. City, Mo.).

“Executive Committee of the Chippewa Tribe.” The ad stated, Pursuant to the Provision of Section 1 of the By-laws, Notice is hereby given that the annual meeting of the Tribal Council of Turtle Mountain Chippewa Indians of North Dakota and Montana, will be held on the 10th day of July, 1931, at Belcourt, N. Dak., for the purpose of electing officers for the ensuing year and transacting any tribal business that may come before the Council.¹⁴⁶

Every adult enrolled in the tribe was invited to attend and participate.¹⁴⁷ Discussions of a tribal claim were still very much alive at this time, as well.¹⁴⁸

In early September of 1931, the new council, on “TURTLE MOUNTAIN TRIBE OF CHIPPEWA INDIAN COUNCIL” letterhead, wrote to Hyde to confirm he had received the information the council had sent, and requested that he forward it to the Commissioner of Indian Affairs.¹⁴⁹ It did not take long before Hyde began angrily complaining to his superiors about the new council. Hyde’s mid-September letter to the Commissioner of Indian Affairs is important because it makes clear that a tribal claim against the federal government was the major impetus for political movement at Turtle Mountain. He wrote, “At the time the tribal council was formed, it was stated as their purpose to present and push tribal claims.”¹⁵⁰ It reflects a people who were trying to regain a measure of agency over themselves and over the superintendent. Hyde explained,

[S]ince the Council has been formed, I have had evidence of a desire on the part of the Council to designate policies of administration. The majority of the Council members are patent-in-fee Indians and they have assumed a belligerent attitude toward my administration. Yesterday afternoon the Council met at some place over town unknown to me; and four of the Councilmen afterwards came to my office with a

146. *Advertisement*, TURTLE MOUNTAIN STAR, July 2, 1931, at 4.

147. *Id.*

148. Letter from James H. Hyde, Superintendent, Turtle Mountain Agency, to Julia Percy Dennis (Aug. 22, 1931) (on file with the Turtle Mountain Subgroup, Record Group 75, Nat’l Archives Cent. Plains Region, Kan. City, Mo.).

149. Letter from the Turtle Mountain Tribe of Chippewa Indian Council to James H. Hyde, Superintendent, Turtle Mountain Agency (Sept. 1, 1931) (on file with the Turtle Mountain Subgroup, Record Group 75, Nat’l Archives Cent. Plains Region, Kan. City, Mo.).

150. Letter from James H. Hyde, Superintendent, Turtle Mountain Agency, to Comm’r of Indian Affairs (Sept. 17, 1931) (on file with the Turtle Mountain Subgroup, Record Group 75, Nat’l Archives Cent. Plains Region, Kan. City, Mo.).

proposal to dictate who should be employed on the road work and building program and the number of days that they should be employed. After learning the trend of their proposal I advised them that matters of administration would continue to be handled by this office without interference on the part of the Council. I further advised then that I would gladly discuss with them at any time matters pertaining to the tribe, or in which the tribe as a whole was interested, but that matters of policy and administration for which I was solely responsible, I could not and would not make the subject of Council conferences.¹⁵¹

This reveals Hyde's paternalistic and caustic attitude concerning the people of Turtle Mountain:

I realize that with a sympathetic cooperative Council, much could be accomplished through them in forming public opinion, but in view of the characters of the individuals who make up this particular Council, I know that cooperation is impossible. They have stated that it is their purpose to bring about a change in the Agency and Hospital personnel and particularly in the position of [S]uperintendent, and to hope for constructive cooperation with them is out of the question.¹⁵²

By November of 1931, the Council was anxious to hear from the Secretary of the Interior as to whether their constitution and by-laws received secretarial approval,¹⁵³ but they were ultimately rejected.¹⁵⁴ Nonetheless, the correspondence is a clear indication that the desire for political maneuvering had reached a heated point, and that a claim against the federal government was a dominant motivation for this maneuvering.

Hyde left the Turtle Mountain Reservation in 1931. After his departure, the community continued to press for recognition of their new tribal government. In the summer of 1932 the tribal council again wrote to Washington D.C. in the hopes of receiving information about their proposed constitution and by-laws. The Commissioner of Indian Affairs, C.J. Rhodes, responded by noting that amendments

151. *Id.*

152. *Id.*

153. Letter from the Turtle Mountain Tribe of Chippewa Indian Council to Sec'y of the Interior (Nov. 3, 1931) (on file with the Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

154. TURTLE MOUNTAIN CONSTITUTION AND BY-LAWS (on file with the Indian Org. Div., Gen. Records Concerning Indian Org. ca. 1934-56, PT-163, Entry 1012, Nat'l Archives Bldg., Washington D.C.).

and other changes had been taken up with the new Superintendent, Charles H. Asbury, for consultation with the community.¹⁵⁵

Asbury's short time at Turtle Mountain was generally unremarkable, with two exceptions. First he tried to bury the "sundry petitions and complaints mard [sic] by Brien and others," which he described as "petty matters" in the general files.¹⁵⁶ Second, Asbury contacted John A. Stormon, a local non-Native attorney, concerning the claim against the federal government.¹⁵⁷ Stormon's responsibilities quickly moved beyond the claim, and the attorney's long association with Turtle Mountain left an indelible mark on the community's political history. Francis J. Scott, Asbury's successor, picked up where Asbury had left off and was also instrumental in bringing a constitution to Turtle Mountain.

Scott came to the Turtle Mountain reservation in October of 1932 with a certain amount of ambition and resolve. The new Superintendent also knew how to convey a sense of leadership to the local press. In an interview with the *Turtle Mountain Star* he stated,

It is my strongest hope and greatest desire that under my direction the aims and ideals of the Indian Service will be carried out. With the organization we have and the interest of Washington, I am sure that the progress made at Belcourt will prove an eye-opener to those interested.¹⁵⁸

155. Letter from C. J. Rhoads, Comm'r of Indian Affairs, to Louis M. Marion (Aug. 9, 1932) (on file with the Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

156. Note from C. H. Asbury, Superintendent, Turtle Mountain Agency (Feb. 20, 1932) (on file with Complaints; 509163-164, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

157. Letter from John A. Stormon, Attorney, Turtle Mountain Agency, to C. H. Asbury, Superintendent, Turtle Mountain Agency (Apr. 25, 1932) (on file with Acts of Tribal Council, 509160, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

158. S. A. Lavine, *Agency Superintendent Sees Interesting Work*, *TURTLE MOUNTAIN STAR*, Oct. 6, 1932, at 1. Scott was a family man, bringing a wife and two daughters along with his twenty years of experience to the North Dakota prairie. He began his career in the Indian Service in 1912 in Umatilla, Oregon as an industrial teacher. A year later Scott moved to the Prairie-Band Potawatomie reservation to become an assistant clerk. Six months later he was named chief clerk. Scott continued to bounce around different reservations until World War I broke out and he resigned his post with the Indian Service in order to join the cause. At first, this proved to be a rash decision as he was rejected for service. *Id.* at 1. Eventually, however, Scott was accepted into the armed services. He achieved the rank of corporal which, according to Scott, gave him, "the right to tell everyone where to get off." *Id.* After a year in the armed services Scott was right back in the other service he had known professionally. He once again made his way from different reservation to different reservation, eventually becoming acquainted with the upper Midwest with stops in

Just below Scott's profile in the *Turtle Mountain Star* there was an announcement for a tribal meeting to be held in two days. The purpose of the meeting was to be "for the purpose of electing tribal officials and adopting a constitution for the tribe."¹⁵⁹ Scott wasted little time in enacting his vision in his new post. According to the announcement, "Mr. Scott feels that the benefits of such an organization will be valuable to the residents of the local reservation."¹⁶⁰

Two days later the Turtle Mountain Band of Chippewa Indians had a constitution. The preamble of this new document deceptively suggests that it was the product of debate and discussion amongst tribal members: "we, the Indians of the Turtle Mountain Reservation of North Dakota, in general tribal council assembled, do hereby establish an organization to be known as the Turtle Mountain Advisory Committee, and do hereby adopt the following Constitution and by-laws to govern the same."¹⁶¹

The text of the Constitution is both conciliatory and somewhat preoccupied with itself. Article 2, of six total articles, is the only place in the text where the powers of the tribal governing body are discussed. It states,

The duties of said committee shall be to promote cooperation of the Turtle Mountain Band of Chippewa Indians with the Superintendent and the plans of the government, and to assist the Superintendent in an advisory way in promoting the social, financial and industrial welfare, and the best interests of the tribe.¹⁶²

Article 2 continues by stating that the tribal governing body is also empowered to consider tribal business and to execute tribal papers. The final sentence of Article 2 allowed for meetings of the general tribal population. "When in the opinion of the Superintendent or a majority of the members of the [tribal governing body] a matter requires action of the general tribal council, the Superintendent may take appropriate steps for the calling of a general council of the tribe."¹⁶³

Red Lake, Cass Lake, and Pine Ridge. *Id.*

159. *Tribal Meeting Called for Belcourt Saturday*, *TURTLE MOUNTAIN STAR*, Oct. 6, 1932, at 1.

160. *Id.*

161. CONSTITUTION AND BY-LAWS, *reprinted in* *TURTLE MOUNTAIN BAND OF CHIPPEWA CONSTITUTION CONVENTION AND REVISION PROCESS 2001-2002*, at 236 (Jerilyn DeCoteau ed., 2003) (1932).

162. *Id.* at art. 2.

163. *Id.*

Thus, the lone article of the tribal constitution that specifically deals with the powers of the government that it establishes gave tremendous deference to the Superintendent of the tribe. The text of the document stated that the purpose of this new tribal government was to “promote co-operation” with the agents and laws of the United States government. Tribal decision-making, while established and legitimate, was pyrrhic at best, and the true authority of the tribe continued to be in the hands of the Superintendent. No other powers of the tribal governing body were enumerated in the text beyond “co-operation” and the ability to conduct tribal business and execute tribal papers. In addition, the last sentence of Article 2 suggested that the Superintendent was at authority to override a decision of the tribal governing body and to call a general council of the tribe. In fact, the constitution created some confusion as to whether or not the tribal governing body itself could call a general council without the Superintendent’s permission. Perhaps the greatest indication of how the newly established government of Turtle Mountain was understood by those most closely involved in its creation comes from Article 1. In Article 1, the governing body of Turtle Mountain proclaimed, “The name of this organization shall be the Turtle Mountain Advisory Committee.”¹⁶⁴ As such, the lone branch of government was an “Advisory Committee.”

If the community met on October 8, 1932, in order to establish a constitution and by-laws, then Article 2 reads like the constitution and the rest of the other five Articles read like the by-laws. Article 1, discussed above, merely established the name of the governing institution. Article 3, titled “Memberships and Elections” established the rules governing who could sit on the Advisory Committee and how they would be chosen.¹⁶⁵ Article 4 established an oath and duties for officers in the new government.¹⁶⁶ Article 5 made the constitution effective upon its adoption by the tribe.¹⁶⁷ Article 6 provided for the adoption of amendments to the constitution. Amendments could be approved by either the Advisory Committee or a general tribal council, but the amendments could not go into effect until they had approval from the Commissioner of Indian Affairs.¹⁶⁸

The conciliatory tone of the constitution toward the Commis-

164. *Id.* at art. 1.

165. *Id.* at art. 3.

166. *Id.* at art. 4.

167. *See id.* at art. 5.

168. *See id.* at art. 6.

sioner of Indian Affairs provides some insight into the origin of the text itself. The 1932 Turtle Mountain Tribal Constitution could hardly be described as an organic document originating from the people. In the National Archives Building in Washington, D.C., there is an undated memo titled *Turtle Mountain Constitution and By-Laws* which briefly summarizes some of the pertinent correspondence between the tribal agency and Washington, D.C. during this period. According to this memo, a letter from Asbury to his superiors suggests that tribal members participated in writing the first draft of a constitution.¹⁶⁹ While the summary implies that the document was, at least initially, tribally generated, there is other evidence in the memo that implies otherwise and makes clear that the final draft was a product of the federal government.

Prior to the tribal meeting with Stormon, copies of the constitution and by-laws of two other tribal communities were sent to the Turtle Mountain Agency to provide models of documents that had been approved by officials in Washington, D.C.¹⁷⁰ Additionally, revisions and amendments were suggested by federal officials and implemented by Stormon.¹⁷¹ Interestingly, the correspondence from Washington, D.C. noted that the final draft of the constitution left an inordinate amount of authority in the hands of the tribal superintendent, a point which would not be lost on the community.¹⁷²

The constitution was a creation of Scott, Stormon, and to a lesser extent, Asbury. Scott announced in the ratification meeting that “[i]n view of previous action taken by the government at various other reservations, I have had a constitution for an organization drawn up that will, I trust, serve your purpose.”¹⁷³ As such, it is unsurprising that the document so readily bent to the will of the Commissioner of Indian Affairs and stressed “co-operation.” The totality of the

169. “Letter not too clear but apparently this constitution was drafted by the executive committee which had been elected in 1931 with the assistance of Mr. John Stormon, Attorney-at-law, Rolla, North Dakota.” *TURTLE MOUNTAIN CONSTITUTION AND BY-LAWS* (on file with the Records of the Indian Org. Div., Gen. Records Concerning Indian Org. ca. 1934-56, PT-163, Entry 1012, Nat’l Archives Bldg., Washington D.C.).

170. *See id.*

171. *Id.*

172. *Id.* “Letter [from Assistant Commissioner of Indian Affairs J. Henry Scattergood] contains a post script noting that superintendent has considerable authority in nominating and approving candidates in advisory committee. No objection to this if Indians desire it but Indian Office does not require it.” *Id.*

173. S. A. Lavine, *Indians Organize to Present Tribal Claim*, *TURTLE MOUNTAIN STAR*, Oct. 13, 1932, at 1.

evidence also makes clear that Stormon was the primary—and likely, dominant—author of the constitution. The text of the constitution was even printed on Stormon’s stationery.¹⁷⁴

Thus, on October 8, 1932, the people of the Turtle Mountain Reservation voted to adopt a tribal constitution that was not of their own making and left little actual governing power in the one official body that the constitution created, revealingly titled the Advisory Committee. Considering the movement toward a tribal constitution prior to Scott’s arrival on the reservation and the political maneuvering that occurred beforehand, the adoption of this new constitution seems, on its face, to have been a step backwards for the people of Turtle Mountain. Yet, beneath its surface, the tribal ratification begins to make sense when one considers it in the context of the major force driving the political action of the day at Turtle Mountain: a claim against the federal government.

The possibility of a lawsuit dominated the discussion in the tribal meeting concerning the adoption of the constitution. Scott was up front about the purposes of the document. He explained,

You have been called together today in order to organize yourselves. This step is most necessary in view of the fact that some of you people believe that you have a claim against the government . . . [but] any action you may wish to take is hindered because of your lack of unity and organization.¹⁷⁵

Scott was also up-front about what he expected from the people of Turtle Mountain:

The constitution is so arranged as to provide for that tribal organization that is approved by the office at Washington. Our task today is not to amend or change it, but rather accept it so that the Turtle Mountain people may hire lawyers to take their claim to the Court of Appeals.¹⁷⁶

Scott may have slightly misspoken or may have been misquoted, as any lawsuit against the federal government would first have to have been taken to the Court of Claims. Nonetheless, the point was made.

Stormon was also at this meeting and was also forceful in his statements concerning the tribe’s need to adopt the constitution. He echoed Scott in stating that this constitution was the only means

174. TURTLE MOUNTAIN BAND OF CHIPPEWA CONSTITUTION CONVENTION AND REVISION PROCESS, *supra* note 161, at 236–39.

175. Lavine, *supra* note 173, at 1.

176. *Id.*

available toward accomplishing the goal of a lawsuit.

[Stormon] told of drawing up the paper and his reasons for wording it as he did. He also told of the need of presenting a well-constructed case to the government, a matter which needed perfect organization and told the people that the adopting of the constitution was the only and sole means of securing any action whatsoever.¹⁷⁷

Despite the declarations of both Scott and Stormon and the admonition of Scott that the constitution was not to be amended or changed, a dialogue about the constitution ensued. Scott and Stormon had their say in the morning session of the October 8 meeting. Tribal members were heard in the afternoon session.

Robert Bruce, a prominent community member (whose involvement in another organization at Turtle Mountain will be detailed later), was a lead discussant. A preliminary vote on the constitution in the afternoon session showed that the community was fairly evenly split on the issue of adoption. Bruce voiced strong opposition to the paternalist tone of the document. Bruce said,

I feel . . . that this constitution invests altogether too much power in the hands of the [S]uperintendent. The various articles all seem to be so constructed as to give the balance of power to the Agency office and on these grounds I think the plan is not only unfair, but unjust.¹⁷⁸

The example of Robert Bruce is particularly instructive because it reflects the difficult decision that the community faced and the deep desire for a claim against the federal government. The response to Bruce's objections is unknown. What is known is that whatever was said was enough to lead to the ratification of the constitution. Eventually, even Bruce himself came around and voted in favor of the document.¹⁷⁹ The proposed constitution was unsatisfactory to Bruce and assuredly to others. Yet, the possibility of finally beginning a claim was too much to resist. At least some, if not many or even most, of the members of the community recognized the shortcomings of their new constitution; but those shortcomings could not outweigh the potential of seeking some retribution for the McCumber Agreement through American courts.

The new constitution called for the election of members to the Advisory Committee. Bruce not only was elected to the Advisory

177. *Id.*

178. *Id.* at 4.

179. *Id.*

Committee, he received more votes than anyone else. Of course, the new constitution needed not only the support of the people of Turtle Mountain, but also the support of the Commissioner of Indian Affairs. Such approval was granted by Commissioner C. J. Rhoads on December 23, 1932.¹⁸⁰ Two-and-a-half months after agreeing to it, the people of Turtle Mountain were now officially governed by Scott and Stormon's document.

As the claim was the biggest political concern at Turtle Mountain, it is unsurprising that movement toward a lawsuit was first and foremost on the minds of the newly established Advisory Committee. The first meeting of the new governing body occurred on January 2, 1933, and seven elected officials were sworn in.¹⁸¹ Interestingly enough, in a meeting intended to begin legal action against the United States, a distinctly American feel inaugurated the proceedings, including a Boy Scout presenting the American flag and a rendition of "America."¹⁸² Scott spoke at the opening of the meeting. He detailed the steps that were taken in enacting the constitution and made statements suggesting a large measure of tribal self-determination. Scott then stated that he did not want to influence the community in its business and that the members of the Advisory Committee had his confidence in their ability to perform their sworn duties.¹⁸³ Scott also went on to say that he expected that the Advisory Committee would cooperate with him and that tribal members would cooperate with the Advisory Committee.¹⁸⁴

The Advisory Committee eventually did proceed into the business of the day. The meeting, "attended by a large number of the Turtle Mountain Indians," came up with seven different complaints against the United States: (1) children born after the McCumber Agreement should receive allotments, (2) allotments off of the reservation were limited to surface rights whereas they should have included full rights to the land, (3) the government exercised their rights over the land before the McCumber Agreement was ratified and interest should be paid, (4) the community never ceded a particular piece of land and

180. Letter from C. J. Rhoads, Comm'r of Indian Affairs, to F. J. Scott Superintendent, Turtle Mountain Agency (Dec. 23, 1932) (on file with Cent. Classified Files, 1907-39, Turtle Mountain, 53924-1931-057 to 57873-1912-110, Record Group 75, Nat'l Archives Bldg., Wash., D.C.).

181. *Turtle Mountain Chippewa Officially Prepare Claims Against Government*, TURTLE MOUNTAIN STAR, Jan. 5, 1933, at 1.

182. *Id.*

183. *Id.* at 8.

184. *Id.*

was never paid for it, (5) tribal members had to pay a fee for their allotment when they were supposed to receive them for free, (6) interest should be paid on the twelve years between the negotiations on the McCumber Agreement and its ratification, and (7) the price of ten cents an acre was unconscionably low.¹⁸⁵ Despite some initial friction within the community, the people of Turtle Mountain were ready to move forward on their claim.¹⁸⁶

185. *Id.* at 1.

186. Controversy concerning the claim arrived almost as soon as the new constitution was ratified. North Dakota Senator Lynn Frazier introduced another jurisdictional bill on behalf of Turtle Mountain in January of 1933. *Indian Claim Bill Is Introduced By Frazier*, TURTLE MOUNTAIN STAR, Jan. 26, 1933, at 1. In March of 1933 three members of the Advisory Committee wrote to the Secretary of the Interior with three complaints: (1) A recent contract with three attorneys to pursue a claim against the federal government was not explained properly to them and when it was properly explained they did not approve of the contract; (2) Certain fellow Advisory Committee members were not officially tribal members; and (3) They felt that the new jurisdictional bill that was before Congress was not in the best interests of the community. Letter from Gregare Brien, Severt Poitra, & John B. Azure, Advisory Comm. Members, to Harold Ickes, Sec'y of the Interior (Mar. 4, 1933) (on file with Acts of Tribal Council, 509160, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.). These disgruntled Advisory Committee members were able to create action in the tribal agency and in Washington D.C. Although by the time that the three tribal members had sent their letter the jurisdictional bill was dead, the Secretary of the Interior, Harold Ickes, responded with a return letter noting that the three men had signed the contract with attorneys present. Ickes also suggested that the three men meet with Scott to discuss their objections to a jurisdictional bill and their objections to some of their fellow Advisory Committee members. Letter from Harold L. Ickes, Sec'y of the Interior to Gregare Brien, Advisory Comm. Member (Mar. 22, 1933) (on file with Acts of Tribal Council, 509160, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.). Scott did meet with one of the three and found the objections of the group relatively without merit. Letter from F.J. Scott, Superintendent, Turtle Mountain Agency, to Harold Ickes, Sec'y of the Interior (Mar. 30, 1933) (on file with Acts of Tribal Council, 509160, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.). New Commissioner of Indian Affairs John Collier even responded to the situation. In his reply to the group, Collier noted, "Your objection to the jurisdictional bill is merely that it is not for the best interests of the members of the Turtle Mountain Band. No action can be taken on this general statement." Letter from John Collier, Comm'r of Indian Affairs, to Gregare Brien, Advisory Comm. Member (May 1, 1933) (on file with Acts of Tribal Council, 509160, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.). Collier also noted that if a more thorough complaint were to be made it would be given further attention, and that the three fellow Advisory Committee members of whom the disgruntled group complained were on the tribal rolls. *Id.* Regardless, by July of 1933 the controversy had not gone away and the Advisory Committee was forced to wrestle with the issue in its quarterly meeting. Nor had the pursuit of a claim against the federal government gone away. Minutes from the Turtle Mountain Advisory Comm. (July 3, 1933) (on file with Acts of Tribal Council, 509160, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent.

The 1932 Turtle Mountain tribal constitution was part of a trend. Prior to the enactment of the IRA in 1934 there were already over fifty tribal constitutions on file with the Bureau of Indian Affairs. Political scientist Elmer Rusco has argued that these pre-IRA constitutions shared two characteristics, both of which benefited the federal government: (1) the responsibility for writing a constitution was an “administrative prerogative” that appears to have lacked tribal input during the writing process, and (2) the writing of tribal constitutions was “relatively routine” with the main office in Washington, D.C. making suggestions and providing documents that had been used elsewhere.¹⁸⁷ It is probable that Scott believed that the Turtle Mountain tribal constitution would simplify the administration and assimilation of the community by consolidating political authority in one body under his authority. The fact that Scott had the document drawn up by a local non-Native attorney also suggests that the Turtle Mountain situation fits into Rusco’s analysis.

Yet, for the community, the constitution was something much different than a simple instrument of federal authority imposed upon them. The flaws in the document were apparent to those who voted on it. Despite these flaws, the community voted to ratify the constitution spearheaded by Scott because they believed that it would lead to a claim against the federal government. Thus, the constitution and the vote on the constitution, for the people of Turtle Mountain, was an instrument of autonomy and resistance. Similar patterns of seeking out, adopting, and reforming constitutions to meet tribal goals were emerging elsewhere in Indian Country.¹⁸⁸

Jurisdictional bills for other tribal communities also multiplied at this time, further suggesting that other tribal communities were seeking out constitutions in order to begin claims against the federal government. Historian Harvey D. Rosenthal noted in his study of the Indian Claims Commission that 219 tribal claims were filed between 1881 and 1946, when Congress established the Indian Claims Commission.¹⁸⁹ He also noted that only 39 of those claims were filed in the Court of Claims prior to Congress passing a 1924 act that

Plains Region, Kan. City, Mo.).

187. ELMER R. RUSCO, *A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT* 102 (2000).

188. For a discussion of pre-IRA tribal constitutions on the Rosebud and Pine Ridge Reservations, see Biolsi, *supra* note 72, at 46-59.

189. H. D. ROSENTHAL, *THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION* 24 (1990).

granted all tribal peoples American citizenship.¹⁹⁰ Thus, 180 claims were filed after 1924 but before the Indian Claims Commission came into effect. Rosenthal stated that in the three-year period following the passage of the 1924 act, almost as many claims were filed (37 claims) as had been filed in the previous forty-two years (39 claims).¹⁹¹ While it is not within the scope of this project to study the histories of all of these pre-IRA tribal constitutions, it certainly seems probable that the proliferation of both tribal constitutions and tribal filings in the Court of Claims is more than mere coincidence.

Even with its constitutional authority, the Advisory Committee was just one of the groups organized at Turtle Mountain at this time. Other groups were formed both before and after the Advisory Committee was established. Generally short-lived, these various organizations spoke, or attempted to speak, for the community, or interests within the community, at various times (thus leaving an often-confusing legacy). The Turtle Mountain Co-Operative Association was the most prominent and influential of these groups. The tribal agency consistently tried to downplay the influence of the Co-Operative Association. Scott wrote to his superiors in the summer of 1934 claiming that the organization “[p]lays no part in tribal matters.”¹⁹² However, the Turtle Mountain Co-Operative Association did play a role in tribal matters. Robert Bruce, who voiced objections about the paternalist tone of the eventual tribal constitution, was the president of the Co-Operative Association at the time. By 1933, the organization was claiming a membership of over 1200 people and sending letters to Washington D.C. to ask specific questions about the law and to ask for further aid on the reservation.¹⁹³ Additionally, although there was conflict between the Co-Operative Association and the Advisory Committee, the overlap among the leadership meant that the two groups often worked in concert and sometimes the Co-Operative Association exerted authority over the Advisory Committee.¹⁹⁴

190. *Id.* at 18.

191. *Id.*

192. Letter from F. J. Scott, Superintendent, Turtle Mountain Agency, to Comm’r of Indian Affairs (July 19, 1934) (on file with the Records of the Indian Org. Div., Gen. Records Concerning Indian Org. ca. 1934-56, PT-163, Entry 1012, Nat’l Archives Bldg., Wash., D.C.).

193. Letter from Robert E. Bruce, President, Turtle Mountain Coop. Ass’n, to Harold Ickes, Sec’y of the Interior (Nov. 6, 1933) (on file with Cent. Classified Files, 1907-1939, Turtle Mountain, 41624-1937-162 to 48072-1932-174, Record Group 75, Nat’l Archives Bldg., Wash., D. C.).

194. An example of the intermingling of the two groups was evident in late 1933

The Co-Operative Association also had its own constitution and bylaws.¹⁹⁵ The exact relationship between the Co-Operative Association, whose leadership appears to have generally consisted of the younger, more-educated members of the community, and other organizations (such as the tribal council that took out the advertisement in the newspaper in 1931) is not completely clear. Additionally, the Co-Operative Association appears to have had more traction than other groups because it sought to act in a more general governing capacity. While the community decided to ratify the constitution produced by Scott and Stormon in order to initiate a claim, it is clear that at least some people were uncomfortable with the document, and it is possible that many in the community hoped that the tribally-generated alternative would eventually replace the federally-generated tribal government. When the IRA was introduced, the Co-Operative Association presented itself as a viable alternative to the Advisory Committee and a champion of reorganization. A prominent member of the group wrote to the Commissioner of Indian Affairs that

as the law stands now we have to organize and then select our own officers. [The Co-Operative Association] is already organized and could take over the management right away and give the plan a trial. Otherwise those who are not organized will buck our organization and it will make it hard to organize in the future.¹⁹⁶

VI. TURTLE MOUNTAIN AND THE IRA

By the late 1920s, allotment and its sister assimilationist efforts were coming under increasing scrutiny not only for their inability to

and early 1934. In December of 1933, the Advisory Committee sent a proposal for the rehabilitation of Turtle Mountain to the Commissioner of Indian Affairs. The plan included sections on health, education, and economic development. *See* Letter from John B. Azure #1, President, Advisory Council, to Comm'r of Indian Affairs (Dec. 15, 1933) (on file with Cent. Classified Files, 1907-1939, Turtle Mountain, 53924-1931-057 to 57873-1912-110, Record Group 75, Nat'l Archives Bldg., Wash., D. C.). Approximately five weeks later the new president of the Co-Operative Association wrote to the President of the United States and included a nearly word-for-word reproduction of the Advisory Committee proposal. *See* Letter from Z. J. Dauphanais, President, Turtle Mountain Coop. Ass'n, to The President of the United States (Jan. 19, 1934) (on file with Cent. Classified Files, 1907-1939, Turtle Mountain, 53924-1931-057 to 57873-1912-110, Record Group 75, Nat'l Archives Bldg., Wash., D. C.).

195. *See* Letter from Alex Martin to John Collier, Comm'r of Indian Affairs (received Aug. 30, 1934) (on file with Records of the Indian Org. Div., Gen. Records Concerning Indian Org. ca. 1934-56, PT-163, Entry 1012, Nat'l Archives Bldg., Wash., D.C.).

196. *Id.*

raise the standard of living for Native peoples, but also for often having the opposite consequence of leaving Native peoples more destitute and poverty-stricken than before. In 1928, the Washington D.C. think-tank The Brookings Institute produced a major publication, nicknamed the *Meriam Report* after its lead author, which was highly critical of the federal government's administration of Native peoples.¹⁹⁷ The *Meriam Report* ultimately did not disavow assimilationist policies, and its actual influence on future policy is a subject of debate.¹⁹⁸ Yet it was important, as the 2005 edition of *Cohen's Handbook* noted that "it brought to public attention the deplorable living conditions of Indian people."¹⁹⁹ With the failures of the Allotment Era becoming increasingly evident, the time was ripe for change—the time was ripe for John Collier.

Perhaps the most controversial figure in federal Indian policy in the twentieth century, Collier had long been an advocate for Native peoples before he was approved as Commissioner of Indian Affairs on April 20, 1933.²⁰⁰ A strong critic of the federal government's assimilationist policy, he sought an end to allotment and other programs designed to destroy tribal ways of life.²⁰¹ He also attempted to relieve the poverty that existed throughout Indian Country.²⁰² The new era of policy that Collier brought to his post, including new legislation and other efforts, is often referred to as the Indian New Deal.²⁰³ The

197. See generally BROOKINGS INST., THE PROBLEM OF INDIAN ADMINISTRATION: REPORT OF A SURVEY MADE AT THE REQUEST OF HONORABLE HUBERT WORK, SECRETARY OF THE INTERIOR, AND SUBMITTED TO HIM, February 21, 1928 (1928) (criticizing the government's effect on various institutions of Natives' lives).

198. The 2005 edition of the Cohen Handbook argues, "The Meriam Report . . . was the primary catalyst for change." FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 84 (Nell Jessup Newton, ed., 2005). However, Deloria Jr. and Lytle argue, "Although almost every commentator on Indian matters credits the Meriam Report with providing the motivation and framework for the subsequent reforms initiated by the New Deal, there is not much evidence to support such an idea conceptually or in execution." DELORIA JR. & LYTLE, *supra* note 71, at 44.

199. COHEN, *supra* note 198, at 84.

200. Two excellent resources upon which this paper relies, Rusco's A FATEFUL TIME, *supra* note 187, and Deloria Jr. & Lytle's THE NATIONS WITHIN, *supra* note 71, both provide a nice synopsis of Collier's activities prior to his appointment as Commissioner of Indian Affairs.

201. DELORIA JR. & LYTLE, *supra* note 71, at 62.

202. *Id.*

203. Deloria Jr. & Lytle argue that, although he didn't win many fans among politicians, Collier was able to utilize the New Deal legislation of the times to bring much needed economic relief to Indian Country. DELORIA JR. & LYTLE, *supra* note 71, at 184.

[H]e was a skillful administrator and even more skillful at bringing the resources of other agencies into the field of Indian affairs. During his

defining piece of legislation of the Indian New Deal was the Indian Reorganization Act of 1934.²⁰⁴

The IRA was a gigantic, omnibus bill that sought to alleviate several of the ills in Indian Country that Collier identified.²⁰⁵ Perhaps most importantly, the IRA sought to reinvigorate tribal sovereignty and economic development by reestablishing tribal governments through constitutions and corporate charters.²⁰⁶ Collier's complicated, highly technical bill ran into opposition from many sides, including within Indian Country, most likely due to the fact that Collier introduced the bill to Congress without consulting either Native peoples or members of Congress.²⁰⁷ In response, Collier announced that he would hold a series of Indian congresses to explain the bill to Native peoples.²⁰⁸ Vine Deloria, Jr. and Clifford M. Lytle noted that "[f]or the first time in decades, the government was actually going out to the tribes to obtain their views on proposed Indian policies."²⁰⁹ Deloria and Lytle also noted the purpose behind these congresses.²¹⁰ "A master of self-confidence, Collier was con-

time as commissioner, he was able to get the Resettlement Administration, the Farm Security Administration, the Civilian Conservation Corps, the Works Progress Administration, the Soil Conservation Service, and the Federal Emergency Relief Administration to fund Indian projects and using these agencies and their programs enabled him greatly to expand the scope of federal services available to Indians.

Id.

204. Indian Reorganization Act, ch. 576, §§ 1–17, 48 Stat. 984, 984–88 (1934) (current version at 25 U.S.C. §§ 441–50 (2009)).

205. *Id.*

206. *Id.* § 16 ("Any Indian tribe . . . shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe . . ."). Section 17 of the Act provided that a tribe may become incorporated but subject to a restriction on the alienation of reservation property. *Id.* § 17.

207. It is possible that Collier had nothing to present to Indian Country or Congress before it was introduced on Capitol Hill. Rusco argues that Collier came to his major policy initiatives, particularly the IRA, more deliberately than has been previously reported. RUSCO, *supra* note 187, at 151–52. The bill that was to become the IRA took longer to prepare than was anticipated because of Collier's inexperience as an administrator, the enormity of the omnibus bill itself, and the desire to seek the aid of anthropologists and other experts to help draft the bill. Rusco's seventh chapter, "Drafting the IRA Proposal," details the difficulties and delays that Collier experienced in creating the IRA. *Id.* at 177–219. In fact, the first draft Congress saw may not have been complete. Collier and Assistant Commissioner William Zimmerman rode to Capitol Hill together making last-minute changes to the IRA on the way to turn the bill over to Congress in February of 1934. *Id.* at 208.

208. DELORIA JR. & LYTLE, *supra* note 71, at 102.

209. *Id.*

210. *Id.*

vinced he could turn the Indian congresses to his advantage.”²¹¹

Turtle Mountain sent a delegation consisting of eight tribal members, four members of the agency staff, and an interpreter to the first of the ten Indian congresses, held in Rapid City, South Dakota between March 2 and March 5, 1934.²¹² A passage from the *Turtle Mountain Star* prior to the delegation’s departure is particularly revealing in that it indicates that the constitution and the Advisory Committee had yet to consolidate political authority or gain the complete trust of the community. It reported,

Suggestions for consideration of the Indian Bureau in its announced plan to radically alter the entire administration of Indian affairs have been submitted by members of the Turtle Mountain band of Chippewa Indians, as requested by the Bureau. While these suggestions have not been officially acted on at a regular meeting of the Advisory Council, they have been signed by certain officers and members of such council. The Turtle Mountain Co-operative [A]ssociation was active in drawing up the suggestions.²¹³

The Turtle Mountain Co-operative Association provided a total of seventeen suggestions for the Turtle Mountain delegation to bring to the Indian congress.²¹⁴

Among the suggestions were calls for greater self-government, better enforcement of law and order regulations, and for the federal government to provide lands for tribal members around the reservation.²¹⁵ One particularly provocative suggestion would have expanded tribal membership beyond the scope of the rigid racial borders that were the established norm of the day. The *Turtle Mountain Star* detailed the proposal and explained,

Those who will be entitled to membership of the proposed community shall be as follows: must be an enrolled member of the tribe, or those who should have been enrolled. Citizenship should be granted to whites, either man or woman, who are married to Indians who are members of the tribe. The holding of whites who are married to Indians cease upon their death; same to revert to the heirs of the deceased when in relation to the Indians, and if no heirs, same to re-

211. *Id.*

212. *Turtle Mountain Tribe Offers “New Deal” Plan*, *TURTLE MOUNTAIN STAR*, Mar. 1, 1934, at 1.

213. *Id.*

214. *Id.* at 3.

215. *Id.*

vert to the Indian Community for proper disposition.²¹⁶

This bold recommendation appears to have been designed as a counter-punch to the ever-present criticism that the community was not truly “Indian.” It would have addressed both the mixed-blood character of the community, and some of the issues, particularly intermarriage, that arose due to living on a small reservation in proximity to non-Native communities.

Nonetheless, the Turtle Mountain delegation would do more listening than speaking during this first Indian congress. Collier had a lot to say; so much so that by the third day some Native delegates were thinking about naming him Iron Man for his endurance and ability to tire out translators.²¹⁷ Collier’s demonstrated interest in the development of Indian affairs led to the idea of naming Collier into the Blackfeet community. It was not only used for levity among the congress but it was also used for reminding Collier of the troubles Indian Country faced. Upon adopting him into the community, Joseph Brown of the Blackfeet delegation had this to say to Collier and the other audience members:

The name which we are going to give our leader here, and you may call him by his Indian name when you meet him, is Spotted Eagle. That name, Spotted Eagle, represents the Indian Reservations, the way they are checkerboarded. We hope that those spots will be rubbed off so that every Indian Reservation will be all in one spot.²¹⁸

Despite these sentiments and other apprehensions to the bill, Collier was at ease with his audience and spoke openly with the delegates.²¹⁹ Collier also spoke passionately about the bill.²²⁰ Addi-

216. *Id.*

217. PLAINS CONGRESS, MINUTES OF THE PLAINS CONGRESS, RAPID CITY INDIAN SCHOOL, RAPID CITY, SOUTH DAKOTA, MAR. 2-5, 1934 (Haskell Print Shop 1934), reprinted in THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 24, 77 (Vine Deloria Jr. ed. 2002).

218. *Id.* at 88.

219. When discussing the evils of the allotment policy and its consequent issues of the fractionalization of individual interests in land, Collier even made a joke. “Under the allotment law, as it stands, the situation has to get worse every year as the original allottees die. This complicates this crazy quilt as heirship holdings increase year by year. Nothing can stop it because people insist on dying. We cannot stop them.” *Id.* at 33.

220. I am informed that some of you here, on the strength of things you heard before you came here; things that you read in the newspapers or that people have told you, have crystallized your thinking against any change, and I desire for you to realize what I know to be the truth; that beyond your power, beyond my power, beyond the power of the President himself, the

tionally, Collier reflected a willingness to listen to the delegates and a willingness to adapt to their wishes. Originally, the bill would have provided for the Secretary of the Interior to transfer individually allotted land back to a tribal community. The subject caused much consternation for many of the delegates. Collier conceded some ground on this point. "We are going to recommend to the Committees of Congress that this transfer of title by the allottee to the community, this transfer shall be exclusively voluntary and that the compulsion feature shall be stricken out."²²¹ This statement was noted by the transcriber to have elicited "[g]reat applause."²²²

When the delegates from Turtle Mountain did have their say, they were relatively noncommittal about the IRA. John Azure was the first Turtle Mountain delegate to speak, and he was most concerned with the difficulties facing the community:

Friends: at the present time our Reservation is twelve miles long and six miles wide and in that Reservation there are more than three thousand people. The better half of this Reservation is now owned by the white people. So we are having a hard time. Something must be done so that we can get along better than this.

We have been here for three days now trying to understand the explanation of Commissioner Collier. But we did not learn so very much because we do not have the education. When I was first elected to our council I could hardly spell my own name, but I am still trying to do the best I can for my people.

Now the way we understand Mr. Collier's explanation, it sounds rather good to us delegates, but we are not going to say that we are in favor of the new policy or against it. We would like to take the news back to our Indian people and explain everything we have learned to them. After that, if the majority wants to take up this new policy it is up to them.

The only thing now we wish from the Government is to give us help or relief to get a start. The first thing of all we need is education. We have no education on our Reservation. If the Government can work out a plan that helps us out, some way to get us on our feet—that is what we want. I

forces are moving which are going to make the change in a way to destroy you unless it is made in a way to save and help you.

Id. at 34.

221. *Id.* at 82.

222. *Id.*

thank you.²²³

Perhaps because the community had just ratified a constitution, Azure was less interested in the promise of a new tribal government and more concerned with any aid that could immediately help the people of Turtle Mountain.

The other Turtle Mountain tribal delegate to speak at the Indian congress was Kenick, the Advisory Committee chairman. He was, although complimentary, also noncommittal:

I am glad to meet the Commissioner of Indian Affairs. My greatest desire was to see him. I am a poor man. I am just glad to see the Commissioner, as I would be to see him in Washington. The reason why I am so glad to meet him is because of what I have heard which is all for the benefit of the people. Of course, when I get up they all look at me as a poor man.

Upon my return the people will be looking to me to find out what I have learned from this meeting. I will tell my people what this great man has told me.

By the way I understand these Bills, the Commissioner of Indian Affairs wants to help me. The reason I am glad to meet him is that I have seen the Bill which he has presented to me. I am going to report it to the people that have sent me and I am pretty sure they will be pleased with it.

Concerning this self-government I am not quite ready to accept it yet because my people are just starting. I desire to say I will recommend it in a few years. That is my desire. Thank you.²²⁴

Kenick's comments hint at why both he and Azure did not fully embrace the IRA. The newly ratified constitution already held the promise of initiating a claim against the federal government. Additionally, the continuing existence and activity of the Turtle Mountain Co-Operative Association suggests that at least some, if not many, community members did not fully embrace the Advisory Committee and the constitution that created it. The objections that were raised at the ratification meeting make it clear that the community understood its deficiencies. Under those conditions, with a relatively unpopular yet seemingly necessary constitution already in

223. PLAINS CONGRESS, MINUTES OF THE PLAINS CONGRESS, RAPID CITY INDIAN SCHOOL, RAPID CITY, SOUTH DAKOTA, MAR. 2-5, 1934 (Haskell Print Shop 1934), reprinted in THE INDIAN REORGANIZATION ACT: CONGRESSES AND BILLS 24, 77 (Vine Deloria Jr. ed. 2002).

224. *Id.* at 87.

place, there would have been little to no incentive to replace one document created by the federal government with another document created by the federal government. Kenick's decision to "recommend it in a few years," allowed for time for the claim to play out. While Deloria and Lytle considered this first meeting a success for Collier,²²⁵ the comments of the Turtle Mountain delegates make clear that Collier's efforts were not a complete success because the folks who had made the journey from the reservation in north central North Dakota were not completely sold on the Indian Reorganization Act.

The rest of 1934 and well into 1935 was a roller coaster ride for the legal and political fortunes of Turtle Mountain. Several discussions were held concerning the proposed IRA (including with local non-Native communities) and the possibility of a jurisdictional bill waxed and waned.²²⁶ During this time, Scott had to answer to his superiors about his role in promoting the IRA within the community. A tribal member had written to the Commissioner of Indian Affairs complaining about Scott's attitude concerning the legislation. The Superintendent explained his behavior in a two-page letter, stating among other things,

After returning from the Rapid City conference, the Advisory Committee told me that they did not think it would be advisable to call a general meeting for the purpose of discussing and considering the proposed bill until we could get a printed copy of the minutes of the Rapid City meeting.²²⁷

The Advisory Community's lack of enthusiasm was most likely more than mere prudence. Later in April of 1934, the Superintendent at the Fort Totten Indian Agency wrote to the Commissioner of Indian Affairs to defend Scott and to detail his understanding of how

225. DELORIA JR. & LYTLE, *supra* note 71, at 107.

226. Shortly after returning from the Rapid City Indian congress, Superintendent Scott held a discussion with the Rolla Commercial club, a non-Native organization centered just outside of the reservation. During the meeting note was made of the large population of the tribal community and the small land base. The features of the proposed IRA that involved increasing tribal land holdings, coupled with the unique land/population ratio, was of the most concern to the club, who wished to have their say heard in the discussions of the proposed bill. *Discuss Features of New Indian Program*, TURTLE MOUNTAIN STAR, Mar. 15, 1934, at 1. Additionally, although it ultimately failed, a jurisdictional bill was making its way through Congress while the Turtle Mountain delegation was attending the Indian congress. *Senate Passes Chippewa Claim Jurisdictional Act*, TURTLE MOUNTAIN STAR, Feb. 1, 1934, at 1.

227. Letter from F. J. Scott, Superintendent, Turtle Mountain Agency, to John Collier, Comm'r of Indian Affairs (Apr. 7, 1934) (on file with Wheeler-Howard: 509159, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

tribal members felt about the impending legislation. “The sentiment, of both the Turtle Mountain and Devils Lake Reservation Indians, is one of indecision; and, I judge, predominates in favor of the Bill. However, as elsewhere, there are strong influences being brought to bear upon the Indian people of both reservations.”²²⁸ That same month, Scott also wrote to the Commissioner of Indian Affairs concerning Turtle Mountain’s consideration of the IRA. He stated that the claim was still important to the community and that the younger tribal members seemed amenable to the IRA, but that the general consensus was against acting on the bill until the claim had been heard.²²⁹

During the discussions concerning the IRA, frustration was assuredly again mounting in May 1934 concerning a jurisdictional bill. A bill that had been introduced by Senator Lynn Frazier had made its way through both the Senate and the House, only to be vetoed by President Franklin D. Roosevelt.²³⁰ The rationale for the veto was that the compensation of one million dollars had already been paid under the McCumber Agreement. “If such relief and settlements,’ said the president, ‘are ignored or deprived of their legal effect in this instance an undesirable precedent would be created where applications for similar relief are made for other Indian tribes.’”²³¹ Things were made more difficult for the tribe when the possibility of a jurisdictional bill again arose in June of 1934.²³²

On June 18, 1934, a compromised, yet still radical, version of the IRA was signed into law by President Roosevelt, but passage of the bill was only the first step. Questions about the new law continued to arise as the summer months of 1934 turned to fall and winter. In August, another tribal meeting was held to discuss the IRA. Scott told

228. Letter from O.C. Gray, Superintendent, Fort Totten Indian Agency, to John Collier, Comm’r of Indian Affairs (Apr. 24, 1934) (on file with Wheeler-Howard: 509159, Turtle Mountain Subgroup, Record Group 75, Nat’l Archives Cent. Plains Region, Kan. City, Mo.).

229. Letter from F. J. Scott, Superintendent, Turtle Mountain Agency, to John Collier, Comm’r of Indian Affairs (Apr. 25, 1934) (on file with Wheeler-Howard: 509159, Turtle Mountain Subgroup, Record Group 75, Nat’l Archives Cent. Plains Region, Kan. City, Mo.).

230. *Roosevelt Vetoes Indian Bill*, N.Y. TIMES, May 12, 1934, at 2.

231. *Indian Jurisdictional Bill Vetoed on Friday*, TURTL E MOUNTAIN STAR, May 17, 1934, at 1.

232. Senator Frazier was again the sponsor of this new attempt at a jurisdictional bill. According to the Turtle Mountain Star, “This bill had been revamped and the parts which caused President Roosevelt to veto the original measure were said to have been eliminated.” *Senate Approves Indian Jurisdictional Measure*, TURTL E MOUNTAIN STAR, June 14, 1934, at 1.

the crowd that he approved of the new law and that it would not harm the community and might possibly benefit some members.²³³ Considering the prior dialogue at Turtle Mountain about the IRA, it is likely that Scott's comments were meant to reassure those who felt that a tribal claim under the federal government might be halted or prevented by the new law.

Scott did not see a vote on the IRA at Turtle Mountain come to fruition under his watch. Scott was transferred to Leupp, Arizona, and was replaced by J. E. Balmer, who arrived from the Western Navajo Agency in Tuba City, Arizona. Originally an interim superintendent, Balmer accepted the position on a permanent basis in October of 1934.²³⁴

Discussions concerning the IRA continued during Balmer's tenure. L. C. Lippert, the tribal superintendent at the Standing Rock agency, aided Balmer during the early months of Balmer's time at Turtle Mountain. By late September the community still had several questions about the new law, most of which concerned land and the different possibilities concerning allotments.²³⁵ In early October Lippert arrived at the reservation for another meeting. By this time, the *Turtle Mountain Star* noted, "Several meetings have now been held in an effort to explain fully the rights and responsibilities in the Indians under the act."²³⁶

By late October a familiar issue arose that delayed a vote on the IRA. The weather was worsening and Lippert wrote to Balmer again stating his opinion that it would be prudent to wait on a vote for better weather and the hope of a better turnout, particularly considering the rule in the IRA that stated that any vote not cast by an eligible voter would be considered a "yes" vote.²³⁷ As the wait for a vote

233. *Turtle Mountain Chippewas Consider Features of Self-Government Measure*, TURTLE MOUNTAIN STAR, Aug. 23, 1934, at 1.

234. *Balmer to Be Agent at Turtle Mountain Agency*, TURTLE MOUNTAIN STAR, Oct. 4, 1934, at 1.

235. Letter from J. E. Balmer, Superintendent, Turtle Mountain Indian Agency, to L.C. Lippert, Superintendent, Standing Rock Agency (Sept. 22, 1934) (on file with Wheeler-Howard: 509159, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

236. *Discuss Features of Self Government Bill*, TURTLE MOUNTAIN STAR, Oct. 11, 1934, at 1.

237. Letter from L. C. Lippert, Superintendent, Standing Rock Agency, to J. E. Balmer, Superintendent, Turtle Mountain Indian Agency (Nov. 5, 1934) (on file with Wheeler-Howard: 509159, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

continued, so did the meetings.²³⁸ An illness prevented Lippert from attending.²³⁹ Despite Lippert's absence, Balmer thought events were moving in a positive direction.²⁴⁰ Balmer and Lippert continued to correspond about the details of a vote, and by April of 1935 it was recommended that the election be held in June.²⁴¹ By early May the firm date of June 15 was chosen.²⁴² However, another difficulty occurred in May. According to Collier, tribal members not living on the reservation would not be allowed to vote.²⁴³ The tribal reaction to this decision is unknown, but it eliminated several people living both near and far from the reservation. Collier justified the decision by noting that not having the right to vote would not necessarily exclude those tribal members from participating in tribal life and government, assuming that an approved constitution would allow them to do so.²⁴⁴

Ultimately, the tribal agency determined that 1181 persons were eligible to vote in the election. Of those voting, 550 cast "no" votes and only 257 cast "yes" votes. That meant that 374 eligible voters did not cast a ballot. Under the original rules of the IRA, they were considered "yes" votes and the *Turtle Mountain Star* reported that the tribal community was now governed by the IRA.²⁴⁵ Yet, on the very day

238. Letter from J. E. Balmer, Superintendent, Turtle Mountain Indian Agency, to L.C. Lippert, Superintendent, Standing Rock Agency (Nov. 23, 1934) (on file with Wheeler-Howard: 509159, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

239. Telegram from Neumeau, Chief Clerk, to J.E. Balmer, Superintendent, Turtle Mountain Indian Agency (Jan. 15, 1935) (on file with Wheeler-Howard: 509159, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

240. Letter from J. E. Balmer, Superintendent, Turtle Mountain Indian Agency, to L. C. Lippert, Superintendent, Standing Rock Agency (Jan. 22, 1935) (on file with Wheeler-Howard: 509159, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

241. Telegram from John Collier, Comm'r of Indian Affairs, to J.E. Balmer, Superintendent, Turtle Mountain Indian Agency (Apr. 15, 1935) (on file with Wheeler-Howard: 509159, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

242. Letter from William Zimmerman, Jr., Assistant Comm'r of Indian Affairs, to L. C. Lippert, Superintendent, Standing Rock Agency (May 3, 1935) (on file with Wheeler-Howard: 509159, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

243. Letter from John Collier, Comm'r of Indian Affairs to J. E. Balmer, Superintendent, Turtle Mountain Indian Agency (May 10, 1935) (on file with Wheeler-Howard: 509159, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.).

244. *Id.*

245. *Indians Vote Against Self-Government Plan*, *TURTLE MOUNTAIN STAR*, June 20, 1935, at 1.

that Turtle Mountain voted on the IRA, the law was amended to apply to only those tribal communities where a majority of those who voted in a tribal referendum voted positively to enact the IRA. Thus, Turtle Mountain had actually excluded itself from the law.²⁴⁶

There were a fair number of rumblings about the change in rules and the results of the referendum. The Co-Operative Association had thrown its support behind the IRA before the vote, calling it, “a great epoch in American history for the American Indian.”²⁴⁷ Undoubtedly some, if not most, members of the Cooperative Association were disappointed with the results, particularly since the group had positioned itself as a body that could step in and govern under the IRA.

One particular tribal member, Louis Marion, was especially vocal in decrying the results of the vote. Marion, who would spend most of the 1940s as a member of the Advisory Committee, spent much of the rest of the 1930s looking to secure a new vote. In July of 1935 Marion wrote to a North Dakota Congressperson blaming the loss on, “misinterpretation, explanation and propaganda spread by the opposing local attorneys, non-enrolled Indians and other members of the tribe who knowingly have spread falsehood among our older Indians.”²⁴⁸ He also requested another chance to vote on the IRA.²⁴⁹ A second chance was not forthcoming, as it would have required Congress to amend the IRA to allow another vote.²⁵⁰ Nonetheless, Marion kept trying, writing his Congressman again in 1936 and in 1938.²⁵¹ A number of other petitions also made their way to Washing-

246. Letter from John Collier, Comm’r of Indian Affairs to the chairman of the tribal business committee, members of tribal council, and to the Indians of the reservation through the superintendent (July 18, 1935) (on file with Wheeler-Howard: 509159, Turtle Mountain Subgroup, Record Group 75, Nat’l Archives Cent. Plains Region, Kan. City, Mo.).

247. Letter from Z. J. Dauphanais, President, to Comm’r of Indian Affairs, Feb. 6, 1935 (on file with Records of the Indian Org. Div., Gen. Records Concerning Indian Organization ca. 1934-56, PT-163, Entry 1012, Nat’l Archives Bldg., Wash., D.C.).

248. Letter from Louis Marion to Rep. Wm. Lemke (July 7, 1935) (on file with Records of the Indian Org. Div., Gen. Records Concerning Indian Org. ca. 1934-56, PT-163, Entry 1012, Nat’l Archives Bldg., Wash., D.C.).

249. *Id.*

250. Letter from John Collier, Comm’r. of Indian Affairs to J. E. Balmer, Superintendent of Turtle Mountain Indian Agency (Nov. 14, 1935) (on file with Records of the Indian Org. Div., Gen. Records Concerning Indian Org. ca. 1934-56, PT-163, Entry 1012, Nat’l Archives Bldg., Wash., D.C.).

251. Letter from Louis M. Marion to Rep. Wm. Lemke (Jan. 18, 1936) (on file with Records of the Indian Org. Div., Gen. Records Concerning Indian Org. ca. 1934-56, PT-163, Entry 1012, Nat’l Archives Bldg., Wash., D.C.); Letter from Louis Marion, Tribal Council Treasurer to Rep. Wm. Lemke (Mar. 26, 1938) (on file with Records

ton, D.C.²⁵²

VII. TURTLE MOUNTAIN AND LEGAL PLURALISM

As noted above, the scholarship on tribal constitutionalism exists in a colonialist/revolutionary dialectic that artificially constricts the boundaries of the discourse to the Indian Reorganization Act and its efficacy. The dialectic is not unlike the traditional approach as outlined by Hartog, in that they both use limited evidence and information to preserve a particular view of how the law functions. While the state of scholarship concerning tribal constitutionalism has been opening as of late, it is nonetheless still dominated by a stringent focus on the IRA and its successes or failures.

Yet, as Hartog demonstrates with pigs in the streets of New York City, the traditional approach cannot, by itself, adequately explain what the law is and how it operates for all peoples at any given place or time. A legal pluralist approach—an approach that stretches the boundaries of the methodology and evidence that the traditional approach is willing to accept—is necessary to most fully understand the varied and contested operations of law. This is a lesson well heeded and well endorsed by tribal advocates, most clearly as it concerns treaties.

Nonetheless, it is a lesson unevenly applied. Tribal constitutions are not routinely studied under a legal pluralist approach and they are certainly not regarded in the same manner as treaties. This may be because societal discourse, both inside and outside of Indian

of the Indian Org. Div., Gen. Records Concerning Indian Org. ca. 1934-56, PT-163, Entry 1012, Nat'l Archives Bldg., Wash., D.C.).

252. See Letter from F. H. Daiker, Assistant. to the Comm'r of Indian Affairs to Lewis Gourneau, Chairman, Turtle Mountain Indian Council (Aug. 28, 1936) (on file with Records of the Indian Org. Div., Gen. Records Concerning Indian Org. ca. 1934-56, PT-163, Entry 1012, Nat'l Archives Bldg., Wash., D.C.); Petition from Members of the Turtle Mountain Chippewa Tribe to John Collier, Comm'r of Indian Affairs (Nov. 1, 1937) (on file with Records of the Indian Org. Div., Gen. Records Concerning Indian Org. ca. 1934-56, PT-163, Entry 1012, Nat'l Archives Bldg., Wash., D.C.); Petition from Members of the Turtle Mountain Chippewa Tribe to John Collier, Comm'r of Indian Affairs (Mar. 26, 1938) (on file with Records of the Indian Org. Div., Gen. Records Concerning Indian Org. ca. 1934-56, PT-163, Entry 1012, Nat'l Archives Bldg., Wash., D.C.); Petition from Members of the Turtle Mountain Chippewa Tribe to John Collier, Comm'r of Indian Affairs (Sept. 3, 1937) (on file with Acts of Tribal Council, 509160, Turtle Mountain Subgroup, Record Group 75, Nat'l Archives Cent. Plains Region, Kan. City, Mo.); Letter from John A. Stormon, Attorney, Turtle Mountain Agency, to John Collier, Comm'r of Indian Affairs (Mar. 5, 1938) (on file with Records of the Indian Org. Div., Gen. Records Concerning Indian Org. ca. 1934-56, PT-163, Entry 1012, Nat'l Archives Bldg., Wash., D.C.).

Country, makes it easier to conceptualize tribal peoples as parties to treaties than as ratifiers of constitutions.²⁵³ Regardless, in order to gain a deeper, more complex, and more meaningful understanding of tribal constitutionalism it is vital to begin evaluating tribal constitutions not just as functional tools that address contemporary concerns (as the traditional method would have one do), but also as historical documents that reveal important information about a particular tribal nation and the document's place within that nation (as the legal pluralist method would have one do).

The history of the first constitution of the Turtle Mountain Band of Chippewa Indians provides an insight into the community that cannot be reached by the colonialist/revolutionary dialectic or its analogous method, the traditional approach. Although this article's retelling of that history is admittedly truncated, it nonetheless makes clear that the IRA, and consequently the assumptions that emerge from previous discussions concerning the IRA, do not define the origin of constitutionalism at Turtle Mountain. Rather than suffering under the imposition of an IRA constitution, the people of Turtle Mountain were actively seeking a constitution as a way to initiate a claim against the United States, to reaffirm their status as a tribal nation, and to reclaim political authority from their superintendents. A constitution was not a "foreign" document that was "foisted" (to use some of the more popular language in the dialectical debate) upon the people. It was a weapon they actively sought to wield. The people of Turtle Mountain saw the promise that the constitution held and they have lived under a constitution since 1932.

The people of Turtle Mountain have also been highly discontented with their constitution since its inception. During its ratification, members of the community noted that the document prepared by the Superintendent and the non-Native attorney left the tribal government with little actual authority and almost completely under the thumb of the superintendent. Nonetheless, the community ratified the document because they were told that it was the only way they were going to be able to begin a claim against the federal government. The choice must have been extremely difficult, as the community had sought to have tribally generated documents recognized by the federal government in the past and alternative

253. For an acute study of the prevalence and affect of racism and stereotypes in the field of Indian law see ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005).

organizations existed, such as the Cooperative Association. The people of Turtle Mountain were presented with what must have been another extremely difficult choice once the IRA became law. Some in the community believed that the IRA would allow them to replace the 1932 constitution's Advisory Committee with a tribally generated body. Others undoubtedly believed that it was necessary to maintain their newly minted constitution in order to begin a claim against the United States. The end result was that the community rejected the IRA and was left with a document that few were happy with, yet many saw as necessary.

Thus, the people of Turtle Mountain were left with a document that nobody seemed to like, not because constitutionalism was forced on the tribal nation (clearly it was not), but because they were unable to secure a document that most fully expressed the true will of the people. Discontent with the constitution grew almost immediately, especially when it proved unable to secure a lawsuit against the federal government. The original constitution was replaced in 1959, during the Termination Era, by a new constitution. But this new document suffered under the weight of its own circumstances as well and also became quickly unpopular, including amongst those who helped usher in its adoption.²⁵⁴ Another massive overhaul of the constitution was attempted in 2002 and 2003, but those efforts did not meet with success when the proposed constitution became ever more identified with an increasingly controversial tribal chairman.²⁵⁵ Still today, constitutional crises are common within the community.²⁵⁶

The traditional approach would allow a tribal advocate to see that the current Turtle Mountain tribal constitution is often controversial, and the advocate might consequently conclude that it is probably ill-equipped to handle the myriad of problems that the community faces. This advocate might study the constitution and seek out weaknesses that seem apparent from the issues that are routinely raised in the community. As a result, she or he might suggest amendments to the constitution that would make it more clear, equitable, and functional. These proposed changes would probably be at least somewhat helpful and undoubtedly would be very well intentioned.

However, the legal pluralist approach would help the advocate to

254. See Richotte, Jr., *supra* note 67, at ch. 3.

255. See *id.* at ch. 4.

256. See e.g., Tu-Uyen Tran, *Power Struggle Ensues at Reservation*, GRAND FORKS HERALD, July 18, 2009, at A1.

see that the people of Turtle Mountain have a schizophrenic relationship with their constitution. The community has sought out constitutionalism and has continually embraced it in their efforts at governmental reform; yet, the community has always been discontented with their governing document from the very start. The commitment to a constitution at Turtle Mountain has always been in serious conflict with the discontent that the people have had with the document. Under this analysis, it becomes difficult to see how a few amendments or reforms would provide much relief to the community. Instead, under a legal pluralist approach, it becomes clear that a different set of questions need to be asked: what sort of document would it take to fulfill the hope that has constantly been engendered by the constitution? Does the community need to reevaluate what a constitution can and cannot do for the tribal nation? At this point, could any document sustain the community's trust? Would an alternative governmental structure more readily serve the community? What would that alternative be? And so on.

This article is not an attempt to solve whatever problems might be presently befalling Turtle Mountain. Rather, it is an attempt to steer tribal advocates away from the artificially limited parameters of both the colonialist/revolutionary dialectic and the traditional method and toward the questions engendered by a legal pluralist method when considering tribal constitutionalism. Tribal constitutions are historical documents, much like treaties, that can tell a subtle, yet complex story about tribal governance that can dramatically affect the state of things within a tribal community. If we neglect these histories, we will continue to paint over the cracks in the walls. But if we heed these stories perhaps we can build stronger foundations.