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#### The United States Federal Government should end Title V of the Energy Policy Act of 2005 Section 3504 restrictions that allow the Secretary of the Interior to block the production of wind and/or solar energy.

#### Federal paternalism in TERA deters investment in renewables

Kronk 12—Assistant Professor, Texas Tech University School of Law (Elizabeth, Tribal Energy Resource Agreements: The Unintended "Great Mischief for Indian Energy Development" and the Resulting Need for Reform, 29 Pace Envtl. L. Rev. 811)

Mirroring this desire, many tribes are also becoming interested in energy development opportunities:¶ Perhaps more importantly, tribes are beginning to perceive renewable energy development in a positive light, as something [\*816] that is consistent with tribal culture and values. Many tribal leaders now see renewable energy as a vehicle for economic development in areas that may no longer be (or never were) suitable for agricultural development. Some also see this as a way for tribes to play a positive role in the nation's energy future. n20¶ Accordingly, energy development in Indian country is attractive to the federal government. It both advances the federal interests discussed above, and provides some tribes a method to achieve economic diversification, promote tribal sovereignty and self-determination, and provide employment and other economic assistance to tribal members.¶ Despite the foregoing, extensive energy development within Indian country has yet to happen. Former Senator Campbell explained why this may be the case:¶ The answer lies partly in the fact that energy resource development is by its very nature capital intensive. Most tribes do not have the financial resources to fund extensive energy projects on their own and so must partner with private industry, or other outside entities, by leasing out their energy resources for development in return for royalty payments... . The unique legal and political relationship between the United States and Indian tribes sometime makes this leasing process cumbersome.¶ ... .¶ The Committee on Indian Affairs has been informed over the year that the Secretarial approval process is often so lengthy that outside parties, who otherwise would like to partner with Indian tribes to develop their energy resources are reluctant to become entangled in the bureaucratic red tape that inevitably accompanies the leasing of Tribal resources. n21¶ Recognizing the importance of energy development in Indian country, the need to promote such development, and the fact that the existing structure for energy development in Indian country may actually act as a disincentive to private investors, Congress [\*817] passed the Indian Tribal Energy Development and Self-Determination Act of 2005 as part of the Energy Policy Act of 2005. n22 In relevant part, the Act allows tribes who have met certain requirements to "enter into a lease or business agreement for the purpose of energy resource development on tribal land" without review by or approval of the Secretary of the Interior, which would otherwise be required under applicable federal law. n23 In order to qualify, a tribe must enter into a Tribal Energy Resource Agreement (TERA) with the Secretary of the Interior. n24 The Secretary must approve the TERA if the tribe meets several requirements. n25 One of these requirements is of particular importance to this article. Tribes are required to "establish requirements for environmental review," n26 which must mirror the requirements of the National Environmental Policy Act (NEPA). n27 In addition, the Indian Tribal Energy Development [\*818] and Self-Determination Act of 2005 expounds upon the federal government's trust responsibility to tribes as related to TERAs. Specifically, the Act states:¶ Nothing in this section shall absolve the United States from any responsibility to Indians or Indian tribes, including, but not limited to, those which derive from the trust relationship or from any treaties, statutes, and other laws of the United States, Executive orders, or agreements between the United States and any Indian tribe. n28¶ However, the Act goes on to provide that "the United States shall not be liable to any party (including any Indian tribe) for any negotiated term of, or any loss resulting from the negotiated terms of, a lease, business agreement, or right-of-way executed pursuant to and in accordance with a tribal energy resource agreement." n29 The Act's mandated environmental review, statement on the federal government's trust responsibility, and general waiver of the federal government's liability will all be discussed in much greater detail below as they relate to why tribes have not taken advantage of the Act's TERA provisions.¶ From the text of the Act, it may be inferred that Congress hoped to promote energy development in Indian country by "streamlining" the bureaucratic process (i.e., removing the requirement of Secretarial approval for tribes that enter into a TERA with the Department of Interior). In 2003, Senator Domenici confirmed this conclusion, explaining the purpose of the then-proposed TERA provisions as follows:¶ The Indian people of the United States are the proprietors of large amounts of property. On this property and in this property lie various assets and resources ... .¶ ¶ The purpose of this bill will be to say to our Indian people, if you want to develop resources in the field of energy that lie within your lands, we are giving you the authority to do so and hopefully in a streamlined manner so that it will not be forever bogged down in the red-tape and bureaucracy of Indian lands [\*819] being subject to the Federal Government's fiduciary relationships. n30¶ Tribal representatives initially indicated support for the TERA provisions, as the TERAs allowed for increased tribal self-determination and also encouraged efficiency in energy development in Indian country. n31¶ In addition to tribal and federal governmental interests in the TERA provisions, third party investors may also be interested in TERAs, because "if a TERA is properly structured, a mineral developer should gain greater certainty and efficiency in the development of energy resources on tribal lands." n32 In this way, the TERA provisions represent a rare instance in the history of tribal-federal relations where both tribes and the federal government may benefit from a partnership. However, despite [\*820] this possibility, not a single tribe has taken advantage of the "streamlining" opportunity presented by the TERA provisions.¶ Despite the attractiveness of increased energy development in Indian country, tribes have failed to take advantage of the existing TERA provisions because they represent a mixture of federal paternalism, oversight, and limited liability that is not attractive to tribes. This article examines more deeply why tribes have, to date, failed to take advantage of the TERA provisions and then makes recommendations as to how TERA might be reformed in order to increase tribal participation. Accordingly, Section II examines the underlying purpose of the TERA provisions and associated legislative history. Three categories of tribal concerns related to the TERA provisions emerge following a review of the applicable legislative history. Each of these categories is explored in depth. Next, Section III discusses the general ability of tribes to develop their energy resources. This Section also discusses why such development may be generally attractive to tribes. The Section concludes that some tribes have both the capacity to, and economic interest in, developing their energy resources. Given the foregoing, Section IV theorizes that tribes have failed to enter into TERA agreements due to the concerns represented in the related legislative history. As a result, Section V presents two alternative proposals for reform, arguing that should either proposal be adopted by Congress, the likelihood that tribes would be willing to enter into TERA agreements would increase. Ultimately, this article concludes that adoption of either of the proposed TERA reforms will spur tribal promulgation of TERAs with the Secretary of Interior.

#### TERA regulations deter investment and stifle Native control over energy development---reform is necessary to boost Native sovereignty and effective renewable energy production

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Many tribes are currently engaged in some form of energy development. n112 A long history of energy development and [\*843] natural resource extraction exists in Indian country. n113 Within the past decade, tribes have increasingly tested their ability to branch out from their historical practice of providing access to energy resources through leases to third parties by self-development and management of energy resources. Moreover, those outside of Indian country have increasingly expressed a need for and interest in energy development within Indian country. n114 The list of existing and proposed tribal energy projects extends from the proposed Navajo-owned wind farm project in Arizona n115 to the proposed coal-to-liquids and biomass-to-liquids Many Stars Project on the Crow Reservation in Montana. n116 As a result of their historical and modern experiences, tribes have a demonstrated record of energy development. Today, many tribes are able to accomplish such energy development in a sustainable manner, thereby reducing further environmental degradation. n117¶ Ultimately, energy development in Indian country is attractive to many tribes because of the potential benefits to the [\*844] tribal community, as well as the ability to help the entire nation meet its energy goals. n118 Yet, despite the potential benefits and the demonstrated ability to engage in energy development, not a single Indian tribe has yet taken advantage of the "streamlining" benefits available under the TERA provisions of the Energy Policy Act of 2005, as discussed above. Tribal governments' lack of interest in the TERA provisions of the Energy Policy Act of 2005 is perplexing. The ability of tribal governments to exercise their sovereignty in a meaningful and stable manner increases the likelihood of tribal economic development, n119 something that is crucial to tribal governments. Moreover, "TERAs offer the potential to significantly improve investor confidence and enhance the development of renewable energy projects on tribal lands." n120¶ IV. A THEORY: THREE FACTORS DISCOURAGE TRIBAL ADOPTION OF TERAS¶ Given the potential benefits to Indian country available to tribes through utilization of the TERA provisions, the fact that tribes have not taken advantage of this opportunity is perplexing. [\*845] The fact that tribes apparently requested streamlined procedures from the federal government, n121 but yet have failed to take advantage of the streamlined provisions of TERAs n122 compounds the oddness of this turn of events. According to the Department of the Interior, "several tribes have expressed interest in obtaining information about Tribal Energy Resource Agreements (TERAs) and the TERA regulatory process, but that as of [December 1, 2010], no tribes had submitted a request to the Department to enter into a TERA." n123 On May 7, 2012, a representative of the Bureau of Indian Affairs confirmed that "to date the Secretary has received no TERA applications and no TERAs have been approved." n124 Moreover, the stated purpose of Title V of the Energy Policy Act, which contains the TERA provisions, was to attract energy development to Indian country, n125 but it has failed to do so. As exemplified by the [\*846] legislative history detailed above, it appears that tribes may have declined to enter into TERAs because of concerns associated with the federally-mandated environmental review program and the potential impact of the waiver of federal government liability, n126 which in turn may have implications related to the federal trust relationship.¶ The waiver of federal liability is itself somewhat of a conundrum, as the Secretary is directed to "act in accordance with the trust responsibility" and "act in good faith and in the best interests of the Indian tribes." n127 The Act provides that nothing contained within it "shall absolve the United States from any responsibility to Indians or Indian tribes." n128 Yet, at the same time, the provisions state that "the United States shall not be liable to any party (including any Indian tribe) for any negotiated term of, or any loss resulting from the negotiated terms" of an agreement entered into under the tribe's TERA. n129 Although perhaps not directly contradictory, these provisions are not entirely consistent with one another, as demonstrated by many of the comments highlighted above. As was explained by President Joe Shirley, Jr. of the Navajo Nation, the general waiver provisions of TERA are inconsistent with the federal trust responsibility and "is an abdication of the federal trust responsibility that is patently unfair to tribes." n130¶ [\*847] Furthermore, under the existing TERA provisions, tribes are increasingly seeing the cost of energy development being shifted to themselves. n131 This issue dovetails into concerns associated with the federally mandated environmental review provision, which places additional regulatory burdens on tribes without providing financial resources.¶ Accordingly, given that the above aspects of the TERA likely serve as impediments to tribes entering into TERAs, reform is necessary to address these concerns. In considering potential revisions to the TERA provisions, one should keep in mind the perspectives of Senators Bingaman and Campbell discussed above. The options for reform may be reflective of the perspectives articulated by Senators Bingaman and Campbell, one of which represents a vision that encompasses a stronger role for the federal government in Indian country and the other which represents a vision that encompasses a stronger opportunity for tribes to express their sovereignty and self-determination. Both of these options are discussed below.¶ V. PROPOSED SOLUTIONS TO SPUR TRIBAL ENERGY DEVELOPMENT UNDER TERAS¶ Notably, the Obama Administration may be receptive to potential options to reform the TERA provisions. The current Administration has generally been open to hearing previous calls for reform from Indian country. n132 As explained in Section II of this paper, America needs to diversify its energy portfolio, and Indian country will likely play a role in increased domestic production of energy. However, as President Joe Shirley, Jr. explained, tribes are unlikely to "opt in" to the existing TERA [\*848] provisions, for the reasons articulated above. n133 Even Congress seems to recognize the necessity of reform. In 2009, Senator Bryon Dorgan (D-ND), Chairman of the Senate Committee on Indian Affairs, and Senator John Barrasso (R-WY), Vice Chairman of the Committee, released a concept paper on energy development and efficiency within Indian country. n134 In recognizing the need for reform, the concept paper identified "outdated laws and cumbersome regulations for tribal energy development and programs" as one of the three areas where reform was necessary. n135 Ultimately, following the release of the concept paper and numerous follow-up hearings, legislation was proposed to amend the TERA provisions; however, none of this legislation was enacted. n136 As a result, reform is still very much needed. n137¶ [\*849] The discussion below offers two suggestions for reform. These options, though somewhat contradictory, would both improve upon the existing TERA regulations. Whether one proposal is found more persuasive than the other may turn "partly on how one conceptualizes the trust doctrine. It can be seen as a federal duty to protect tribes' right of self-governance and autonomy, or as a way to justify federal power and control over tribal affairs." n138 Senators Bingaman's and Campbell's comments on the then-pending TERA provisions exemplify this difference of viewpoint on the federal government's trust responsibility to federally-recognized tribes.¶ The first proposal approaches the federal trust responsibility from the perspective of promoting tribal sovereignty and self-determination: the TERA regulations maintain federal decision-making authority over energy development in Indian country, which is unnecessary and perhaps even detrimental to the overarching goal of tribal self-determination and energy development. Alternatively, the second proposal for reform adopts a "federal" or "paternalistic" perspective of the federal trust responsibility: the federal government maintains a significant role in energy development in Indian country and therefore should be liable for decisions made under TERA (presumably to protect the economic stability of tribal governments). In considering these proposals, one must be mindful of the fact that the role of the federal government in tribal decision-making is a hotly contested issued. n139 Moreover, these two options for reform are presented in recognition of the existing trade-offs between the tribal trust responsibility and full tribal sovereignty. As Professor Ezra Rosser explained, "the challenge for Indian scholars and leaders alike is recognizing that the future of tribal progress will involve a trade-off between self- [\*850] determination and the trust duties of the federal government." n140 Interestingly, the Navajo Nation made similar recommendations to the Senate Committee on Indian Affairs in comments submitted in 2003. n141¶ A. One Potential Avenue for Effective Reform: Empower Tribal Governments to Make Decisions Regarding Energy Development Without Intervention from the Federal Government¶ If Congress truly wishes the federal government to be free from liability with regard to certain types of energy development within Indian country, the TERA provision waiving federal government liability may remain. However, to maximize energy development within Indian country and truly promote tribal self-determination as is the stated goal of the Act, the federal government should remove some or all federal "conditions" on such development. n142 This is consistent with the viewpoint expressed by Senator Campbell and discussed above; if tribes are to be sovereign, they must have control over regulation within their territories and also bear the liability for tribal decision-making. n143 This means that federal mandates, such as the [\*851] mandates listed in the existing TERA provisions related to environmental review, should be removed. n144 Moreover, under the current provisions, "the government's significant involvement in the approval process could be interpreted as an infringement on tribal self-sufficiency and sovereignty." n145 As previously discussed, many tribes and tribal representatives expressed strong concerns about federally-mandated environmental review provisions that would potentially disrupt tribal governance and subject tribal governments to standards not applicable to the states. n146 Such reform would empower tribes to become the true decision-makers with regard to energy development under the TERA provisions. The proposed reform offers several benefits. First, tribes empowered as true decision-makers tend to perform better. n147 Acting as decision-makers allows tribes to exercise their sovereignty, which as discussed above is tied to the overall likelihood of tribal economic success. In order for a tribe to exercise its sovereignty as a "true" decision-maker, the federal government must play a lesser role in making decisions affecting [\*852] development within Indian country. n148 In fact, scholars have deduced that "federal control over economic decision-making is "the core problem in the standard approach to development and a primary hindrance to reservation prosperity'." n149¶ Tribes that have undertaken increased decision-making roles have a demonstrated record of success, as exemplified by tribal forest management under Public Law No. 638. Under P.L. 638, tribes may enter into contracts and self-governance compacts to assume administration of federal Indian programs, and may use the 638 program to gain significant control over natural resources development. For example, a statistical analysis of seventy-five forestry tribes showed that in the 1980s, forty-nine of the tribes used the 638 program to take some degree of management over their forest resources. The study concluded that "tribal control of forestry under P.L. 638 results in significantly better timber management." n150 When tribes took complete management over their forest resources under 638, output rose as much as forty percent with no increase in the number of workers, and the tribes received prices as much as six percent higher than they had when the forest resources were managed by the Bureau of Indian Affairs. n151 Empirical proof exists that, at least in the context of forest management (which is analogous to energy development given both involve the development of natural resources), tribes have demonstrated the ability to excel when allowed to exercise increased decision-making authority. As Professor Royster concludes, "tribal control of federal programs is thus better than federal control, but a clear second-best to tribal choices of what programs and development opportunities." n152 By eliminating the [\*853] requirement that tribes entering into a TERA come into compliance with a federally-mandated environmental review process, tribes would, therefore, have increased decision-making authority, which in turn increases practical sovereignty that has been shown to increase the likelihood of success of a project.¶ Furthermore, reduction of the federal government's role in energy development within Indian country correlates with the federal government's goal to promote tribal self-determination. n153 Although some tribes may not be in a position to take an increased role in decision-making within their territories, those that are in the position should be encouraged to take an increasingly active role, thereby empowering the appropriate tribes to be self-determinating. n154 The failure of the federal government to recognize that many tribes are capable of independent decision-making would see tribal nations "frozen in a perpetual state of tutelage." n155

#### Federal restrictions allow for arbitrary interference in Native energy projects and are antithetical to Native sovereignty

Unger 10—Clerk, Hon. Ferdinand Fernandez , U.S. Court of Appeals for the Ninth Circuit, JD Loyola Law School, MA - Linguistic Anthropology, University of Texas at Austin (Kathleen, CHANGE IS IN THE WIND: SELF-DETERMINATION AND WIND POWER THROUGH TRIBAL ENERGY RESOURCE AGREEMENTS, http://www.tribesandclimatechange.org/docs/tribes\_24.pdf)

The decision not to transfer responsibility to the tribe can be made during the consultation process if an activity is truly the province of the federal government (for example, an activity that binds the federal government to take a particular action). 257 Protecting the federal government’s sphere of action is a legitimate concern, but the government’s default posture should be to grant control to tribes to better fulfill the self-determination principle. 258 Removing the “inherently Federal functions” provision will help shift the presumption from the federal government retaining control over resource development to tribes taking over that control.¶ Second, the environmental review requirements in the Indian Energy Act should be revised to allow tribes more discretion in how they approach environmental issues. Where the TERA framework requires more stringent review than would apply under NEPA, 259 it should be altered to allow tribes greater flexibility. Congress created the TERA environmental review requirements because of concern that tribes would not protect the environment as well as the federal government would under NEPA. 260 However, scholars of tribal attitudes toward the environment suggest that tribes generally place value on environmental protection and that tribal environmental review would likely not be weaker than NEPA review. 261 Some tribes have already voluntarily adopted environmental policy acts comparable to NEPA. 262 Their reasons for doing so include a desire to meaningfully consider concerns about “environmental, cultural, historical, and ecological factors” and a desire to preserve the reservation land base for future generations.263¶ Indeed, environmental review is best viewed as a decisionmaking tool rather than as a compliance hurdle. 264 For example, preparation of an environmental assessment during planning is advisable even when not required for NEPA compliance, because an assessment can help in identifying and mitigating environmental impacts. 265 Because tribes rely on their land base and resources, 266 they have strong incentives to approach environmental review in this light.¶ For this reason, the shift from federal environmental review under NEPA to tribal environmental review under the TERA structure would be a positive step that would improve the environmental review process and avoid the conflicts of interest inherent in federal environmental review. 267 Additionally, the principle of self-determination suggests that tribes should be able to control the procedures of environmental protection, based on their own values, while engaging in resource development on their lands. 268 But to accomplish this, the TERA framework should increase flexibility for environmental review rather than specifying the form of that review, as it presently does. 269¶ Third, the sections of the legislation and regulations relating to the trust responsibility should be modified to better accord with the principle of self-determination. 270 The foremost concern is that the government uses the trust responsibility to retain control of tribal resource development, contrary to the principle of self-determination. 271 The regulations regarding interested party petitions are a case in point: when an interested party brings a claim that a tribe did not comply with a TERA, the regulations allow the Secretary to reject a tribe’s resolution of the claim. 272 This amounts to the government second-guessing tribes, even though the TERA framework and the Indian Energy Act in general purport to foster tribes’ ability to control their natural resource development activities under the self-determination principle. The portions of the legislation and regulations that enable such Secretarial second-guessing should be revised to guide the Secretary instead to view the trust responsibility as a duty to protect tribes’ right to self-determination. 273 ¶ In addition, changes to the legislation’s trust provisions can allow the provisions to better foster self-determination. The provision related to the trust obligation with respect to physical assets allows federal assertion of control at the expense of tribal self-determination. 274 This provision should be removed or revised in order to clarify that the Indian Energy Act does not authorize such control. The provision related to the trust obligation toward individual Indians and tribes should also be revised, to direct that it should be interpreted to require federal protection and encouragement of self-determination. 275¶ As the foregoing discussion indicates, the concerns expressed about the government abdicating its trust obligation 276 are unwarranted—the government has more of a tendency to use the trust doctrine to retain control over tribal resource development. TERA advocates who emphasize that TERAs are voluntary recognize the importance of focusing more on the opportunity for self-determined resource development than on the security afforded by the federal trust obligation. 277 Thus, the provision limiting federal liability does not require revision, 278 for two main reasons.¶ One reason revision is not needed is that the Indian Energy Act’s explicit recognition of the trust responsibility offers assurance that this responsibility remains intact. 279 The Act can be compared with the Indian Mineral Development Act of 1982. 280 Professor Judith V. Royster asserts that in that Act, Congress intended to sustain the trust responsibility despite the inclusion of a similar limitation on federal liability. 281 Though Professor Royster expresses some reservations based on differences between the Indian Mineral Development Act and the Indian Energy Act, she ultimately concludes that the concerns about the trust responsibility are unfounded. 282¶ Another reason the limitation on federal liability does not need to be changed is that tribes must be willing to take responsibility when assuming control over resource development. The TERA framework envisions a process in which the Secretary no longer approves specific development agreements. 283 It is sensible not to require that the federal government be liable for damages related to such agreements. 284 More importantly, it is in tribes’ own interests to accept the risks attendant to developing their resources. 285 Freedom from government control necessarily entails forgoing some federal protection. 286 The Indian Energy Act includes several provisions to build tribal capacity to take on development projects. 287 Tribes must evaluate when their capacity enables them to use a TERA to take control over resource development. They have the ability to opt in or remain under the preexisting framework for development, with federal approval and greater federal oversight and responsibility. 288 When they do take control, they should embrace the attendant risks, because “sovereignty without such risks is a contradiction in terms.” 289¶ A fourth change that should be made to the TERA structure is that it should be reworked to encourage direct tribal participation in development projects. Though the Indian Energy Act’s asserted aim is to allow tribes to take control of development on their lands, in reality the TERA legislation is geared more toward having tribes take over the regulatory role of the federal government, while private development is still the most likely medium through which resource development will take place. 290 Because research has suggested that economic development is more successful when tribes are actively involved, 291 this model should be rethought. In part, rethinking the tribe-as-regulator model will involve considering whether the TERA framework works to enable truly self-determined resource development by tribes. The framework has been called a “guarded effort” to allow tribes to determine the course of resource development on their lands. 292 But a guarded effort may not be enough to foster real self-determination.¶ In fact, the TERA legislation and regulations specify in great detail the provisions that a tribe’s TERA and its subsequent development agreements must contain. 293 This high level of federal regulation appears logically inconsistent with real tribal control over economic and resource development. 294 The issue at the heart of self-determination is tribes’ right to make their own laws and govern themselves. 295 When the federal government dictates the terms under which tribes can take control over resource development, this right remains unfulfilled. ¶ As noted previously, much of the concern over TERAs for natural resource development arose in the context of mineral resources, because of the high potential for adverse impacts resulting from their development. 296 But because wind power does not share this potential, 297 it can provide an opening for a less rigid structure than the present TERA framework allows. Given the imperative to develop wind power, now may be the perfect time to consider this possibility.¶ VII. CONCLUSION¶ Indian tribes and the DOI should view the TERA framework as providing an opportunity for tribes to take charge of resource development when their capacity is sufficiently advanced. Because of its lesser environmental impacts, wind power provides a significant opportunity for tribes to use TERAs to step into an active development role.¶ Not only do the characteristics of wind power make it particularly well suited for use of the TERA structure, but wind power is also particularly appropriate for development by a tribal energy resource development organization made up of several tribes. Allowing a tribal energy resource development organization to enter into a wind power TERA would enable the development of this renewable resource through large-scale projects that can help meet the nation’s energy needs in a sustainable way and also help meet tribes’ needs for sustainable economic development.¶ In addition, a wind power TERA provides an opportunity for tribes to have an ownership interest in the development of their resources rather than remaining only regulators of development undertaken by others. 298 This ownership enables tribes to take greater control over development projects, thereby furthering the goal of self-determination.¶ Finally, TERAs enhance self-determination by giving tribes the power of choice over development decisions. 299 Because the TERA structure is a voluntary framework for development, tribes can choose to use this tool or to forgo it in favor of the preexisting, more protective framework. Moreover, TERAs allow tribes to choose tribal control, and thus self-determination, in place of federal protection under the trust doctrine. 300 There may be less need for a robust trust doctrine after the past several decades, in which the self-determination principle has influenced federal Indian policy and has led to greater tribal autonomy—and through the choice TERAs offer, they can be seen as harmonizing the trust obligation with that present reality.301¶ However, it is worth considering whether the TERA framework goes far enough in fostering self-determination. Making some changes to the TERA structure, as this Note suggests, can help tribes achieve the goal of developing wind power in a self-determined way. But now may be the time to make broader changes to the federal legal framework that governs tribal resource development, to truly unleash the power of tribal wind.

#### TERAs are key to tribal sovereignty---they are a crucial recognition of equality by the federal government

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TERAs were devised to cut through the red tape and streamline the process by which tribes negotiate and execute leases regarding energy development and generation. In the past, the Department of Interior's Bureau of Indian Affairs (BIA) has been required to review each individual agreement — a sometimes stifling prospect that led to costly delays and/or loss of opportunities. A TERA would provide an umbrella agreement between a tribe and DOI that would allow the tribe to negotiate directly with other business partners, without federal governmental oversight. After a long public vetting process, the TERA regulations were formally approved April 9 of this year. A long time coming According to David Lester, an enrolled Muscogee Creek and executive director of the Council of Energy Resource Tribes (CERT), the Council, in conjunction with other inter-tribal organizations, “began work 10 years ago to create some kind of TERA-like legislation.” Paul Moorehead, currently a partner at Drinker Biddle & Rheath LLC where he specializes in federal Indian law and policy, concurs that TERAs and Title V have had a long slow journey through Congress. “I served on the Senate Committee on Indian Affairs as chief counsel and staff director from 1997- 2005, and during my tenure the committee worked with tribal leaders and others in Congress to fashion precursor legislation to what became the Indian Tribal Energy Development and Self Determination Act, signed into law in August 2005 by President Bush as part of the Energy Policy Act,” Moorehead said. Both men see the creation of TERA legislation as a positive step regarding Indian sovereignty and self-determination. “For every sovereign in the world, energy is a major concern,” Lester said. “We need to first be able to address our own energy needs, then if there is a surplus, supply energy to outside customers to increase currency flow and further diversify our economies.” “This is a big step forward and essentially steps the government back from a domineering role,” Moorehead said. “Under current law, even the most sophisticated and savvy Indian tribe must rely on the Department of Interior to review and approve energy-related leases, business agreements, right-of-way that involve tribal lands, tribal resources, and tribal populations.” The nuts and bolts That shiny new vehicle sits, shimmering like a chimera on the plains, waiting to be taken on a test drive. But getting a license is a lengthy and detailed process. It is true that once a tribe has a TERA in place, doing business will be greatly expedited; however, the TERA application itself will likely take a year to complete. “There is no quick and easy form,” according to Darryl Francois, senior program analyst at the Office of Indian Energy and Economic Development (IEED). “The regulations outline a specific set of steps that must be taken when applying for a TERA.” Francois said that a tribe may approach IEED formally or informally at any time during the application process. “We can sit down with the tribe and explain all the options so the tribe is not walking blind into the process.” While there are specific steps, some of those steps remain vague and subjective. According to Title V regulations, DOI must determine that a tribe has the requisite capacity to “manage the full scope of administrative, regulatory, and energy resource development” that the tribe proposes to assume under the TERA. Francois said that IEED has access to engineers, geologists, resource specialists and administrators not only to help determine a tribe's capacity but also to help the tribe build capacity. “We are also in the process of creating a Tribal Energy Policy Advisory Committee composed of tribal members and DOI personnel to assist in capacity building,” Francois said. And, he pointed out, tribes could rely on their partners in energy development to provide needed technical and/or administrative expertise. Another gray area is environmental oversight. Regulations will require that DOI conduct National Environmental Policy Act (NEPA) reviews over the range of a proposed TERA before approving it. However, there will be no NEPA review required for each specific action under the umbrella of the TERA. Instead, the tribe will have to conduct its own environmental review, including public comment. Once a tribe submits a TERA application, the Bureau of Indian Affairs has 30 days to determine if the application is complete. If it's determined not to be complete the tribe has 45 days to submit a final proposal. Once BIA accepts the proposal it has 270 days to render a ruling, accepting or denying the TERA. Tribes operating under a TERA would assume all financial and administrative responsibilities and would suffer the consequences of poor business decisions. However, Francois noted that federal tribal trust responsibilities “are still there.” He said that in cases of fraud or where a tribe's physical assets were in danger, “the department would step in.” TERA options TERAs may not be a fit for every tribe in every instance. According to Moorehead, “TERA is not for every tribe because some tribes have the kind of demonstrable capacity to develop their resources and manage their physical environments and some do not. It's also important to note that those tribes that, for whatever reason, aren't comfortable with or don't like the TERA regime, can continue to operate under existing pre-2005 statutes such as the Indian Mineral Development Act.” Francois agrees, noting that tribes, like all entities, have limited dollars to work with and need to make wise resource decisions. Besides the DOI's Indian Mineral Development Act, tribes also have access to programs like the Department of Energy's Tribal Energy Program. The main difference between these “pre-2005” statutes and TERA is the degree of tribal control. Francois said that if a tribe were on the verge of implementing an energy agreement when TERA took effect, they could insert language specifying that when the current lease was up they would be free to renegotiate under a TERA. “Technically there should be no change for any private party, just a regulatory change between the government and the tribe.” The future of TERAs “It's a new vehicle,” Francois said. “We welcome the opportunity to work with tribes to enhance their self-determination.” “I think you have to look at TERAs as part of the broad swings and themes in federal Indian law and policy. The current policy stresses tribal decision-making and tribal political and economic development, as compared to past policies that put a premium on a paradigm dominated by the federal government. TERAs present an opportunity for willing tribes to assume greater control and responsibility for energy and resource development on their own lands without need for the Secretary of Interior's review or approval,” said Moorehead. “I think the TERA concept is a logical step in Indian energy development in the age of Indian self-determination and could and probably will be applied to future tribal resource and land management statutes. You can also view a TERA for what it really is: a bi-lateral agreement between two sovereigns governing activities that will be managed by the local sovereign, the Indian tribe itself. In the old days, these kinds of bi-lateral agreements were called treaties.”

#### The status quo allows for cycles of structural violence to occur on Native lands---sovereign development of renewable energy is necessary to combat fossil fuel colonialism

Gough 9—Intertribal Council On Utility Policy; paper submitted by Honor the Earth, the Intertribal Council on Utility Policy, the Indigenous Environmental Network, and the International Indian Treaty Council (Bob, Energy Justice in Native America, A Policy Paper for Consideration by the Obama Administration and the 111th Congress, www.mynewsletterbuilder.com/email/newsletter/1409857447)

A just nation-to-nation relationship means breaking the cycle of asking Native America to choose between economic development and preservation of its cultures and lands; renewable energy and efficiency improvements provide opportunity to do both simultaneously. A green, carbon-reduced energy policy has major national and international human rights, environmental and financial consequences, and we believe that this administration can provide groundbreaking leadership on this policy. The reality is that the most efficient, green economy will need the vast wind and solar resources that lie on Native American lands. This provides the foundation of not only a green low carbon economy but also catalyzes development of tremendous human and economic potential in the poorest community in the United States- Native America. ¶ HISTORY OF EXPLOITATION AND ENERGY INJUSTICE¶ The history of resource exploitation, including conventional energy resources, in Indian Country has most recently been highlighted by the Cobell lawsuit against the Department of the Interior on behalf of individual Indian land owners, which requires both accountability of the federal trustees and a just settlement for the Indian plaintiffs. The programmatic exploitation of conventional energy resources has run an equally long and often deadly course in Indian Country, with a distinctly colonial flavor where tribes have supplied access to abundant natural resources under trust protection at rock bottom prices in sweetheart deals promoted by the federal government, yet often go un-served or underserved by the benefits of such development. Even the most recent federal energy legislation and incentives are still designed to encourage the development of tribal resources by outside corporate interests without ownership or equity participation of the host tribes. ¶ The toxic legacy left by fossil fuel and uranium development on tribal lands remains today and will persist for generations, even without additional development. Mines and electrical generation facilities have had devastating health and cultural impacts in Indian country at all stages of the energy cycle- cancer from radioactive mining waste to respiratory illness caused by coal-fired power plant and oil refinery air emissions on and near Native lands. Native communities have been targeted in all proposals for long-term nuclear waste storage. ¶ Compensation for uranium miners and their families has not been fulfilled from the last nuclear era, and every tribal government with uranium resources has opposed new uranium mining developments, including in the Grand Canyon, as an immoral and untenable burden for Native American communities. In addition, energy-related deforestation has serious climate change and human rights impacts for Indigenous communities globally. Approximately 20% of climate change-inducing emissions come from deforestation and land use, often from unsustainable energy projects, biofuel (agrofuel) and other monocrop development fueled by a need to satisfy tremendous foreign and World Bank debt obligations. On an international level, the US has yet to sign onto the United Nations Declaration of the Rights of Indigenous Peoples, we believe signing onto this important agreement is an essential early step in the context of the administration’s dealings with Native America. ¶ When considering energy and climate change policy, it is important that the White House and federal agencies consider the history of energy and mineral exploitation and tribes, and the potential to create a dramatic change with innovative policies. Too often tribes are presented with a false choice: either develop polluting energy resources or remain in dire poverty. Economic development need not come at the cost of maintaining cultural identity and thriving ecosystems. Providing incentives to develop further fossil fuels and uranium in Indian country will only continue the pattern of ignoring the well-being of tribes and Alaska Native villages in favor of short-sighted proposals that exploit the vulnerabilities of poor, politically isolated communities. ¶ ‘Clean coal’ is an oxymoron; mining coal is never ‘clean,’ coal plant emissions add to climate change impacts, carbon capture and sequestration technology is unproven financially and technically. Coal expansion on and near Native lands should not be incentivized by the administration.¶ Nuclear power is not a solution to climate change: from mining to nuclear waste, the nuclear cycle is far from carbon neutral and disproportionately impacts Native communities. Nuclear power is also economically unfeasible, and will not address climate change at the speed required to mitigate the devastation ahead. ¶ Oil drilling in sensitive Arctic regions, including the off shore Outer Continental Shelf areas of the Beaufort and Chukchi Seas, threatens Alaska Natives’ way of life, and perpetuates the nation’s addiction to oil and GHG emissions. It is of utmost importance to institute a federal time-out on the proposed offshore development within the Outer Continental Shelf areas in Alaska. It has not been proven whether or not cleaning up spills in broken ice conditions is possible, the implications to subsistence ways of life and human health of coastal communities have not been reviewed extensively and impacts to Polar Bears and other threatened and endangered Arctic marine species have not been studied.¶ Importing 80% of the Alberta Canada tar/oil sands crude oil to feed US energy needs encourages unprecedented ecological destruction in Canadian Native communities and the use of a fuel far more carbon intensive than conventional oil. This tar sands expansion has been called the tip of the nonconventional fuels iceberg. This iceberg includes oil shale, liquid coal, ultra-heavy oils and ultra-deep off shore deposits. Extraction of these bottom-of-the-barrel fuels, emits higher levels of greenhouse gases and creates ecological devastation.¶ Unchecked expansion of biofuels (agrofuels) production and agricultural monocrops threaten biodiversity and food security and contribute to climate change and the destruction of rainforests, impacting Indigenous communities worldwide. ¶ Impacts of climate change are greatest in Native communities because of the close cultural relationship with the land and subsistence farming, hunting and fishing. In Alaska, the entire Indigenous village of Shishmaref will need to relocate (at a cost of $180 million) because rising temperatures have caused ice to melt and rapid erosion of the shoreline. Shishmaref is one of some 180 villages that will either move, at an estimated cost of $1.5 million per household or be lost. All of these burdens fall on tax payers, although one Alaskan Native Village- Kivalina has sued 14 oil companies for the damages.¶ Our Native organizations and the communities and tribes we serve believe the Obama Administration should request the new Congress and direct the departments of interior, energy and treasury to review all energy subsidies that go to coal, gas, oil and nuclear industries which have climate or toxic waste impacts on Native communities and to redirect the billions in subsidies to actualize clean sustainable energy development in Native America. Subsidies for the nuclear, coal, gas and oil industry should be rapidly phased out with a proportional ramp up of subsidies for renewable technologies and locally administered conservation/efficiency improvements. ¶ In particular, we believe that any climate change legislation should not allocate funds for nuclear or clean coal technologies, and proposals to provide liability guarantees to nuclear plants, and capitalize research on uranium in situ mining practices must be eliminated. ¶ NATIVE AMERICA: IN NEED OF GREEN ECONOMIC DEVELOPMENT¶ Ironically, whiles some Native Nations and their reservation communities have borne the brunt of destructive energy development that has reaped massive profits for some, they are the poorest in the country, with high unemployment rates and inadequate housing.¶ The unemployment rate on Indian reservations is more than twice the national rate.¶ The median age in Indian Country is about 18 years, with a young and rapidly growing population in need of both jobs and housing. ¶ The poverty rate for Native Americans is 26%; more than twice the national average.¶ More than 11% of Indian homes do not have complete plumbing. About 14% of reservation households are without electricity, 10 times the national rate. ¶ In rural Alaska where Alaska Natives predominately reside, 33% of the homes lack modern water and sanitation facilities. ¶ Energy distribution systems on rural reservations are extremely vulnerable to extended power outages during winter storms threatening the lives of reservation residents. ¶ Reservation communities are at a statistically greater risk from extreme weather related mortality nationwide, especially from cold, heat and drought associated with a rapidly changing climate. ¶ Reservations are waiting on more than 200,000 needed new houses. ¶ About 1/3 of reservation homes are trailers, generally with completely inadequate weatherization.¶ Inefficient homes are a financial liability, leaving owners vulnerable to energy price volatility.¶ Fuel assistance programs provide millions of dollars of assistance to tribal communities. While necessary in the short term, they do nothing to address the cycle of fuel poverty due to leaky inefficient homes, and the need for a localized fuel economy. ¶ Internationally, the present levels of deforestation and climate-related disasters are creating huge populations of environmental refugees. It is anticipated that within 20 years, we will be spending some 20% of world GDP on climate change related mitigation and disasters.¶ Unemployment rates, poverty and the need for efficiency improvements and renewable energy provide an ideal opportunity on tribal reservations and Alaska Native villages for maximizing the impact of a green jobs initiative. Local jobs weatherizing buildings, constructing, installing and maintaining renewable energy technology could be created. This has huge financial implications for rural economies, and for the overall US economy. ¶ The Obama Administrations’ economic stimulus plans that incorporates a green economy and green jobs portfolio must include provisions for access of these resources by our Native Nations, our tribal education and training institutions and Native organizations and communities. ¶ GREEN ECONOMIES IN NATIVE COMMUNITIES: MASSIVE POTENTIAL, MAXIMUM IMPACT¶ Providing clean renewable energy development and reversing the trend from exploitation toward energy justice should be top priority in administration energy decisions. Tribes must be provided federal support to own and operate a new crop of renewable electricity generating infrastructure providing the dual benefits of low carbon power and green economic development where it is needed most. Tribes should be targeted with efficiency programs to reduce consumption of fossil fuels for heating and cooling and creating local jobs weatherizing and retrofitting buildings, helping reduce the tremendous amount of money that exits communities to import energy. ¶ Tribal lands have an estimated 535 Billion kWh/year of wind power generation potential.¶ Tribal lands have an estimated 17,000 Billion kWh/year of solar electricity generation potential, about 4.5 times total US annual generation. ¶ Investing in renewable energy creates more jobs per dollar invested than fossil fuel energy.¶ Efficiency creates 21.5 jobs for every $1 million invested. ¶ The costs of fuel for wind and solar power can be projected into the future, providing a unique opportunity for stabilizing an energy intensive economy.

#### Native renewable energy allows for a democratic paradigm shift that preserves domestic communities

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“We believe the wind is wakan, a holy or great power,” explains Pat Spears, from his home on the Lower Brule reservation in South Dakota. Pat, President of the Intertribal Council on Utility Policy, is a big guy with a broad smile. “Our grandmothers and grandfathers have always talked about it, and we recognize that.” The Lakota, like other Native peoples, have made peace with the wind, recognizing its power in change, historically and today. Alex White Plume, president of the Oglala Lakota Nation, echoes Spears' words, talking about tate as the power of motion and transformation, a messenger for the prayers of the Lakota people. Indeed, it is a time of change, brought on by rising oil prices and crumbling infrastructure. Native peoples have an eye to the horizon, where wind turbines, solar panels, and a movement for local control of energy are rising. This is a movement, not about technologies and gadgetry, but about what the future should look like. Will it be centralized, with the necessities of life coming from far away, or will it have local food and local energy? This is about a movement which is found in the winds that sweep the reservations and ranches of the Great Plains, in the sun that bakes the Southwest, and in the grasses and grains of the prairies. All of these resources lend themselves to locally controlled power production. In the United States, we are missing the canoe. Centralized power production based on fossil fuel and nuclear resources has centralized political power, disconnected communities from responsibility and control over energy, and created a vast, wasteful system. Renewable energy, which has the opposite effect, is the fastest growing energy source in the world. And according to Exxon, energy is the biggest business in the world. So tackling this issue has some large implications. At the very least, the United States is missing major economic opportunities. When the Rosebud Sioux wanted to build a wind generator, they had to import turbine parts from Denmark, and that's a long way away. When George Bush can say in his State of the Union address that the United States is addicted to oil, it's time to admit that we are energy junkies. The United States, with only 5 percent of the world's population, consumes one third of the world's energy. In just the past 70 years, the world has burned 97 percent of all the oil ever used. We have allowed our addictions to overtake our common sense and a good portion of our decency. We live in a country with the largest disparity of wealth between rich and poor of any industrialized nation. As the price of energy rises, the poor are pushed farther out on the margins. Renewable energy is a way to reverse that trend. We need to recover democracy, and one key element is democratizing power production. Alternative energy represents an amazing social and political reconstruction opportunity, one that has the potential for peace, justice, equity, and some recovery of our national dignity. Distributed power production, matched with efficiency, is the key. According to the Department of Energy, we squander up to two-thirds of our present fossil-fuel electricity as waste; we lose immense amounts in inefficient production, heating, and transportation systems. We must reduce our consumption, then create distributed energy systems, where local households and businesses can produce power and sell extra into the grid. Relatively small-scale and dispersed wind, solar, or even biomass generation provides the possibility for production at the tribal or local level without involving big money and big corporations. That, in turn, allows for a large measure of local accountability and control—pretty much the definition of democracy—and an appreciation for where we are and where we need to go. Some of the largest wind projects in the country are in Minnesota, where the Plains come to the edge of the Great Woods and the winds sweep across the southern part of the state. Funding for Minnesota's renewable energy programs is largely the result of a hard-fought battle in the Minnesota legislature over a nuclear waste dump adjacent to the Prairie Island Dakota reservation. The tribe's concern over the health effects of nuclear waste next to their community led to state legislation requiring a significant investment in renewable energy, which spear–headed wind development. Elsewhere, indigenous peoples have four of the nation's 10 largest coal strip mines on our territories; have been inundated and drowned for dam projects like Pick Sloan (Missouri River Basin), James Bay, Kinzua, and Columbia River; and have been irradiated by uranium mines and proposed nuclear waste dumps in Western Shoshone and Goshute communities. Native communities are ready for a change.

#### Localized wind and solar offer an opportunity to move beyond conventional biopolitical models of development that exploit Indigenous culture and land and have resulted in the systematic extermination of Native Americans

Powell 6—Assistant Professor of Anthropology, Appalachian State (Dana, Technologies of Existence: The indigenous environmental justice movement, www.cfeps.org/ss2008/ss08r/harcourt/harcourt3\_powell.pdf)

In her work with the indigenous movement in Ecuador, Catherine Walsh speaks of the movement’s building of local alternatives as ‘the resignifying in meaning and practice of ‘development’ (Walsh, 2002: 7). Development, with its long history of top-down, state-driven, regulatory, and often export- and expert-oriented goals, is being increasingly challenged by indigenous social movements in the Americas seeking to decentralize and gain local control over various aspects of governance, economic growth, cultural projects, and natural resources. Not completely unlike the Ecuadorian Pachakutik movement Walsh describes, the movement for ‘environmental justice’ in indigenous communities in the US is experimenting with alternative strategies to restructure the production of power to advance democracy and sovereignty for indigenous communities. This essay addresses the possible resignification of development being produced by the practices and discourses of a particular indigenous movement in the US, which addresses controversies over natural resource management on reservation lands. In particular, I consider the emergence of renewable energy projects within the movement as new modes of economic, ecological, and cultural development, countering the history of biopolitical regimes of natural resource extraction, which have marked indigenous experience in North America since Contact. I argue that these emerging technologies not only resist but also propose alternatives to the dominant models of energy production in the US.

Background

The Indian Self-Determination and Education Act of 1975 enabled American Indian tribes for the first time to self-determine their own resource policies and regulatory agencies, overseeing tribal programs, services, and development projects. In 1988, the Indian Gaming Regulatory Act opened the way for the development of casinos on reservations as a new mode of tribal economic development, and today 34% of all federally recognized tribes run full-scale (class III) casino gambling, although only a minute fraction of these represents the soaring economic success of places like the Foxwoods Casino and Resort on the Mashantucket Pequot reservation. These and other approaches to economic development ^ especially natural resource extraction and casino gaming ^ have become issues of intense debate among scholars and activists (LaDuke, 1999; Gedicks, 2001; Blaser et al., 2004; Cattelino, 2004; Hosmer and O’Neill, 2004), as well as among tribal governments, federal agencies, and within the general population. In the cacophony of competing moral claims and recommended approaches elicited by these various controversies, the voices with alternative proposals are sometimes lost. Against these two dominant approaches, there is another trend in tribal economic development beginning to emerge, connected to the indigenous environmental justice movement (IEJM) in North America and critical of neo-liberal development models. Drawing upon an historical conflict over resource extraction on reservation lands (see Figure 1), this movement is turning towards what David Korten has called an ‘emergent alternative wisdom’ of development practice (Korten, 2005).

This trend, embedded in a broader network of environmental justice projects in Native America, is a move towards renewable energy technologies on reservations: wind power and solar power in particular. While these projects engage wider energy markets, global discourses on climate change and the ‘end of oil’, and funds from federal agencies, they also embody an alternative knowledge grounded in an historical, indigenous social movement in which economic justice for indigenous peoples is intimately intermeshed with questions of ecological wellness and cultural preservation. As such, wind and solar technologies are being presented and implemented as alternative approaches to dominant practices of economic development and carry with them a history of centuries of struggle, as well as the hope for a better future.

These emerging practices of a social movement-driven development agenda draw our attention to the cultural politics, meanings, histories, and conceptual contributions posited by unconventional development projects. As part of an emerging movement in support of localized wind and solar energy production on tribal lands, these projects are responses to the biopolitical operations of 20th century development projects. They respond to a long history of removal, regulation, knowledge production, and life-propagating techniques administered on reservation-based peoples. The movement itself addresses controversies in a way that interweaves the economic, the ecological, the cultural, and the embodied aspects of being and being well in the world; as a member of the Indigenous Environmental Network (IEN) said to me:

The movement is really about health and people dying … people can’t have an enjoyable life anymore. The work of the movement is never about the power plant itself, but about how all the EJ (environmental justice) issues come together and link up to affect people’s lives … its about having a good life (B Shimek, 2004, personal communication).

Such an analysis resonates with Arturo Escobar’s emphasis on a framework of a ‘political ecology of difference’ and the need to consider ‘cultural distribution’ conflicts in studies or other engagements with natural resource issues (Escobar (2006) Introduction). Concerns of ‘cultural distribution’ have become crucial work for the IEJM as it seeks to resignify development as ‘environmental justice’ in the context of a particular history of illness and disease, environmental contamination, poverty, and place-based worldviews. I argue that the way in which the IEJM has coalesced around these alternative development projects suggests that these projects are ‘technologies of resistance’ (Hess, 1995) to dominant forms of economic development, but also ^ and perhaps more significantly ^ imaginative technologies of existence, mediating a particular discourse of natural resource controversies, including values of a ‘good life’. As such, renewable energy technologies are resignifying the politics of ‘sustainability’ through the movement’s concept of ‘environmental justice’, which cuts across reductive interpretations of economy, ecology, and culture.

Development as a biopolitical operation

In analysing development as a biopolitical operation, I follow other feminist scholars and development critics who have considered the biopolitical effects of particular development discourses on women’s bodies and movements (Harcourt, 2005) and labour and corporations (Charkiewicz, 2005). As they argue, the post World War II model of development as a project driven by Western states to modernize other ‘emerging’ states and bring them into a geopolitical sphere of economic control is, at its base, an exertion of biopower on particular (gendered, raced, labouring) bodies. Michel Foucault described biopower as the power of the state ‘to make live and let die’, in contrast to the disciplinary power of monarchical states, which exerted a sovereign’s power ‘to make die and let live’ (Foucault, 2003). In other words, the king controlled his subjects by the threat (and occasional enactment) of killing some and letting others live, in order to maintain control, whereas the modern state makes less of a spectacle out of individual killings and exerts its force over populations instead, managing the species through techniques of regulating birth, mortality, biological disabilities, and the effects of the environment. The significant shift to a regime of biopower is the new target of control: the population. When viewed as a biopolitical operation, development programs of the post-war model (which has lingered and reproduced itself in various forms on into the 21st century) are revealed as schemes to control populations ^ in particular, ‘Third World’ populations defined by the West as political problems and scientific problems, as well as economic opportunities.

A similar history runs through Native America, as this ‘Fourth World’ population was a target of regulation, management, and biological speculation from the moment of Contact, over 500 years ago. Indigenous populations worldwide have experienced the effects of biopower, especially in terms of the management and extraction of natural resources (including bodies and, more recently, genetic information), but in the Americas the situation is geo-historically particular, given the sweeping catastrophe of disease, decimating what some have estimated to be 95 per cent of the pre-Contact population. Another particularity of the North American situation is that, over the long history of occupation since 1492, tribal populations have been alternately exterminated, removed, recombined, relocated, and politically reorganized by state institutions, often under the guise of care and patrimony. In the 19th and early 20th centuries, tribes as populations were regulated and made to live through land enclosures, creating spatial patterns of security, on frontier lands considered undesirable to European colonists. This desirability was, however, based on the visible alone; the resources that laid beneath the surface of the often barren, dry reservations would emerge in the 20th century as some of the most coveted commodities on earth (Figure 2).

In sum, thinking of the history of development as a biopolitical operation to manage the life of populations of indigenous peoples in the Americas allows us to see the regulatory operations of the state, sometimes glossed as integrationist policies, as has been the trend in Latin America with the history of indigenismo (Sawyer, 2004), and sometimes framed as patrimony and treaty responsibility, as in the United States, with the ‘Indian New Deal’ in the 1930s (Collier, 1938). Moreover, it provides a way of understanding the history of state-driven development models as regimes of controlling, regulating, and organizing particular bodies and environments ^ the antithesis of the liberal, humanitarian projects these regimes have often claimed to be. Finally, as I move to discuss the IEJM and the emergence of wind and solar power projects on reservations, these technologies of resistance and existence can be thought of as counter-projects to the biopower of 20th century models of development, which have exacted significant ecological and cultural costs from tribes, in service of a reductive, disembedded view of economic growth.

Emergence of wind and solar power projects in the IEJM

In 2003, the first utility scale, indigenous-owned and operated wind turbine in the US was installed on the Rosebud Sicangu Lakota reservation in South Dakota. The project took eight years of organizing, fundraising, and coordinating among the tribal government, the Intertribal Council on Utility Policy (ICOUP), the Department of Energy, local activists and indigenous non-governmental organization Honour the Earth (HTE). Rising to 190ft tall, the 750kW, Danish-manufactured wind turbine was installed with ceremony and great expectation as the first of many to come. As the closest structures to the turbine site, the Rosebud casino and its adjacent hotel will consume the wind’s power until new lines are constructed to carry it deeper into the reservation to individual homes. The turbine at Rosebud was installed as the first among several emerging wind energy projects on Native American reservations from the Dakotas to Montana and Colorado. Bob Gough of ICOUP explains that this technology is being used to promote a wider campaign for renewable energy on other reservations:

This turbine could have been simply a stand-alone project and the tribe would have been pleased enough. This is really a show horse. It’s there at the casino to get high visibility ^ we’re going to have information kiosks to teach people about it. But this project was also designed to take us through all the steps we need to learn to build more of these. There’s a lot more than just putting up a wind turbine and connecting a few wires. With wind turbines you’re connecting into the North American electricity grid, the largest machine in the world, which involves a lot of rules and policies.We’ve used this as an opportunity to learn how to do this on a larger scale, and we are sharing that with any of the other tribes that are interested (Tidwell, 2003: 3).

Situated within the broader IEJM in North America, these projects mark a shift towards wind energy activism within the movement, which traces its own history of resistance to the recent action of the 1960s and 1970s, but more deeply to the resistance that has always been a part of the colonial experience of being occupied and ‘developed’. The Rosebud turbine is a community based development project imagined and executed by local and regional activists and engineers, but funded by a combination of national foundations and federal agencies, including the Environmental Protection Agency, the Department of Energy, Department of Interior and US Department of Agriculture, making for complex and contradictory alliances between tribes and the state. The project is also situated within the context of environmental and political debates on energy development around the state of South Dakota, where plans are underway to develop 2000 MW of coal-fired power by the end of 2010 (LaDuke, 2004). The wind turbine is moving to centre stage as a potential solution to many of movement’s primary concerns: climate and ecological change, natural resource conflicts, cultural preservation, globalization, and tribal sovereignty.

Twenty years earlier and1100 miles south, Hopi engineers, activists, and tribal leaders began to install solar photovoltaic panels on rooftops of residential homes, bringing electricity to families who had been living off the grid, without electricity Projects on the Hopi and Navajo reservations have proliferated over the past two decades, with the Hopi solar business NativeSun and engineer Debby Tewa leading the way. In recent years, these projects have connected with the emerging wind power projects in the Plains region, through the work of the national Native NGOs, HTE, and the IEN, and have become central to these groups’ common visions and overlapping strategies of environmental justice and sustainable development on tribal lands. In the last two years, these two national networks have collaborated with grassroots environmental and cultural protection organizations to install additional technologies on Newe Segobia, or Western Shoshone territory, on the Pine Ridge Lakota reservation, and on the Navajo reservation. These installations have become intermeshed with ongoing indigenous environmental justice campaigns focused on conflicts centring primarily on aspects of energy production, such as the recent conflicts over the proposed mining of the sacred Zuni Salt Lake; the proposed federal nuclear waste storage sites on the Skull Valley Goshute reservation and at Yucca Mountain, Nevada; and uranium mining on the Navajo and Hopi reservations. In several of these cases, the environmental justice activists are challenging tribal governments’ contracts with regional utilities and/or federal agencies. Without a long digression into the history and politics of natural resource use and development on reservation lands, suffice to say it is not always but is often a site of intense internal debate and conflict for tribes themselves.

The significance of the relatively recent emergence of wind and solar technologies as tribal development projects is that tribes are increasingly connecting into this network of renewable energy activism as a means of economic growth, ecological protection, and cultural preservation. Seemingly an oxymoron ^ to preserve ‘tradition’ with the use of high-tech machines ^ advocates of wind and solar power emphasize that cultural preservation is itself about flexible practices, change, and honouring worldviews in which the modernist distinction between nature and culture is nonsensical. In other words, when some of the most important cultural resources are the land itself (i.e., mountains for ceremonies, waters for fishing, soils for growing indigenous foods), to protect nature is also to protect culture. As Bruno Latour has also argued, this natures-cultures epistemology is also ontology ^ a different way of knowing, inhabiting and engaging the world (Latour, 1993, 2005). Wind turbines and solar photovoltaic panels are articulating with this worldview, and at the same time articulating with many tribes’ desires to move beyond fossil fuel extraction as a primary means of economic development, and towards natural resource practices that are more ‘sustainable’. The wind and the sun introduce new elements of common property to be harnessed for alternative development projects and increased decentralization and ownership over the means of power production.

Technologies of existence

This recent emergence of renewable energy technologies on reservations inspires analysis of natural resource conflicts to move beyond models of resistance in understanding controversies and social struggles over resource management and energy production to seeing the ways in which concepts such as ‘sustainability’ are being resignified through the introduction of what I argue are imaginative technologies of existence. I stress existence over resistance not to obscure the contestations of federal, tribal, and utility consortium proposals for natural resource development, which have been importantly detailed elsewhere (Gedicks, 2001), but to emphasize the creative, imaginative work of the movement in envisioning and enacting alternative ways for tribes to self-sustain and grow healthy economies, ecologies, cultures, and bodies in an integrated manner. There are other technologies of existence engaging particular, situated natural resource conflicts within the movement: recovery of customary foods and harvesting practices, coalition-building around water rights and resources, restoration of salmon and sturgeon populations, and projects involving information and film media as a means of preserving and producing the ‘natural’ resource of culture itself. This constellation of resources ^ energy, food, water, and culture ^ are of central concern to the IEJM and creating sustainable methods of generating each advances the ‘good life’ towards which the movement’s work strives.

In this sense, wind and solar projects on reservations are not technologies of existence to ‘make live’ in the biopolitical sense of a population’s ensured biological survival and micro-practices of regulation, but technologies that articulate with desire, history, localization, imagination, and being in a way in which the meaning of ‘existence’ exceeds a definition of continued biological survival or reproduction. These technologies are about a particular quality of existence that speaks to the late Latin root of the word, existentia, which comes from the earlier Latin exsistere, meaning ‘come into being,’ itself a combination of ex ‘out’ þ sistere ‘take a stand’ (O.A.D., 2001). Thus, when ‘existence’ recovers the notions of coming into being, externality, and taking a stand, what it means to live and to grow is inherently active and perhaps even risky. Sustainability, then, in the context of the IEJM, is a bold existence and set of practices informed by a particular history of struggle and oriented towards a future of well-being, in which the economic, the ecological, and the cultural are interdependent and mutually constitutive.

The movement’s concept of ‘environmental justice’conveys such a non-reductive understanding of sustainability as a certain quality of existence. The concept proliferates and circulates through the geographically dispersed installations of wind turbines and solar panels (among the other technologies of existence) and is reinforced at national and transnational gatherings of HTE and the IEN. As an enunciation of sustainability, ‘environmental justice’ recalls specific cases of contamination on indigenous lands, articulates with broader environmental and anti-racist movements worldwide, and critiques dominant approaches to development by posing concrete alternatives. This is a critical, alternative knowledge being produced through the networked practices of a specific social movement. It is not the sustainability of the ‘triple bottom line’ in neo-liberal theory that self-congratulates its attention not only to capital but also to pre-figured notions of the environment and society; though it is also not a romanticized ‘traditional’ wisdom of indigenous people, endowed with some sort of essentialist knowledge and protective role for the natural world. It is, instead, a sophisticated hybrid concept ^ in which knowledges of wider energy and trade markets, science and engineering, local resource management issues, global processes of climate change and wars for oil, and the relational knowing that comes with enacted attachments to place, converge to inform and generate a call for ‘environmental justice,’ implemented through specific material technologies.

#### Advocating for Native renewable energy development is necessary to create epistemological fissures that can begin to rectify historical traumas of energy exploitation

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In this paper, we explore how non-governmental political action on the Navajo Nation, and environmental activism, in particular, is organized around the perennial question of development, and the ontological frictions that produce and continue to shape these debates. At the same time, we suggest that these ontological differences are never complete or total, but in fact are the result of historical processes of lived experience, as much dependent upon the circulations of “outside” forces such as popular culture, higher education, global pan-Indigenous movements, and the traveling discourses of environmentalism, climate change, and environmental justice, as upon anything inherently Diné. The effects of such global forces work to produce political actors who very often move and operate across the boundaries of well-worn categories such as “tradition” and “modernity,” “grassroots” and “governmental.” The experience of indigeneity itself is forged in and through encounters, always a relational, unpredictable, and “open-ended process,” as others have shown (see de la Cadena and Starn 2007). The result is a process of frictions, fractures, and flows of political action, in which differing senses of what the world is and should be (what we herein call “ontologies”) generate an opening for exploring how a sense of unique identity (what it means to be specifically Diné) is being worked out through environmental activism and contested interpretations of ethics, “nature” and “culture.” In this sense, social movement actors are contributing in an active and meaningful way to local, regional, and national debates on the future of particular extractive industries (in this case, mining) on indigenous territories. The knowledge they bring forth and mobilize is, we will show, integral to the Nation-wide debates on the future of energy for the tribe and the region. Through this paper, we aim to contribute to the interdisciplinary fields of social movements studies and development studies, which have largely overlooked, as Bebbington points out, “the roles of rural social movements in mediating the effects of large scale capital investment on rural livelihoods and territorial change” (Bebbington et al 2008: 4). Like others (see Escobar 1998 and Hess 2005), we view the work of social movements to be crucial in shaping the discourse, knowledge, and future of not only how development technologies are implemented (or not) in particular places, but how the very conceptual framework of “development” itself is thought, spoken, and transformed. 3¶ [Continues]¶ In conjunction with the FLD, tribal members have used other Diné ethical principles such as dóó nal yee dah to support their call for the prohibition on uranium mining and milling on and around Diné territory. Dóó nal yee dah, which roughly translates to “certain substances within the Earth that are harmful to the People should not be disturbed,” was derived from consultations by environmental groups with medicine people and other tribal elders with traditional/historical knowledge. Once introduced, use of similar customary principles and concepts have taken hold and proliferated in other struggles. More recently, the group Diné CARE (Diné Citizens Against Ruining our Environment) issued a report on economic and energy alternatives to a proposed 1500-megawatt coal-fired power plant on the Navajo Nation known as the Desert Rock Energy Project, using FLD and other related Diné ethical principles as the basis of their argument in a 200-page report laying out economic and energy alternatives to the proposed coal plant. 10 The report’s Introduction cites the 2005 Diné Natural Resources Protection Act (DNRPA) and its use of FLD as an authoritative basis and point of departure for their own argument:¶ “DNRPA and its incorporation of Diné Fundamental Laws to ban uranium activities make evident the need for Navajo energy development and economy to be “rebalanced” through the traditional concept of Alch’i Silá (“they face/relate each other”), rectifying the historical trauma of energy development and mining with sustainable renewable technology in accordance with foundational principles” (Diné CARE 2008).¶ Building on this call for “rebalancing” through new and different technologies, the report continues to draw upon Diné worldview and values to argue for investment in solar and wind power on the Navajo Nation, instead of coal-fired power. Stressing core Diné ethics of hozhó (“beauty, or balance”), k’e (“relations”), and áná’áál’ii’ nitl’iiz niná’nil (“atonement by putting things in place”) and also explicating the technicalities of concentrated solar power technology, the report stands out in its unique usage of Diné ontology and epistemology combined with technical knowledge and renewable energy expertise. 11¶ Also drawing on Diné Natural Law and ontological difference, other non-governmental Navajo groups have sustained long term public campaigns challenging development projects in areas outside of reservation geopolitical boundaries, but in places that are considered part of their historic territory and sacred to the Diné (as well as other Native peoples of the region). In several recent cases, activists have mounted challenges to development activity on what are considered to be holy mountains that play an important role in Navajo cosmology, as sites of the birth and resting places of specific and central deities such as Changing Woman, and her twin sons, Monster Slayer and Born-for-Water. These mountains are sacred in Navajo belief and are the geographic, historical boundaries for Dinétah, the Navajo territory. An example of one such struggle is the “Save The Peaks” movement, centered in Flagstaff, Arizona, one of the larger Navajo and nonNative “border towns” of the reservation. The Flagstaff-based Black Mesa Water Coalition (BMWC), a coalition of Navajo and Hopi organizers, along with non-Native allies opposed the city’s plan to use recycled effluent, or city wastewater to create “snow” for the Arizona Snowbowl Ski Area. This ski area was slated as a tourist attraction on the mountain known, in English, as the San Francisco Peaks. This mountain, known as Dook’sliid by the Diné, is the westernmost of their four sacred mountains. In their campaigns, BMWC and the affiliated organizations used the FLD and other traditional/historical principles as a central organizing ethic for their “environmental justice” work. Interestingly, in this particular campaign – as in the campaign that culminated in the moratorium on uranium mining – the Navajo Nation Council has aligned with non-governmental actors against the developers, also deploying FLD and invoking cultural preservation as the basis for protecting these landscapes. ¶ Admittedly, use of customary principles serves as a pragmatic legal strategy, but there remains strong use of these concepts within the meaning-making work that goes on within Diné non-governmental politics. In fact, it is precisely the contested meanings of FLD that fuel the debates over various development technologies, as evidenced in all ten of the public hearings for the Draft Environmental Impact Statement on the Desert Rock Energy Project (coal fired power plant) during the Summer of 2007. The meaning-making work of these social movement actors is crucial to their political subjectivities and epistemologies, which are significant products of the cultural politics they are engaged in. In other words, their efficacy and agency cannot be measured only in terms of “political opportunities” or directly causal factors, but operates as well at the level of knowledge production and resignification. 12 What’s more, many of Navajo non-governmental actors express extreme dissatisfaction with the decision-making processes currently operating in the Navajo Nation government, while at the same time stressing the central importance of tribal sovereignty, self-determination, and good governance. ¶ Significantly, leaders within environmental justice organizations critique the structure of the tribal government as a systemic cause for dissonance between industrial/extractive development and traditional notions of environment. These organizations argue (as do many scholars, see Iverson) that because the Navajo Nation government was created by the federal Bureau of Indian Affairs in 1923 as an instrument of extended colonial rule and relations between the U.S. federal government and the Navajo people in the interests of extractive industry, the current government is both non-traditional, colonial, and structured to act more in the interests of large corporations than in the interests of the Navajo people. In other words, grassroots organizations question the legitimacy of formal political institutions on the Navajo Nation, now in existence for only 80 years, while using historical Diné knowledge, which, although it has evolved over time, has a much longer history. As such, the politics of authenticity and heritage is forged where ethical teachings engage modern institutions, implicating and generating a diverse array of Diné identities. This sort of contentious social practice yields shifting personal and collective identifications, often through these contested ontologies and epistemologies. Following Holland and Lave (2001), relationships between enduring struggles (such as contested modes of governance) and historical subjectivities (the activists, the council members, and others) are mediated through local, situated practice, such as the debate over existing and proposed development projects. And the sides of the debate on which specific actors will fall is never fully foreseeable.

#### Obsession with short-time frame impacts obscures ongoing violence that doesn’t fit neatly within conventional temporal frames

Nixon 10 (Rob, Rachel Carson Professor of English, University of Wisconsin-Madison, Slow Violence and the Environmentalism of the Poor, pp 1-14)

When Lawrence Summers, then president of the World Bank, advocated thai the bank develop a scheme to export rich nation garbage, toxic waste, and heavily polluting industries to Africa, he did so in the calm voice of global managerial reasoning.' Such a scheme. Summers elaborated, would help correct an inefficient global imbalance in toxicity. Underlying his plan is an overlooked but crucial subsidiary benefit that he outlined: offloading rich-nation toxins onto the world's poorest continent would help ease the growing pressure from rich-nation environmentalists who were campaigning against garbage dumps and industrial effluent thai they condemned as health threats and found aesthetically offensive. Summers thus rationalized his poison-redistribution ethic as offering a double gain: it would benefit the United States and Europe economically, while helping appease the rising discontent of rich-nation environmentalists. Summers' arguments assumed a direct link between aesthetically unsightly waste and Africa as an out-of-sighl continent, a place remote from green activists' terrain of concern. In Summers' win win scenario for the global North, the African recipients ot his plan were triply discounted: discounted as political agents, discounted as long-term casualties of what 1 call in this book "slow violence," and discounted as cultures possessing environmental practices and concerns of their own. I begin with Summers' extraordinary proposal because it captures the strategic and representational challenges posed by slow violence as it impacts the environments and the environ-mentalism of the poor.¶ Three primary concerns animate this book, chief among them my conviction that we urgently need to rethink—politically, imaginatively, and theoretically what 1 call "slow violence." By slow violence 1 mean a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at all. Violence is customarily conceived as an event or action that is immediate in time, explosive and spectacular in space, and as erupting into instant sensational visibility. We need, I believe, to engage a different kind of violence, a violence that is neither spectacular nor instantaneous, but rather incremental and accretive, its calamitous repercussions playing out across a range of temporal scales. In so doing, we also need to engage the representational, narrative, and strategic challenges posed by the relative invisibility of slow violence. Climate change, the thawing cryosphere, toxic drift, biomagnification, deforestation, the radioactive aftermath s of wars, acidifying oceans, and a host of other slowly unfolding environmental catastrophes present formidable representational obstacles that can hinder our efforts to mobilize and act decisively. The long dyings the staggered and staggeringly discounted casualties, both human and ecological that result from war's toxic aftermaths or climate change are underrepresented in strategic planning as well as in human memory.¶Had Summers advocated invading Africa with weapons of mass destruction, his proposal would have fallen under conventional definitions of violence and been perceived as a military or even an imperial invasion. Advocating invading countries with mass forms of slow-motion toxicity, however, requires rethinking our accepted assumptions of violence to include slow violence. Such a rethinking requires that we complicate conventional assumptions about violence as a highly visible act that is newsworthy because it is event focused, time bound, and body bound. We need to account for how the temporal dispersion of slow violence affects the way we perceive and respond to a variety of social afflictions from domestic abuse to posttraumatic stress and. in particular, environmental calamities. A major challenge is representational: how to devise arresting stories, images, and symbols adequate to the pervasive but elusive violence of delayed effects. Crucially, slow violence is often not just attritional but also exponential, operating as a major threat multiplier; it can fuel long-term, proliferating conflicts in situations where the conditions for sustaining life become increasingly but gradually degraded.¶ Politically and emotionally, different kinds of disaster possess unequal heft. Palling bodies, burning towers, exploding heads, avalanches, volcanoes, and tsunamis have a visceral, eye-catching and page-turning power that tales of slow violence, unfolding over years, decades, even centuries, cannot match. Stories of toxic buildup, massing greenhouse gases, and accelerated species loss due to ravaged habitats arc all cataclysmic, but they are scientifically convoluted cataclysms in which casualties are postponed, often for generations. In an age when the media venerate the spectacular, when public policy is shaped primarily around perceived immediate need, a central question is strategic and representational: how can we convert into image and narrative the disasters that are slow moving and long in the making, disasters that are anonymous and that star nobody, disasters that are attritional and of indifferent interest to the sensation-driven technologies of our image-world? How can we turn the long emergencies of slow violence into stories dramatic enough to rouse public sentiment and warrant political intervention, these emergencies whose repercussions have given rise to some of the most critical challenges of our time?¶ This book's second, related focus concerns the environ mentalism of the poor, for it is those people lacking resources who are the principal casualties of slow violence. Their unseen poverty is compounded hy the invisibility of the slow violence that permeates so many of their lives. Our media bias toward spectacular violence exacerbates the vulnerability of ecosystems treated as disposable by turbo-capitalism while simultaneously exacerbating the vulnerability of those whom Kevin Bale, in another context, has called "disposable people."2 It is against such conjoined ecological and human disposability that we have witnessed a resurgent environmentalist!! of the poor, particularly (though not exclusively) across the so-called global South. So a central issue that emerges is strategic: if the neoliberal era has intensified assaults on resources, it has also intensified resistance, whether through isolated site-specific struggles or through activism that has reached across national boundaries in an effort to build translocal alliances.¶ "The poor" is a compendious category subject to almost infinite local variation as well as to fracture along fault lines of ethnicity, gender, race, class, region, religion, and generation. Confronted with the militarization of both commerce and development, impoverished communities are often assailed by coercion and bribery that test their cohesive resilience. How much control will, say, a poor hardwood forest community have over the mix of subsistence and market strategies it deploys in attempts at adaptive survival? How will that community negotiate competing definitions of its own poverty and long-term wealth when the guns, the bulldozers, and the moneymen arrive? Such communities typically have to patch together threadbare improvised alliances against vastly superior military, corporate, and media forces. As such, impoverished resource rebels can seldom afford to be single-issue activists: their green commitments are seamed through with other economic and cultural causes as they experience environmental threat not as a planetary abstraction but as a set of inhabited risks, some imminent, others obscurely long term.¶ The status of environmental activism among the poor in the global South has shifted significantly in recent years. Where green or environmental discourses were once frequently regarded with skepticism as neocolo-nial. Western impositions inimical to the resource priorities of the poor in the global South, such attitudes have been tempered by the gathering visibility and credibility of environmental justice movements that have pushed back against an antihuman environmenialism that too often sought (under the banner of universalism) to impose green agendas dominated by rich nations and Western NGOs. Among those who inhabit the front lines of the global resource wars, suspicions that environmentaUsm is another guise of what Andrew Ross calls "planetary management" have not. of course, been wholly allayed.1 But those suspicions have eased somewhat as the spectrum of what counts as environmenialism has broadened. Western activists are now more prone to recognize, engage, and learn from resource insurrections among the global poor that might previously have been discounted as not properly environmental.' Indeed, 1 believe that the fate of environ mentalism—and more decisively, the character of the biosphere itself—will be shaped significantly in decades to come by the tension between what Ramachandra Guha and Joan Martinez-Alier have called "full-stomach' and "empty-belly" environmenialism.'¶ The challenge of visibility that links slow violence to the environmen-talism of the poor connects directly to this hook's third circulating concern—the complex, often vexed figure of the environmental writer-activist. In the chapters that follow 1 address not just literary but more broadly rhetorical and visual challenges posed by slow violence; however, 1 place particular emphasis on combative writers who have deployed their imaginative agility and worldly ardor to help amplify the media marginalized causes of the environmentally dispossessed. I have sought to stress those places where writers and social movements, often in complicated tandem, have stralcgized against attritional disasters that afflict embattled communities. The writers I engage arc geographically wide ranging—from various parts of the African continent, from the Middle East. India, the Caribbean, the United States, and Britain—and work across a variety of forms. Figures like Wangari Maathai. Arundhati Roy. lndra Sinha. Ken Saro-Wiwa, Abdulrah-man Munif. Njabulo Ndebcle, Nadine Gordimer, Jamaica Kincaid, Rachel Carson, and June Jordan are alive to the inhabited impact of corrosive transnational forces, including petro-imperialism. the megadam industry, outsourced toxicity, neocolonial tourism, antihuman conservation practices, corporate and environmental deregulation, and the militarization of commerce, forces that disproportionately jeopardize the livelihoods, prospects, and memory banks of the global poor. Among the writers 1 consider, some have testified in relative isolation, some have helped instigate movements for environmental justice, and yet others, in aligning themselves with preexisting movements, have given imaginative definition to the issues at stake while enhancing the public visibility of the cause.¶ Relations between movements and writers are often fraught and fric-tional. not least because such movements themselves are susceptible to fracture from both external and internal pressures.\* That said, the writers I consider are enraged by injustices they wish to see redressed, injustices they believe they can help expose, silences they can help dismantle through testimonial protest, rhetorical inventiveness, and counterhistories in the face of formidable odds. Most are restless, versatile writers ready to pit their energies against what Edward Said called "the normalized quiet of unseen power."" This normalized quiet is of particular pertinence to the hushed havoc and injurious invisibility that trail slow violence.¶ In this book, I have sought to address our inattention to calamities that are slow and long lasting, calamities that patiently dispense their devastation while remaining outside our flickering attention spans—and outside the purview of a spectacle-driven corporate media. The insidious workings of slow violence derive largely from the unequal attention given to spectacular and unspectacular time. In an age that venerates instant spectacle, slow violence is deficient in the recognizable special effects that fill movie theaters and boost ratings on TV. Chemical and radiological violence, for example, is driven inward, somatized into cellular dramas of mutation that—particularly in the bodies of the poor—remain largely unobserved, undiagnosed, and untreated. From a narrative perspective, such invisible, mutagenic theater is slow paced and open ended, eluding the tidy closure, the containment, imposed by the visual orthodoxies of victory and defeat.¶ Let me ground this point by referring, in conjunction, to Rachel Carson's Silenl Spring and Frantz Fanon's The Wretched of the Earth. In 1962 Silent Spring jolted a broad international public into an awareness of the protracted, cryptic, and indiscriminate casualties inflicted by dichlorodiphenyltrichlo-roethane (DDT). Yet. just one year earlier, Fanon. in the opening pages of Wretched of the Earth, had comfortably invoked DDT as an affirmative metaphor for anticolonial violence: he called for a DDT-filled spray gun to be wielded as a weapon against the "parasites" spread bv the colonials' Christian church." Fanon's drama of decolonization is, of course, studded with the overt weaponry whereby subjugation is maintained {"by dint of a great array of bayonets and cannons") or overthrown ("by the searing bullets and bloodstained knives") after "a murderous and decisive struggle between the two protagonists."' Yet his temporal vision of violence—and of what Aime Cesaire called "the rendezvous of victory"—was uncomplicated by the concerns thai an as-yet inchoate environmental justice movement (catalyzed in part by Silent Spring) would raise about lopsided risks that permeate the land long term, blurring the clean lines between defeat and victory, between colonial dispossession and official national self determination.11 We can ccr lainly read Fanon, in his concern with land as property and as fount of native dignity, retrospectively with an environmental eye. But our theories of violence today must be informed by a science unavailable to Fanon, a science that addresses environmentally embedded violence that is often difficult to source, oppose, and once set in motion, to reverse.¶ Attritional catastrophes that overspill clear boundaries in time and space arc marked above all by displacements temporal, geographical, rhetorical, and technological displacements that simplify violence and underestimate, in advance and in retrospect, the human and environmental costs. Such displacements smooth the way for amnesia, as places are rendered irretrievable to those who once inhabited them, places that ordinarily pass unmourned in the corporate media. Places like the Marshall Islands, subjected between 1948 and 1958 to sixty-seven American atmospheric nuclear "tests," the largest of them equal in force to 1.000 I liroshima-sizcd bombs. In 1950 the Atomic Energy Commission declared the Marshall Islands "by far the most contaminated place in the world," a condition that would compromise independence in the long term, despite the islands' formal ascent in 1979 into the ranks of self-governing nations." The island republic was still in pan governed by an irradiated past: well into the 1980s its history of nuclear colonialism, long forgotten by the colonizers, was still delivering into the world "jellyfish babies"—headless, eyeless, limbless human infants who would live for just a few hours.11¶ If, as Said notes, struggles over geography are never reducible to armed struggle but have a profound symbolic and narrative component as well, and if, as Michael Watts insists, we must attend to the "violent geographies of fast capitalism." we need to supplement both these injunctions with a deeper understanding of the slow violence of delayed effects that structures so many of our most consequential forgetting\*." Violence, above all environmental violence, needs to be seen—and deeply considered—as a contest not only over space, or bodies, or labor, or resources, but also over time. Wc need to bear in mind Faulkner's dictum that "the past is never dead. It's not even past." His words resonate with particular force across landscapes permeated by slow violence, landscapes of temporal overspill that elude rhetorical cleanup operations with their sanitary beginnings and endings.1'1¶ Kwamc Anthony Appiah famously asked. "Is the 'Post-' in "PostcoloniaF the 'Post-' in 'Postmodern'?" As environmentalists wc might ask similarly searching questions of the "post" in postindustrial, post Cold War, and post-conflict." For if the past of slow violence isnevcrpast. so too the post is never fully post: industrial particulates and effluents live on in the environmental elements wc inhabit and in our very bodies, which cpidcmiologically and ecologically are never our simple contemporaries.'" Something similar applies to so-called postconflict societies whose leaders may annually commemorate, as marked on the calendar, the official cessation of hostilities, while ongoing intcrgcncrational slow violence (inflicted by, say. uncxplodcd landmines or carcinogens from an arms dump) may continue hostilities by other means.¶ Ours is an age of onrushing turbo-capitalism, wherein the present feels more abbreviated than it used to—at least for the world's privileged classes who live surrounded by technological time-savers that often compound the sensation of not having enough lime. Consequently, one of the most pressing challenges of our age is how to adjust our rapidly eroding attention spans to the slow erosions of environmental justice. If, under ncoliberalism, the gult between enclaved rich and outcast poor has become ever more pronounced, ours is also an era of enclaved time wherein for many speed has become a sell justifying, propulsive ethic that renders uneventful" violence (to those who live remote from its attritional lethality) a weak claimant on our time. The attosecond pace of our age, with its restless technologies of infinite promise and infinite disappointment, prompts us to keep flicking and clicking distractedly in an insatiable and often insensate — quest for quicker sensation.¶ The oxymoronic notion of slow violence poses a number of challenges; scientific, legal, political, and representational. In the long arc between the emergence of slow violence and its delayed effects, both the causes and the memory of catastrophe readily fade from view as the casualties incurred typically pass untallied and unremembered. Such discounting in turn makes it far more difficult to secure effective legal measures for prevention, restitution, and redress. Casualties from slow violence are moreover, out of sync not only with our narrative and media expectations but also with the swift seasons of electoral change. Politicians routinely adopt a "last in, first out" stance toward environmental issues, admitting them when limes are flush, dumping them as soon as times get tight. Because preventative or remedial environmental legislation typically targets slow violence, it cannot deliver dependable electoral cycle results, even though those results may ultimately be life saving. Relative to bankable pocket-book actions—there'll be a tax rebate check in the mail next August—environmental payouts seem to lurk on a distant horizon. Many politicians—and indeed many voters—routinely treat environmental action as critical yet not urgent. And so generation after generation of two- or four-year cycle politicians add to the pileup of deferrable actions deferred. With rare exceptions, in the domain of slow violence "yes, but not now, not yet" becomes the modus operandi.¶ How can leaders be goaded to avert catastrophe when the political rewards of their actions will not accrue to them but will be reaped on someone else's watch decades, even centuries, from now? How can environmental activists and storytellers work to counter the potent political, corporate, and even scientific forces invested in immediate self-interest, procrastination, and dissembling? We see such dissembling at work, for instance, in the afterword to Michael Crichton's 2004 environmental conspiracy novel, Slate of Fear, wherein he argued that we needed twenty more years of daia gaihcringon climate change before any policy decisions could be ventured.1\* Although the National Academy of Sciences had assured former president George W. Bush that humans were indeed causing the earth to warm. Bush shopped around for views that accorded with his own skepticism and found them in a private meeting with Crichton, whom he described as "an expert scientist.\*'¶ To address the challenges of slow violence is to confront the dilemma Rachel Carson faced almost half a century ago as she sought to dramatize what she eloquently called "death by indirection."'" Carson's subjects were biomagnification and toxic drift, forms of oblique, slow-acting violence that, like climate change, pose formidable imaginative difficulties for writers and activists alike. In struggling to give shape to amorphous menace, both Carson and reviewers of 5ilcn( Spring resorted to a narrative vocabulary: one reviewer portrayed the book as exposing "the new, unplottcd and mysterious dangers wc insist upon creating all around us,"" while Carson herself wrote of "a shadow that is no less ominous because it is formless and obscure."10 To confront slow violence requires, then, that we plot and give figurative shape to formless threats whose fatal repercussions are dispersed across space and time. The representational challenges are acute, requiring creative ways of drawing public attention to catastrophic acts that are low in instant spectacle but high in long-term effects. To intervene representation-ally entails devising iconic symbols that embody amorphous calamities as well as narrative forms that infuse those symbols with dramatic urgency.¶ Seven years after Rachel Carson turned our attention to ihe lethal mechanisms of "death by indirection," Johan Gaining, the influential Norwegian mathematician and sociologist, coined the term "indirect or structural violence."'' Gakung's theory of structural violence is pertinent here because some of his concerns overlap with the concerns that animate this book, while others help throw inio relief the rather different features I have soughi to highlight by introducing the term "slow violence." Structural violence, forGaltung, stands in opposition to the more familiar personal violence thai dominates our conceptions of what counts as violence per sc." Galtung was concerned, as I am, with widening the field of what constitutes violence. He soughi to foreground ihe vast structures thai can give rise to acts of personal violence and constitute forms of violence in and of themselves. Such structural violence may range from the unequal morbidity that results from a commodificd health care system, to racism itself. What I share with Gal-tung's line of thought is a concern with social justice, hidden agency, and certain forms of violence that are imperceptible.¶ In these terms, for example, we can recognize that the structural violence embodied by a neoliberal order of austerity measures, structural adjustment, rampant deregulation, corporate megamergers, and a widening gulf between rich and poor is a form of covert violence in its own right that is often a catalyst for more recognizably overt violence. For an expressly environmental example of structural violence, one might cite Wangari Maathai's insistence that the systemic burdens of national debt to the IMF and World Bank borne by many so-called developing nations constitute a major impediment to environmental sustainability.JI So. too, feminist earth scientist Jill Schneiderman, one of our finest thinkers about environmental time, has written about the way in which environmental degradation may "masquerade as inevitable."14¶ For all the continuing pertinence of the theory of structural violent t and for all the modifications the theory has undergone, the notion bears the impress of its genesis during the high era of structuralist thinking that tended toward a static determinism. We see this, for example, in Gakung's insistence that "structural violence is silent, it does not show—its is essentially static, it is the tranquil waters."1\* In contrast to the static connotations of structural violence, I have sought, through the notion of slow violence, to foreground questions of time, movement, and change, however gradual. The explicitly temporal emphasis of slow violence allows us to keep front and center the representational challenges and imaginative dilemmas posed not just by imperceptible violence but by imperceptible change whereby vio lence is decoupled from its original causes by the workings of time. Time becomes an actor in complicated ways, not least because the temporal tern plates of our spectacle-driven, 24/7 media life have shifted massively since Galtung first advanced his theory of structural violence some forty years ago. To talk about slow violence, then, is to engage directly with our contemporary politics of speed.¶ Simply put. structural violence is a theory that entails rethinking different notions of causation and agency with respect to violent effects. Slow violence, by contrast, might well include forms of structural violence, but has a wider descriptive range in calling attention, not simply to questions of agency, but to broader, more complex descriptive categories of violence enacted slowly over time. The shift in the relationship between human agency and time is most dramatically evident in our enhanced understanding of the accelerated changes occurring at two scalar extremes—in the life-sustaining circuits of planetary biophysics and in the wired brain's neural circuitry. The idea of structural violence predated both sophisticated contemporary ice-core sampling methods and the emergence of cyber technology. My concept of slow violence thus seeks to respond both to recent, radical changes in our geological perception and our changing technological experiences of time.¶ Let me address the geological aspect first. In 2000, Paul Crutzen. the Nobel Prize-winning atmospheric chemist, introduced the term "the Anthropo-cene Age" (which he dated to James Watt's invention of the steam engine). Through the notion of "the Anthropocene Age." Crutzen sought to theorize an unprecedented epochal effect: the massive impact by the human species, from the industrial era onward, on our planet's life systems, an impact that, as his term suggests, is geomorphic, equal in force and in long-term implications to a major geological event.\* Crutzen's attempt to capture the epochal scale of human activity's impact on the planet was followed by Will Steffen's elaboration, in conjunction with Crutzen and John McNeill, of what they dubbed the Great Acceleration, a second stage of the Anthropocene Age that they dated to the mid-twentieth century. Writing in 2007. Steffen ct al. noted how "nearly three-quarters of the anthropogenically driven rise in COt concentration has occurred since 1950 (from about 310 to 380 ppm), and about half of the total rise (48 ppm) has occurred in just the last 30 years."-7 The Australian environmental historian Libby Robin has put the case succinctly: "We have recently entered a new geological epoch, the Anthropocene. There is now considerable evidence that humanity has altered the biophysical systems of Earth, not just the carbon cycle . . . but also the nitrogen cycle and ultimately the atmosphere and climate of the whole globe."" What, then, are the consequences for our experience of time of this newfound recognition thai we have inadvertently, through our unprecedented biophysical species power, inaugurated an Anthropocene Age and are now engaged in (and subject to) the hurtling changes of the Great Acceleration?¶ Over the past two decades, this high-speed planetary modification has been accompanied (at least for those increasing billions who have access to the Internet) by rapid modifications to the human cortex. It is difficult, but necessary, to consider simultaneously a geologically-paced plasticity, however relatively rapid, and the plasticity of brain circuits reprogrammed by a digital world that threatens to "info-whelm" us into a state of perpetual distraction. If an awareness of the Great Acceleration is (to put it mildly) unevenly distributed, the experience of accelerated connectivity (and the paradoxical disconnects that can accompany it) is increasingly widespread. In an age of degraded attention spans it becomes doubly difficult yet increasingly urgent that we focus on the toll exacted, over time, by the slow violence of ecological degradation. We live, writes Cory Doctorow, in an era when the electronic screen has become an "ecosystem of interruption technologies.''" Or as former Microsoft executive Linda Stone puts it, we now live in an age of "continuous partial attention.?" Fast is faster than it used to be, and story units have become concomitantly shorter. In this cultural milieu of digitally speeded up time, and foreshortened narrative, the intergenerational aftermath becomes a harder sell. So to render slow violence visible entails, among other things, redefining speed: we see such efforts in talk of accelerated species loss, rapid climate change, and in attempts to recast "glacial"-once a dead metaphor for "slow-as a rousing, iconic image of unacceptably fast loss. Efforts to make forms of slow violence more urgently visible suffered a setback in the United States in the aftermath of 9/11, which reinforced a spectacular, immediately sensational, and instantly hyper-visible image of what constitutes a violent threat. The fiery spectacle of the collapsing towers was burned into the national psyche as the definitive image of violence, setting back by years attempts to rally public sentiment against climate change, a threat that is incremental, exponential, and far less sensationally visible. Condoleezza Rice's strategic fantasy of a mushroom cloud looming over America if the United States failed to invade Iraq gave further visual definition to cataclysmic violence as something explosive and instantaneous, a recognizably cinematic, immediately sensational, pyrotechnic event. The representational bias against slow violence has, furthermore, a critically dangerous impact on what counts as a casualty in the first place. Casualties of slow violence-human and environmental-are the casualties most likely not to be seen, not to be counted. Casualties of slow violence become light-weight, disposable casualties, with dire consequences for the ways wars are remembered, which in turn has dire consequences for the projected casualties from future wars. We can observe this bias at work in the way wars, whose lethal repercussions spread across space and time, are tidily bookended in the historical record. Thus, for instance, a 2003 New York Times editorial on Vietnam declared that" during our dozen years there, the U.S. killed and helped kill at least 1.5 million people.'?' But that simple phrase "during our dozen years there" shrinks the toll, foreshortening the ongoing slow-motion slaughter: hundreds of thousands survived the official war years, only to slowly lose their lives later to Agent Orange. In a 2002 study, the environmental scientist Arnold Schecter recorded dioxin levels in the bloodstreams of Bien Hoa residents at '35 times the levels of Hanoi's inhabitants, who lived far north of the spraying." The afflicted include thousands of children born decades after the war's end. More than thirty years after the last spray run, Agent Orange continues to wreak havoc as, through biomagnification, dioxins build up in the fatty tissues of pivotal foods such as duck and fish and pass from the natural world into the cooking pot and from there to ensuing human generations. An Institute of Medicine committee has by now linked seventeen medical conditions to Agent Orange; indeed, as recently as 2009 it uncovered fresh evidence that exposure to the chemical increases the likelihood of developing Parkinson's disease and ischemic heart disease." Under such circumstances, wherein long-term risks continue to emerge, to bookend a war's casualties with the phrase "during our dozen years there" is misleading: that small, seemingly innocent phrase is a powerful reminder of how our rhetorical conventions for bracketing violence routinely ignore ongoing, belated casualties.

#### You should orient your knowledge production towards alleviating structural violence

Biyanwila 8—University of Western Australia (Janaka, Re-empowering labour : Knowledge, ontology and counter-hegemony, <http://www.tasa.org.au/uploads/2011/05/Biyanwila-Janaka-Session-59-PDF.pdf>)

An essential component of union power and issues of empowerment is the production of knowledge. The disempowerment of labour under the neo-liberal intellectual hegemony highlights the need for new forms of counter-hegemonic knowledge. The dominant unions, both in the global South as well as the North, maintain a mono culture of knowledge that situate unions primarily within the realm of production, systems of industrial relations and formal labour markets. In subordinating the realm of social reproduction, and ‘informal’ labour markets, this approach to knowledge evade the lived reality of those, the majority, enduring multiple forms of violence, from hunger to social exclusion in their every day lives. The re-empowerment of unions relates to elaborating union approaches to knowledge or epistemic frameworks that encourage a deeper understanding of union practices as well as communication with other movements. This paper suggests a return to the realm of ontology, the domain of being, in terms of prioritising and transforming the insecurity and violence in everyday life, particularly in the global South. An emphasis on ontology suggests reinforcing social and democratic approaches to knowledge, in order for unions to engage as a counter movement revitalising their identities as civil society actors. ¶ Introduction ¶ Central to debates around union renewal and empowerment is the development of counterhegemonic knowledge capable of organising and mobilising workers (Moody 1997; Lambert, 2002; Waterman, 2005; Clawson, 2003; Hyman, 2004; Webster et al., 2008). Most dominant unions, or the consolidated segments of the labour movement, are compromised within hegemonic knowledge, creating consent to positivist instrumental approaches to knowledge. This mono-culture of knowledge (Sousa, 2003), despite a discourse of diversity and organising ‘new’ workers, represents unions as economic actors, restricted to the workplace, within systems of industrial relations based on a formal economy of exchange. Meanwhile, the less consolidated segments of the labour movement, such as new unions and worker organisations, rely on counter-hegemonic knowledge, or ecologies of knowledge, elaborating their collective identities as a social movement within civil society. The realm of civil society involving organisations, networks and movements, is a space of hegemonic and counterhegemonic struggles, interrelated to the state. Unions as actors within civil society foreground a social and moral economy which is central to strategic theoretical perspectives of ‘community unionism’ and ‘social movement unionism’ (Moody, 1997; Lambert, 2002; Waterman, 2005; Clawson, 2003; Webster et al., 2008). The representation of unions as actors within civil society, emphasise the movement dimension of unions as well as new approaches to knowledge. Nevertheless, these perspectives often fail to factor in the experience of violence in the everyday lives of workers, particularly in the global South. The “South” refers to a status of subordination, in the core-periphery hierarchies of uneven capitalist development, where the historical experience of colonialism, racism, anti-colonial struggles, as well as disillusionment with post-colonial state forms influence the Southern trade union identities (Lambert, 2002).¶ An often ignored significant structural effect of neo-liberal globalisation, particularly in the South, is the spread of violence and insecurity. Under neo-liberal ideology, the spread of “flexible labour markets” and the privatisation public goods, depends on authoritarian state forms that prioritise ‘national security’ over ‘human security’. The generative mechanism of this violence and insecurity are structures of power that reproduce conditions of exploitation, oppression and subjugation (Das, 1990; Galtung, 1996, 2004; Moser, 2001). Various manifestations of violence that permeate multiple scales and temporalities are generated by structural coupling of capitalism, patriarchy, racism and imperialism (Das, 1990; Moser, 2001; Panitch, 2002; Ali and Ercelan, 2004). The adoption of new coercive domestic and international measures by the US in the post 9-11 context, under the ‘war against terrorism’, reflects the restructuring of the coercive apparatuses of all states to coordinate and maintain the US global hegemony (Panitch, 2002). These authoritarian state strategies often depend on ‘uncivil’ actors in civil society for reproducing structures of violence. Of course, this structural violence is debilitating and undermines individual and collective agency. Nevertheless, it is also at the root of social protest and mobilisation (Panitch, 2002). The multiplicity of struggles from Communists Maoists in tribal areas of India to the Zapatistas in indigenous areas of Mexico, illustrate collective struggles forced into violent modes of resistance. ¶ Violence as an expression of power relations involves structural and cultural dimensions. Structural violence (of hunger, poverty, malnutrition, illiteracy) and cultural violence (patriotic, patriarchal, etc) are embedded in power hierarchies based on class, gender, ethnicity, region, caste, age, (dis)ability, and sexuality. These structures of violence are stratified and differentiated with visible and invisible effects. While direct violence, physical and/or verbal, is visible, they emerge from the more invisible cultural and structural violence (Galtung, 2004). Indeed the resistance to structural violence of state and capital by counter forces also appropriates cultural meanings to legitimize their use of violence as the mode of struggle (Ibid.). According to Galtung (2004), transforming violence through human agency requires a counter discourse of peace and non-violence which must be “built in the culture and in the structure, not only in the ‘human mind’”.

#### Reforming TERA is key to outside investment and Native ownership

Royster 12—Professor of Law and Co-Director, Native American Law Center, University of Tulsa College of Law (Judith, Tribal Energy Development: Renewables and the Problem of the Current Statutory Structures, 31 Stan. Envtl. L.J. 91)

The non-minerals statutes that might be used for renewable energy development share a pair of significant disadvantages. First, like the minerals statutes, they generally require the approval of the Secretary of the Interior for each development deal. And [\*113] second, they restrict Indian tribes to a passive role in the development of tribal renewable resources.¶ Almost all of the nonminerals statutes require the approval of the Secretary of the Interior for the specific lease, agreement, or sale. n102 Just as the Secretary must approve all IMLA leases and all IMDA agreements for traditional mineral development, n103 the Secretary must also approve all § 415 leases, n104 all easements lasting seven years or longer, n105 all open-market sales of forest products, n106 and all agricultural leases. n107¶ This instrument-by-instrument approval process introduces both delay and potential federal override of tribal decisions. First, the process itself is time-consuming. Federal approval may take years, n108 potentially inflating the costs of a project as well as increasing the likelihood that non-Indian partners and investors will look elsewhere. n109 Second, in exercising the approval power, [\*114] the Secretary is generally obligated to determine whether the proposed lease, agreement, or sale is "in the best interest of" the Indian tribe. n110 The determination of best interest involves an exercise of the trust responsibility on the one hand and federal paternalism on the other. While the approval process may have saved more than one tribe from an improvident deal, n111 it also allows the federal government to override a tribe's determination of tribal needs and priorities. In the current era of tribal self-determination and increased tribal sophistication in negotiating with energy companies, federal disapproval of proposed energy deals may be rare, n112 but the potential nonetheless exists for the federal government to reject a deal that a tribe has chosen to undertake. Thus, even where the Secretary is obligated to defer to tribal choices, that deference is tempered by the federal oversight responsibility. n113¶ The second major disadvantage with the approaches discussed in this Section is that none allows Indian tribes to take on the active role in development that is authorized in IMDA minerals agreements. As noted earlier, tribes using the IMDA for mineral [\*115] development may enter into negotiated leases or "any joint venture, operating, production sharing, service, managerial ... or other agreement" with a non-Indian company. n114 Tribes may choose any role that best suits their needs, from the relatively passive lessor through the partnership of a joint venture to a service contract in which the tribe merely hires a company to perform the mining activities. n115 Moreover, tribes are not confined to the types of agreements listed in the IMDA, n116 and many minerals agreements have been hybrid arrangements. n117¶ By contrast, as noted throughout the discussion above, none of the nonminerals statutes envisions an active tribal role in development. Tribes may either bypass the statutes altogether and develop their renewable energy resources themselves, or serve as lessors, servient estate holders, or sellers. n118 Unlike the IMDA, none of these statutes provides for the vast middle ground of tribal partnerships with non-Indian energy companies. And that vast middle ground is crucial. Tribes with some ownership component in energy projects not only retain a more significant say in the project itself, but may realize greater revenues, increased professional opportunities for tribal members, and the ability to "create a management team with a long-term stake in the community." n119¶ [\*116] Tribes that want a more active role in renewable energy development must use more creative means. One example is Koda Energy, a limited liability company formed under Delaware law between the Shakopee Mdewakanton Sioux Community as majority partner and Rahr Malting, a non-Indian company. n120 At present, Koda Energy operates a heat and power plant that burns biomass, located a few miles from the Shakopee Mdewakanton Reservation. But if Koda Energy were, for example, to lease tribal lands for wind farm purposes, then the tribe would act not only as lessor, but also as developer through its stake in the energy company. While an arrangement like this puts tribes in a more active role, it does so indirectly and with some potential drawbacks. As a state corporation engaged in off-reservation activities, Koda Energy is subject to state law and state courts. Even if it were acting on tribal lands, it might still be subject to state law and might not enjoy tax advantages available to tribes entering into direct agreements with energy partners. n121 Clear statutory authority for [\*117] tribes to enter into non-lease arrangements for renewable energy resources would allow tribes a more direct route to participate in renewable energy development.¶ IV. ITEDSA: The Solution That Isn't¶ Perhaps the solution is one nice neat statutory package that would authorize a tribe to develop any or all of its energy resources - without regard to whether those resources constitute "minerals" or not - using whatever type of development deal the tribe believes is best. And one exists. Under the Indian Tribal Energy Development and Self-Determination Act (ITEDSA) of 2005, n122 tribes may enter into leases or agreements of any kind for the development of any energy resource. ITEDSA solves many of the problems noted here with the scattershot statutory approach.¶ First, it unambiguously applies to all energy resources. Although the statute does not contain a definition of energy resources, the implementing regulations define energy resources as "both renewable and nonrenewable energy sources, including, but not limited to, natural gas, oil, uranium, coal, nuclear, wind, solar, geothermal, biomass, and hydrological resources." n123 There is simply no question, as there is with the minerals statutes, that renewable energy sources are covered along with traditional energy minerals.¶ Second, ITEDSA normalizes the lease and agreement term. With the exception of oil and gas leases, which may be entered into for the standard ten years and so long thereafter as the oil or gas is produced in paying quantities, n124 all leases and agreements run for a maximum of thirty years, with an option to renew at the discretion of the tribe. n125 Having a single term applicable to all energy development eliminates the confusion of twenty-five years [\*118] for surface leases, ten years for agricultural leases, and five years to accomplish forest products harvesting. Moreover, the thirty-year term is sufficiently long, especially with a thirty-year renewal option, to justify the necessary investments by the non-Indian parties.¶ Third, ITEDSA adopts the best innovation of the 1982 IMDA: it opens up the tribal role beyond that of passive lessor or seller. Tribes are authorized to enter into leases or business agreements, without limitation on the kind or structure, "for the purpose of energy resource development on tribal land." n126 Business agreements are broadly defined in the regulations as "any permit, contract, joint venture, option, or other agreement that furthers any activity related to locating, producing, transporting, or marketing energy resources on tribal land," and "any other business agreement entered into or subject to administration under a TERA [tribal energy resource agreement]." n127 A tribe would thus be free, for example, to enter into a joint operating agreement for the construction and operation of solar collectors, something that is unavailable, or at best uncertain, under current statutory authority. The IMDA allows joint ventures, but its applicability to renewable energy resources is questionable: § 415 allows the placement of solar panels and collectors on tribal land, but it is restricted to leases only. ITEDSA eliminates the problems inherent in using these statutes for renewable energy production by authorizing non-lease arrangements for alternative energy production.¶ Fourth, ITEDSA goes a leap beyond most current statutes, and eliminates the cumbersome step of secretarial approval for every lease and business agreement. Under ITEDSA, tribes may enter into these instruments on their own authorization, without involving the Secretary of the Interior. n128 This provision eliminates one of the drawbacks of the existing development statutes - mineral, surface, forest, and agricultural. As discussed earlier, those statutes generally require the approval of the Secretary of the Interior for each lease, agreement, or sale, with its attendant time delays and the possibility that the Secretary could deny development desired by the tribe.¶ ITEDSA thus presents a solution to the problems with other [\*119] development statutes discussed in Parts II and III. So what is the drawback? The drawback to ITEDSA is that an Indian tribe, to enter into energy leases and agreements without specific secretarial approval, must first enter into a tribal energy resource agreement (TERA) with the Secretary of the Interior. n129 The development of a TERA requires a tribe to meet a number of statutory criteria, develop an extensive tribal environmental review process for each energy development project, and demonstrate to the Secretary that the tribe has "sufficient capacity to regulate the development" of its energy resources. n130 At present, only a handful of tribes even potentially meets the last requirement. Although several tribes have expressed interest in developing a TERA, n131 by mid-2011 no tribe had submitted a TERA application. n132¶ This signifies that ITEDSA, designed as a solution, in fact is not one for the vast majority of tribes with energy resources. The front-end costs of time, money, and staffing to develop a TERA and shepherd it through the approval process are substantial, if not prohibitive. n133 The back-end costs of providing an environmental review process and addressing public input into tribal decisions and compliance are similarly substantial. These costs mean that ITEDSA may ultimately be useful to only a small cadre of tribes with considerable energy resources to develop. n134 For a tribe [\*120] seeking to place a few solar collectors on tribal land or harvest forest residues as biomass, however, the TERA process may be more of a barrier than an opportunity. n135

#### The policy possibilities for native peoples are prefigured by western epistemological frames of reference for decision-making that are dominated by elite interests bent on resource exploitation – we should rethink the value structure implied by western epistemologies that systematically eliminate native people’s interests from politics – affirming reciprocity, holistic tribal knowledge, and the perspective of future generations within our decision frames is necessary for survival of the whole environment

Robyn 2— part of the Anishinabe (Chippewa) nation. She receive d her Ph.D. from Western Michigan University in 1998 and is currently an assistant professor in the Criminal Justice Department at Northern Arizona University. (Linda, Indigenous Knowledge and Technology, The American Indian Quarterly 26.2 (2002) 198-220)

As we begin to examine the relationship between American Indians and environmental justice, it is important to note that American courts have many times in the past criminalized, whether consciously or not, traditional knowledge. Indian people who have challenged multinational corporate giants and the government through political activism in an effort to halt environmentally destructive projects on their lands have been criminalized and arrested to silence their claims. Leaving traditional knowledge out of environmental policy is a grave injustice because it is socially injurious to Native peoples and, in effect, all people, not only in the United States but worldwide.

When writing about Indigenous peoples, the exclusion of environmental issues also establishes an injustice because it does not recognize the origins of social institutions among all human beings. Therefore, everything in American Indian culture is associated with an environmental perspective, even issues that filter through the American court system. As will be examined, Native peoples today are using their sophisticated traditional knowledge, combined with militant strategies in some cases, to effect change. Providing equitable justice for Indigenous people establishes an important precedent that can put social institutions like criminal justice in a context where the connection between society and the environment is recognized.

American Indian institutions originate within Native cultures in ways that associate policies with natural principles and natural laws defined by traditional cultural perspectives. The following represents a reflection of this understanding.

The Native peoples of the Americas represent a wide variety of cultures and social organization strategies. The diversity of Native cultures and kinds of social organizations which developed through time represent a high degree of social/political complexity and are varied according to the demands and necessities of the environment. For example, American Indian nations organized at the band level of social/political development have used effective strategies to [End Page 198] take advantage of marginal habitats such as the Arctic and deserts of the Americas where resources were limited.

Winona LaDuke, a member of the Anishinabe Nation, author, activist, and scholar of environmental and Indigenous issues, writes that "sustainability in these marginal habitats did not simply rely on a matter of 'luck.'" For thousands of years, American Indian people maintained a sustainable way of life based on the concept of reciprocity or reciprocal relations. Reciprocity, based on natural law, defines the relationship and responsibility between people and the environment. All parts of the environment—plants, animals, fish, or rocks—are viewed as gifts from the Creator. These gifts should not be taken without a reciprocal offering, usually tobacco or saymah, as it is called in the Ojibwa language. 1

Colonial-style policies and practices concerning the environment and sustainability were formulated with false assumptions that the people of the Americas were primitive uncivilized savages who impeded the growth of technology and progress. If we put aside our fascination with technology and material wealth, we find that for many people in today's modern society, life is primitive and stunted in terms of family values, spiritual life, commitment to the community, and opportunities for rewarding work and creative self-expression. These are the very areas most richly developed in the traditional communities of the Americas.

In her research, LaDuke argues that social and economic systems based on this type of life are usually decentralized, communal, and self-reliant. These societies live closely with and depend on the life contained in that particular ecosystem. This way of living enabled Indigenous communities to live for thousands of years in continuous sustainability. 2

Through colonial-style practices, Native peoples worldwide have been denied equal access to economic power today and in the past. Examples of exclusion of Native peoples throughout the world in formulating important environmental policy abound. Indigenous peoples and the wealth of sustainable knowledge they possess have been excluded from decision-making processes concerning the environmental impact of colonialism, capitalism, and modern-day corporate intrusion upon their lands.

Louise Grenier is a scholar working in the realms of international development and environmental and Indigenous issues through utilizing Indigenous knowledge. Grenier writes that

Indigenous knowledge (IK) refers to the unique, traditional, local knowledge existing within and developed around the specific conditions of women and men indigenous to a particular geographic area.... The development of IK systems, covering all aspects of life, including management [End Page 199] of the natural environment, has been a matter of survival to the peoples who generated these systems. Such knowledge systems are cumulative, representing generations of experiences, careful observations, and trial-and-error experiments. 3

Since the very survival of Native peoples depended on their being able to utilize knowledge in balance with the natural environment, one could make the argument that Indigenous Knowledge is technology. Grenier writes that

Indigenous knowledge is stored in peoples' memories and activities and is expressed in stories, songs, folklore, proverbs, dances, myths, cultural values, beliefs, rituals, community laws, local language and taxonomy, agricultural practices, equipment, materials, plant species, and animal breeds. Indigenous knowledge is shared and communicated orally, by specific example, and through culture. Indigenous forms of communication and organization are vital to local level decision making processes and to the preservation, development, and spread of Indigenous knowledge. 4

In her researchers' guide for working with Indigenous knowledge, Grenier writes about an example of Native knowledge exclusion which comes from American anthropologist Richard Wilk in his article on sustainability and technology transfer. 5 Grenier writes about Wilk's discussion of a folder of material containing twenty-five separate project proposals, feasibility studies, implementation plans, and project assessments covering a period of one hundred years. All these studies were concerned with commercializing the production of edible palm oil from a tree native to the Belizean rainforest. Technologies developed for use in other tropical palm oil industries were tried. Even with government subsidies and easy access to dense, high-yield tree stands, every one of the projects failed while, at the same time, the Indigenous people continued production of edible oil by using a variety of simple, local technologies based on knowledge passed down for generations.

Indigenous technology is defined as "hardware (equipment, tools, instruments, and energy sources) and software (a combination of knowledge, processes, skills, and social organization) that focus attention on particular tasks." 6 This definition describes the technology utilized by the Indigenous people presented in Wilk's story and prompts Grenier to ask several important questions: Did anyone bother to ask local people the who, how, where, when, and why of their local palm oil production system? Could costly failures have been avoided if the entrepreneurs had bothered to learn about the local production system? If a combination of Indigenous and foreign inputs had been tried, could hybrid technologies have yielded successful ventures? The most important question [End Page 200] Grenier raises is, "what would have been the outcome had any of these proponents worked with Indigenous knowledge?" 7

Until recently, those seeking to exploit Indigenous lands did not consider drawing upon the vast wealth of Indigenous knowledge. Specifically within the United States, loss of power and autonomy through the process of colonialism relegated Indigenous peoples to a position on the lower end of the hierarchical scale in U.S. society. The legacy of fifteenth-century European colonial domination placed Indigenous knowledge in the categories of primitive, simple, "not knowledge," or folklore. It comes as no surprise then that through the process of colonization Indigenous knowledge and perspectives have been ignored and denigrated by the vast majority of social, physical, biological and agricultural scientists, and governments using colonial powers to exploit Indigenous resources.

Colonization is more than just a convenient economic domination of one group by another. In its present-day form, colonization continues to undermine the political, military, social, psycho-culture, value systems, and knowledge base of the colonized and imposes on them the values and culture of the colonizer. For the sake of economic control—the main impetus behind any colonization—the colonizer must constantly devise new means of oppressing the colonized. 8

Colonialism continues today, but with different foreign powers than in the past, that is, banks, corporations, speculators, governments, and various development agencies. Today Indigenous peoples are on the frontline of contemporary colonial struggles. They are sitting on resources the rest of the world wants at the lowest possible cost. Their territories are still considered frontier lands, un-owned, underutilized, and, therefore, open to exploitation. Because Indigenous populations are small, politically weak, and usually physically isolated, their vast environmental knowledge base is, for the most part, denigrated by these new colonizers, making Indigenous populations easy targets as resource colonies. Central to the concept of resource colonization is, as John Bodley emphasizes in his work, Victims of Progress, "that the prior ownership rights and interests of the aboriginal inhabitants are totally ignored as irrelevant by both the state and the invading individuals." 9

When two different groups of people come together in the process of colonization, lives are changed, sometimes for the better but often for the worse. The Europeans' search for gold, precious metals, and fossil fuels demonstrates how such meetings adversely transformed regions and peoples through social conflict; these situations still occur today. The history between the colonizers and the colonized has led to the perception of the latter as an exploitable group or disposable resource.

In retrospect, the historical relationship that evolved between colonizer and [End Page 201] colonized lends insight to the reason why exploitation continues to occur today. Most American Indian tribes, for example, believe in the principle of a strong sense of balance. Before the first Europeans came, the Great Lakes region of the Chippewa was a vast land mass. The trees, earth, and the sense and sight of the environment itself influenced the intellect and thinking process of the Indian people living in that area in the creation of the notion of balance. This precarious balance still exists, and the relationship between plants, animals, the elements, the air, water, wind, and earth are all equally and evenly placed within the whole. For many American Indians even today, their way of life revolves around the environment. One does not, and indeed cannot, own the other if a healthy balance is to be maintained. Rather, only what is necessary to survive is taken from one another. 10

As it is with balance, the spiritual connection with the natural world is sacred. There is a balance of knowledge and power between humans, animals, all of the environment, the heavens, and earth. All these pieces tied together make up the whole. Spirituality, or The Way, guides the balance.

The incongruence in the values and in the understanding of progress between these very different cultures helps explain the lack of inclusion of Indigenous knowledge. For many American Indian people, values are expressed by the strong relationship between family members, kinship ties, the environment, and the knowledge of the unity of all these things. European values allowed land and environment to be viewed as commodities to be exploited, and these colonizers imposed their will upon the land with little thought of the consequences. The knowledge and values of the Indians from the Great Lakes region emerged from their woodland cultures and spirituality. There was a timeless value placed on all things. Native values are circular with all things being related as revealed from the outer world and their religion. This idea will be developed in the rest of the article.

An example of woodland culture spirituality comes from the Anishinabe (Chippewa) people who developed a code of ethics and a value system which guides the behavior of many in accordance with natural law—or mino bimaatisiiwin—translated as the good life or continuous rebirth. LaDuke writes that mino bimaatisiiwin "guides behavior toward others, toward animals, toward plants and the ecosystem, and it is based on tenets of reciprocity and cyclical thinking." 11

In contrasting the value system and knowledge base of the Chippewa with capitalistic values, it is reciprocity or reciprocal relations that define responsibilities and ways of relating between humans and the world around them. This, in turn, affects the technology used by Indigenous groups, such as the Chip pewa, by ensuring methods of harvesting resources that will not deplete supplies needed for survival. LaDuke writes: [End Page 202]

Within this act of reciprocity is also an understanding that "you take only what you need and leave the rest." Implicit in the understanding of Natural Law is also the understanding that most of what is natural is cyclical: whether our bodies, the moon, the tides, seasons, or life itself. Within this natural cycling is also a clear sense of birth and rebirth, a knowledge that what one does today will affect us in the future, on the return.

These tenets, and the overall practice of mino bimaatisiiwin imply a continuous inhabiting of place, an intimate understanding of the relationship between humans and the ecosystem, and the need to maintain balance. For the most part, social and economic systems based on these values are decentralized, communal, self-reliant, and very closely based on the land of that ecosystem. This way of living has enabled Indigenous communities to live for thousands of years upon their land as, quite frankly, the only examples of continuous sustainability which exist on Turtle Island (North America). We hope there will be more. 12

The contrasting views of the value and technology system of the Chippewa versus the European-American capitalistic values of power, materialism, economic efficiency, and immediacy have led to confusion and misunderstanding about other people and their ways. European-American views toward family and religion are different than the views of many American Indians. While not all European-Americans are of the Christian religion, much of the knowledge contained in the exploitive dynamics of the Christian religion are closely tied to the concepts of our capitalistic society and are not connected to the earth or environment as is the spirituality of The Way of American Indians. 13 The result is a culture conflict in which both sides see their values and methods of looking at life as the only correct way. In this context, the unequal balance and hierarchical social structure produced by the expansionary needs of capitalism are, to many American Indian people, highly destructive to their perception of the need for balance between physical and spiritual worlds.

The sharp contrast between these two sets of cultural views is a major point of contention between dominating cultures and Indigenous peoples today. These differences could also be a contributing factor to changes that are beginning to take place in many Indigenous communities. Native peoples who have not been included in decision-making concerning the potentially environmentally devastating impact of corporate intrusion upon their lands are critically thinking about, assessing, and demanding that their voices be heard and not discounted or ignored as in times past.

In exploring the concept of critical thinking, criminologist Richard Quinney writes that "[W]ithout critical thought we are bound to the only form of social life we know—that which currently exists. We are unable to choose a [End Page 203] better life; our only activity is in further support of the system in which we are currently a part and which continues to exploit us." 14 Nowhere is this more true than with multinational corporations who engaged in colonial-style projects on many reservations with disastrous results for the people and the environment. As the effects of these disasters emerged, Indian people on other reservations targeted for corporate exploitation began to take notice. Armed with knowledge about the environmental stability of their homelands, many tribes decided that the inevitable destruction caused by corporate exploitation was not worth the price of letting their resources be taken from the earth. By utilizing their knowledge about environmental devastation and not accepting the colonial-style offers of multinational corporations at face value, the tide on reservations is beginning to turn. Today, Native peoples are calling for inclusion in these decisions by challenging powerful corporations and governmental institutions through a critical perspective on power and control.

As Indigenous peoples continue to challenge the power structure of multinational corporations and the state, and assert their sovereignty rights as First Nations to control the natural resources within their territories according to treaties, the question of power and control over resources is beginning to change. This change can be seen in the relatively recent phenomenon of cooperation between some tribal groups and environmentalists. During the late 1960s and early 1970s, mainstream environmental groups and Indian tribes were usually at odds with each other over issues of concern such as natural resources and fishing and hunting rights. 15 When the Sokaogon Chippewa Indians began their long fight against Exxon's plans to mine next to their reservation in 1976, it was as if the death knell for the tribe had sounded with no hope of staving off this multinational giant. However, many environmentalists began to realize that "we all live downstream" and saw the importance of Indians' assertion of treaty rights as an integral part of environmental protection strategy. In 1976 the Sokaogon became engaged in a battle not only to preserve their wild rice subsistence culture and the treaty-protected waters flowing through their reservation, but for their economic and cultural survival as well. The Sokaogon's very cultural and economic survival depended on their ability to protect and defend the environment. The two could not be separated. 16

Through this decade-long struggle against the formidable resources of Exxon and the state of Wisconsin, the Chippewa were able to garner support from some non-Indian neighbors, people in the tourist industry who also stood to lose their livelihoods if the fishing streams were hopelessly polluted by mining, and people in the environmental community. "By the time Exxon finally withdrew from the project in 1986, the Chippewa had assembled a broad-based Indian-environmentalist coalition that included every mainstream environmental organization in Wisconsin." 17 When Exxon and other [End Page 204] multinational corporations regroup and return with other mining projects it will not be easy to get their projects underway. One important coalition known as the Anishinaabe Niiji (Friends of the Chippewa) that developed from the ten-year struggle between Exxon and the Sokaogon is now an established political force with powerful resources and the ability to take positive action to ensure that Indigenous voices are heard as the resource wars in Wisconsin continue into the new century.

An extremely important strategy that will continue to be used in the protection of natural resources is that of asserting treaty rights. According to LaDuke, one of the most important aspects of Indian treaty rights "is the power of the treaties to clarify issues which would otherwise be consigned to nation-state apologists to the realm of 'opinion' and 'interpretation.' The treaties lay things out clearly, and they are matters of international law." 18 Being victimized by a long history of exploitation has taught American Indian leaders new ways to defend the natural resources on their lands by using the law and trust relations with the United States as weapons in federal court.

By recognizing that a trust relationship exists between the United States and Indian tribes, and that this relationship binds the federal government to a set of responsibilities to tribes, courts and laws are being used to ensure that those responsibilities are met. Important lessons learned in the environmental battles of the 1970s include using trust status to the tribes' maximum advantage to protect their natural resources and lands, as well as reminding the federal government of its obligations as they have been established in treaties. 19

To understand this trust relationship, the definition of "trust" must be considered. Trust is "a right in property held by one person, called the trustee, for the benefit of another, called the beneficiary, or cestui que trust." 20 The federal government has been active as trustee in this relationship by carrying out its trust responsibilities through the Bureau of Indian Affairs and the Department of the Interior. This occurred amidst criticism from the tribes for paternalism and ineffectiveness. 21

Through battles fought over the years, tribes have come to realize that they need to acquire and apply legal expertise to effectively deal with these struggles. In bringing matters regarding resources to court, tribes have had to shift their perspective from looking at their lands in a communal "traditional" way to viewing their properties as "real estate." Imitating the capitalistic attitudes and strategies of corporations and demanding their legal, sovereign rights within the "white" justice system has become an effective and essential defensive tactic in defending tribal resources. 22 Through these conflicts in the U.S. court system, tribes will continue to develop their own judicial and economic strengths in establishing tribal control over their own natural resources.

In a society built upon hierarchical power such as the United States, however, [End Page 205] establishing tribal control over natural resources will meet with resistance. Sociologist Stephen Pfohl has written extensively about deviant behavior, social control, and power from a critical perspective. 23 He argues that if we examine the current situation through the lens of a critical perspective, we find that the control of resources is governed by the interests of those most privileged by power. Using Pfohl's critical perspective in examining the situation of American Indians, I would argue that Indian people have been, throughout history, ritually stripped of their power, except for treaty rights. Resistance of Indian people through assertion of treaty rights to keep their land base and protect their resources threatens the privilege and control of powerful multinational corporations and the state.

In the previous example of the Sokaogon's resistance to Exxon, as they fought (and continue to fight) to hold on to their way of life, many Chippewa in Wisconsin have fiercely resisted the destruction of the environment and the destruction of their treaty rights by multinational corporations and the state. The Chippewa of Wisconsin, along with several grassroots organizations, are no longer willing to submit to the corporations' ongoing war of aggression against Native peoples and the natural world. 24 The Chippewa's unwillingnessto acquiesce to the most powerful institutions in the world has been met with various institutional sanctions, including criminalizing those who dare to resist.

In order to maintain control over the land and resources of others, (in this case, the Chippewa of Wisconsin) corporate/state actors must effectively neutralize the efforts of those who would oppose this control. As a tactic to mobilize public opinion in favor of corporations, American Indians who have resisted the environmentally destructive corporate mega-projects on tribal lands have been portrayed by the media as deviant and un-American because they are supposedly impeding progress. We need only to look to past examples of American Indians as victims of ethnocide and ethnoviolence. 25 American Indians, as a whole, have been systematically portrayed as deviant since first contact with Europeans, and later, European-Americans who have engaged in deculturating and redefining them as inferior beings. 26 Historic rituals of embedding in the Anglo mind images of Native peoples as "savages," "backward," "uncivilized," and "unintelligent," justified the continued repression of traditional ways and forced assimilation into the dominant culture through violence when deemed necessary. 27

Their construction as the "deviant other" along with political and economic disempowerment provides the context for multinational corporations and the state of Wisconsin to wage a war of aggression against the Chippewa for their natural resources. This can be seen in the intense racial conflicts between the Chippewa and non-Indians experienced in Wisconsin for the past twenty [End Page 206] years. These conflicts are a relevant political fact. Since off-reservation treaty rights allowing the Chippewa to spearfish outside reservation boundaries were reaffirmed by the Supreme Court in the 1983 Voigt case, many northern communities in Wisconsin have been bitterly divided. 28 Sportfishers and hunters find the traditional practices of spearing, gill-netting, and "shining" (night hunting) used by the Chippewa concerned with following their traditions rather than sport, objectionable. Opponents of the court's decision consider it "unjust" for the Chippewa to have "special privileges" denied to other Wisconsin residents—like longer hunting seasons and the right to shoot deer from vehicles—just because of some "old treaties." 29 Limited by very strict state regulations, many sportfishers were upset that the efficient Chippewa methods of harvesting fish for subsistence were not available to non-Indians. The opposition started in small groups protesting the regained Chippewa treaty rights. As the groups enlarged, the controversy turned into racial slurs and violence. Bait shops in northern towns sold "Treaty Beer" with labels protesting Indian spearfishing and claiming to be the "True Brew of the Working Man," while many restaurants and taverns displayed and dispensed literature attacking spearfishing and called for the abrogation of Chippewa treaties. 30 Victimizing the Chippewa also included hurling rocks, insults, racial epithets like "timber niggers," waving effigies of speared Indian heads like props from a horror movie, displaying signs with slogans like "Save Two Walleye, Kill a Pregnant Squaw," and using large motorboats trailing anchors to capsize Indian boats. 31

The intense racism experienced by the Chippewa prompted Archbishop William Wantland of the Episcopalean Diocese of Eau Clair, Wisconsin, to state that "of all the states I've lived in this Union, Wisconsin is the most racist. I grew up in the South. And I said that before the Voigt Decision was handed down. It's obvious—the racism, the hatred, the bitterness, the prejudice." 32 Wantland's reflection on the hostility and racism toward the Chippewa since the court's decision in 1983 is particularly telling: "I felt I was caught in a time warp this spring in Wisconsin. I thought I saw the '50s and '60s. I thought I saw Selma and Little Rock and Montgomery." 33

None of the racism described here is unrelated to multinational corporations and the ongoing war of aggression against Native peoples and natural resources. Even though the Supreme Court made its position on the Voigt Decision abundantly clear when the it refused to hear the state of Wisconsin's appeal, and even though the U.S. Constitution states that treaties are the supreme law of the land, Governor Tommy Thompson criticized the Chippewa for exercising their treaty rights. It is important to note that every study conducted on the impact of Chippewa spearfishing, from both the Wisconsin Department of Natural Resources and the Great Lakes Indian Fish and Wild life Commission, [End Page 207] to the most recent report commissioned by Congress, has failed to find any evidence to support the accusations that the Chippewa are threatening the fish resource. 34 This gives one pause to wonder why Thompson and the corporate CEOs would hide behind false hysteria.

The mass media effectively assisted the anti-treaty movement by fueling the fires with sensationalism surrounding the treaty controversy and almost completely ignored the economic and political contexts of the issue. 35 Plans to institute a mining district in the ceded territory of the Wisconsin Chippewa, actively pursued by the executive branch of the state of Wisconsin, has the potential to cause serious long-term damage to the resource and economic bases of northern Wisconsin. Behind the veil of the racist rhetoric of the spearfishing controversy

lies the essential and inseparable connection between the political assault against Indian treaties and the corporate assault on the environment in the 1990s. By focusing on the issue of resource control in the ceded territory, it is possible to see the convergence between the anti-Indian movement, represented by groups like Protect Americans' Rights and Resources (PARR) and Stop Treaty Abuse (STA), and the pro-mining policy of the Thompson administration in Wisconsin. 36

Through effective use of the mass media and by using the convenient excuse that spearfishing was a drain on fish resources, it became easy for those in positions of power to portray the Chippewa as deviants who were "raping the resources," resisting mining, and therefore impeding pursuit of the capitalistic American Dream.

Criminologist Raymond Michalowski has written extensively on the subject of state-corporate crime and the political economy of crime. His work on the dynamic relationship between the capitalist economic model and the hierarchical workings of the state helps analyze resistance as deviance. Michalowski writes that "it is the political economy of a society in connection with its cultural history that determines the definition of what acts are adaptive, rebellious, or maladaptive." 37 Michalowski points out that

to understand the "criminality" of any particular individual or group [in this case resistance by the Chippewa] requires critical examination of the objective yet dynamic connections between individual experience and the historically specific character of material and social relations. 38

In applying Michalowski's analysis to the scenario occurring between the Chippewa and the corporate/state actors in Wisconsin, it is important to recognize that identity is always socially constructed and that relationships of power play an important role in this construction. From this perspective, being [End Page 208] Indian in America is not merely a static condition or state defined by some constellation of perceived physical differences but is a set of social and material relations between American Indians and white Americans that extend back to the time the first treaties were made. Indigenous peoples have existed within and adapted to a set of material and controlling social relations that provides others with greater access to wealth than themselves. Resistance as deviance and social control is located in recurrent historical struggles to control material existence. A critical view of these hierarchical social structures argues that these historical creations do not exist naturally; they are synthetic. The age-old structures between powerful institutions and the Chippewa are reproduced over and over again as part of the everyday struggles of people. A critical approach to the events occurring between the Chippewa and corporate/state institutions provides a framework for challenging these recurrent historical struggles, the hierarchical structure of government, and its application of law. 39 Indigenous peoples have existed within and adapted to a set of material and controlling social relations that provides others with greater access to wealth than themselves.

Social control is always an exercise of power. Linear colonial logic argues that those who are "less civilized" (that is, Indigenous peoples who have different ways of utilizing knowledge) are unable to properly exploit the land and its resources, so therefore, those deemed to be "civilized" (the colonizers) would make decisions about the land and decide on the "who" and "why" when making the laws concerning that land and the environment. Ward Churchill is a well-known scholar, activist, and coordinator of American Indian studies with the Center for Studies of Ethnicity and Race in America at the University of Colorado at Boulder. Churchill and LaDuke have written extensively on issues of Native peoples worldwide. In discussing issues of social control and land they write,

land has always been the issue of greatest importance to politics and economics in this country. Those who control the land are those who control the resources within and upon it. No matter what the resource issue at hand is, social control and all the other aggregate components of power are fundamentally interrelated. 40

The many stories of resistance are not solely about Indian resistance, but involve an environmental social movement that is able to counteract corporate power as well. The assertion of Native land rights takes place in the context of an environmental movement willing to accept other ways of "knowing" and "understanding," to appreciate the knowledge Native people have about the environment, and to accept Native leadership in environmental battles. As has been demonstrated in previous examples, Native peoples today are challenging [End Page 209] the most powerful institutions of a large nation-state by using their capabilities to blend assertion of treaty rights with innovative forms of environmental activism.

The state and multinational corporations have consistently used their historically structured hierarchical positions of power to keep Indian people powerless and in a position of relative disadvantage in the past. Clearly, when the efforts of those privileged by power have been blocked by resistance based in treaty rights, unethical practices in dealing with the tribes have occurred which have caused them injury and harm. Those in powerful positions have countered Indian resistance by using the force of racism. Sociologist Robert Bullard argues that "[W]hether by conscious design or institutional neglect, communities of color in urban ghettos, in rural 'poverty pockets,' or on economically impoverished Native-American reservations face some of the worst environmental devastation in the nation." 41 The struggle engaged in by the Chippewa to protect their natural resources from the state of Wisconsin and huge multinational corporations is but one such example.

Environmental racism experienced by the Chippewa is evident in the systematic efforts put forth to exclude them from participation in the decision-making process. In an effort to "neutralize" the opposition, corporations have narrowly defined issues that can be raised in environmental impact statements and have ignored the objections of those opposed to the destruction caused by mining. And, as we have seen, with the increasing power of mining opponents, other methods of "neutralizing" the opposition must be found by the state and corporations. As illustrated earlier in this article, the state government and corporations have resorted to using the climate of race hatred to weaken and divide potential coalitions active against their multinational corporate vision of industrial development.

Examining these situations from a critical perspective helps facilitate an understanding of the way in which those in power are participants in creating an environmentally harmful atmosphere which maintains current hierarchical positions of power. The critical perspective presented here can be applied to deconstruct the unequal relationship between the state/corporate entities and those who are less powerful, to reconstruct a better form of balance.

As mentioned earlier, balance is a very old and important concept to almost all Indian people and affects every facet of life. Today, it is widely recognized that our environment is drastically out of balance. We are in a state of environmental deterioration that requires alternative approaches to economic survival. Underneath the rhetoric of the environmental problem lies the inseparable issue of power and what Stephen Pfohl describes as powerful rituals of control, which affect human rights as a whole. 42 The point is not only to [End Page 210] understand the problem, but also to solve it. The common denominator is direct action aimed against the status quo. With the assertion of Native rights comes a firm rejection of business-as-usual. Structured arrangements of power within our society have given us images of those who deviate from the dominant order. In a world constructed as much by symbolic action as physical behavior, being a person who has disparate political beliefs or has skin of a different color may be reason enough to call in forces of control. This "natural" or commonsensical character of a social order is really not natural at all but synthetic, artificial, and feigned.

This historically established synthetic order is now being questioned and, in the case of many American Indian tribes as previous examples in this articlehave shown, truly challenged. This is a good start, but more is needed. No single movement or group of related movements can succeed in offsetting present situations only through a shared rejection of injustices. They must also fight for their perception of justice by putting forward a unified vision of the alternatives.

As tribes continue to challenge state and corporate power, new definitions of who they are as Indian people and the role they play economically will emerge. Circular ways of viewing profitable business by utilizing environmentally sustainable methods will assist in redefining the ways Indian people, corporations, and the state do business and will redefine relationships between these groups. New and different ways to take what is needed from the environment without causing total environmental devastation must be examined in the future. Decreasing the environmental deterioration occurring today will require alternative approaches to economic security through sustainable land use practices. Sharing the knowledge that American Indian people have in this area will place the focus on cooperation rather than on hierarchical control. Rearranging this focus will have enormous impacts in the area of policy implementation.

Policy Implications

Policy is built on a variety of philosophical and epistemological arguments, ultimately grounded in subjective choice, and developed using the political skills of strategy and persuasion. Based on this, the central question becomes: What philosophical and epistemological frame of reference is best suited for developing and initiating policy leading to environmental justice and power relations that are based on reciprocity rather than hierarchical domination? The critical perspective used here stresses the significance of values in rethinking how environmental policy should be dealt with and is tested by placing [End Page 211] views about the environment into an American Indian, specifically Chippewa, way of life. In other words, there is a need to reconceptualize neocolonial values deemed to be authoritative. When making decisions, policy should be grounded in doctrines and principles that stress reciprocal power and a holistic way of viewing the environment.

For most of this century, positivist philosophies dominated social science with the belief that questions and problems posed in the social world could be understood and solved using the same techniques as those applied to the physical world. Some have come to question the ability of positivist approaches to deal with complex social issues like those considered in U.S. policy. 43 The basic problem with the positivist approach is its inability to provide a way to transcend political interest in order to obtain policy knowledge.

What is suggested here is how policy analysis might benefit from a methodology which acknowledges that scientific knowledge is dependent upon the normative assumptions and social meanings of the world it explores. John Dryzek is one of the leading political scientists in policy analysis in the United States. Dryzek suggests that policy analysis should address ethics and normative theory and the apparent normative basis of the status quo in the decision-making process; that is, the values and interests represented in the existing regime and policy process. 44

Along the same lines, political scientist Mary Hawkesworth argues that in order to effectively examine policy, the underlying values which drive decision making must be acknowledged. Most importantly, for Hawkesworth, sources of power must be critically examined. Indeed, the critical study of any subject should take into account the hierarchies of power that are inherent in our society. 45

The critical perspective proposed here challenges policy analysts to place themselves within an environmental justice framework which would attempt to uncover the underlying assumptions that may contribute to and produce unequal protection. A framework such as this addresses the ethical and political questions of "who gets what, why, and how much." 46 Addressing ethical and political questions such as these is important because one frame of reference by itself does not inform the whole of the problems associated with negative environmental impacts on people of color and low income groups.

The critical perspective challenges the policy analyst to choose among social values, and, because values underlie decisions, the policy analyst should recognize that by choosing only one framework, their frame of reference is culturally bound and dependent. This point is made by critically examining the values and lifestyle of American Indians. [End Page 212]

A Way of Life

A critical perspective offers a new frame of reference for policy-making grounded in the doctrines and principles of many American Indian people regarding the environment. This perspective demands critical thinking about the policies of both private and public sectors developed by those privileged with power in response to environmental issues. The critical perspective questions the assumptions upon which current policies are based, examines traditional solutions, and advocates new ways of thinking about the environment. While not perfect by any means, this perspective allows for different realities and reciprocal relations of power based upon mutual respect and insists that these different realities should be reflected in decisions and policies made to include Indigenous peoples.

Formulating environmental policies from a critical perspective includes taking into consideration questions about responsibilities toward the environment and how these responsibilities ought to be reflected in the policies adopted by the government, in the private sector, and in the habits of the population as a whole.

As we begin to view our history and future as Native people from a critical perspective, we can reinterpret the values and validity of our own traditions, teachings, and culture within a contemporary context. With this in mind, there are many things that are possible to share with our global society. One of the most important of these from a Native as well as a non-Native perspective, is the reestablishment of a land ethic that is based upon the sound experience of our heritage. Some of these values may be transferable to the whole of society now that we are beginning a new century. Native philosophies of the land generally demonstrate an ethic that presents the earth as vital because we are all born of the earth and require its resources for our very survival. From this perspective it is also possible to see how the relationships that we form with nature are of essential importance. This is one of the elemental teachings that originate generally from within Native culture that expresses our relatedness to nature, creation, and each other. It is important to understand that we must begin, as a global society, to realize this wholeness or relatedness.

To illustrate, for many Ojibwa/Chippewa people, the environment is not an issue. It is a way of life. As with other tribes, the Ojibwa consider themselves inseparable from the natural elements of their land, placing environmental sustainability at the forefront. Environmental sustainability is the ability of a community to utilize its natural, human, and technological resources to ensure that all members of present and future generations can attain a high degree of health and well-being, economic security, and a say in shaping their future [End Page 213] while maintaining the integrity of the ecological systems upon which all life and production depends. The most important aspects of sustainability include economic security, ecological integrity, democracy, and community. 47

As expressed by our ancestors, we are part of nature and must begin to express an idea of community rather than conquest. Native teachings can help us understand our relationship with life and creation as well as expand our awareness of nature and natural cycles. We can begin to see that the earth is a resource for all our needs, in fact, our only resource. As human beings, it becomes increasingly valuable for us to recognize this relationship so that we may benefit by using the gifts of creation effectively and efficiently. By utilizing the environment and eliminating waste in appropriate ways, we begin to establish a way of seeing the future from the perspective of generations to come; not only with respect to oil and luxury items, but by placing value on clean air, water, and soil in ways that will sustain us and our societies into the future. Such an awareness of life can begin to have a profound effect on our whole global society. As a community sharing life with the earth, we can see our dependence with, not independence from, nature. Through the realization that holistic Indigenous knowledge concerning the environment is important and essential to our survival as a whole, the teachings that Native peoples of the Americas present to our global society can be utilized in many ways, if given the chance.

### 2AC T

#### ) “Restriction” are limitations on the use of property

Texas Supreme Court ’10

CAUSE NO. 08-01-18,007-CV-A, Final Judgment, http://www.supreme.courts.state.tx.us/ebriefs/12/12046401.pdf

"Restriction" is defined and commonly used to mean "[a] limitation (esp. in a deed) placed on the use or enjoyment of property." BLACK'S LAW DICTIONARY 1054 (7th ed. 2000).

#### b) Restrictions are the equivalent of conditions on action

Plummer 29 J., Court Justice, MAX ZLOZOWER, Respondent, v. SAM LINDENBAUM et al., Appellants Civ. No. 3724COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT100 Cal. App. 766; 281 P. 102; 1929 Cal. App. LEXIS 404September 26, 1929, Decided, lexis

The word "restriction," when used in connection with the grant of interest in real property, is construed as being the legal equivalent of "condition." Either term may be used to denote a limitation upon the full and unqualified enjoyment of the right or estate granted. The words "terms" and "conditions" are often used synonymously when relating to legal rights. "Conditions and restrictions" are that which limits or modifies the existence or character of something; a restriction or qualification. It is a restriction or limitation modifying or destroying the original act with which it is connected, or defeating, terminating or enlarging an estate granted; something which defeats or qualifies an estate; a modus or quality annexed by him that hath an estate, or interest or right to the same, whereby an estate may be either defeated, enlarged, or created upon an uncertain event; a quality annexed to land whereby an estate may be defeated; a qualification or restriction annexed to a deed or device, by virtue of which an estate is made to vest, to be enlarged or defeated upon the happening or not happening of a particular event, or the performance or nonperformance of a particular act.

#### Best Interpretation:

#### A) Captures the benefits of outright prohibition by including statutory restrictions that make production more difficult but that are limited to those that include the possibility of complete prohibition

U.S. Code ‘5

25 U.S.C. § 3504 : US Code - Section 3504: Leases, business agreements, and rights-of-way involving energy development or transmission, 2005,

An Indian tribe may grant a right-of-way over tribal land for a¶ pipeline or an electric transmission or distribution line without¶ review or approval by the Secretary if -¶ (1) the right-of-way is executed in accordance with a tribal¶ energy resource agreement approved by the Secretary under¶ subsection (e);¶ (2) the term of the right-of-way does not exceed 30 years;¶ (3) the pipeline or electric transmission or distribution line¶ serves -¶ (A) an electric generation, transmission, or distribution¶ facility located on tribal land; or¶ (B) a facility located on tribal land that processes or¶ refines energy resources developed on tribal land; and¶ (4) the Indian tribe has entered into a tribal energy resource¶ agreement with the Secretary, as described in subsection (e),¶ relating to the development of energy resources on tribal land¶ (including the periodic review and evaluation of the activities¶ of the Indian tribe under an agreement described in subparagraphs¶ (D) and (E) of subsection (e)(2)).¶ (c) Renewals¶ A lease or business agreement entered into, or a right-of-way¶ granted, by an Indian tribe under this section may be renewed at¶ the discretion of the Indian tribe in accordance with this section.¶ (d) Validity¶ No lease, business agreement, or right-of-way relating to the¶ development of tribal energy resources under this section shall be¶ valid unless the lease, business agreement, or right-of-way is¶ authorized by a tribal energy resource agreement approved by the¶ Secretary under subsection (e)(2).¶ (e) Tribal energy resource agreements¶ (1) On the date on which regulations are promulgated under¶ paragraph (8), an Indian tribe may submit to the Secretary for¶ approval a tribal energy resource agreement governing leases,¶ business agreements, and rights-of-way under this section.¶ (2)(A) Not later than 270 days after the date on which the¶ Secretary receives a tribal energy resource agreement from an¶ Indian tribe under paragraph (1), or not later than 60 days after¶ the Secretary receives a revised tribal energy resource agreement¶ from an Indian tribe under paragraph (4)(C) (or a later date, as¶ agreed to by the Secretary and the Indian tribe), the Secretary¶ shall approve or disapprove the tribal energy resource agreement.¶ (B) The Secretary shall approve a tribal energy resource¶ agreement submitted under paragraph (1) if -¶ (i) the Secretary determines that the Indian tribe has¶ demonstrated that the Indian tribe has sufficient capacity to¶ regulate the development of energy resources of the Indian tribe;¶ (ii) the tribal energy resource agreement includes provisions¶ required under subparagraph (D); and¶ (iii) the tribal energy resource agreement includes provisions¶ that, with respect to a lease, business agreement, or right-of-¶ way under this section -¶ (I) ensure the acquisition of necessary information from the¶ applicant for the lease, business agreement, or right-of-way;¶ (II) address the term of the lease or business agreement or¶ the term of conveyance of the right-of-way;¶ (III) address amendments and renewals;¶ (IV) address the economic return to the Indian tribe under¶ leases, business agreements, and rights-of-way;¶ (V) address technical or other relevant requirements;¶ (VI) establish requirements for environmental review in¶ accordance with subparagraph (C);¶ (VII) ensure compliance with all applicable environmental¶ laws, including a requirement that each lease, business¶ agreement, and right-of-way state that the lessee, operator, or¶ right-of-way grantee shall comply with all such laws;¶ (VIII) identify final approval authority;¶ (IX) provide for public notification of final approvals;¶ (X) establish a process for consultation with any affected¶ States regarding off-reservation impacts, if any, identified¶ under subparagraph (C)(i);¶ (XI) describe the remedies for breach of the lease, business¶ agreement, or right-of-way;¶ (XII) require each lease, business agreement, and right-of-¶ way to include a statement that, if any of its provisions¶ violates an express term or requirement of the tribal energy¶ resource agreement pursuant to which the lease, business¶ agreement, or right-of-way was executed -¶ (aa) the provision shall be null and void; and¶ (bb) if the Secretary determines the provision to be¶ material, the Secretary may suspend or rescind the lease,¶ business agreement, or right-of-way or take other appropriate¶ action that the Secretary determines to be in the best¶ interest of the Indian tribe;¶

#### Ending federal oversight is a financial incentive for energy development

Brown 10 -- AP (Matthew, Indian tribes to Congress – Streamline energy development, [www.buffalopost.net/?p=8525#more-8525](http://www.buffalopost.net/?p=8525#more-8525))

American Indian leaders on Thursday asked Congress to streamline the development of energy projects on tribal lands by curbing some federal oversight and providing incentives for companies to strike deals with reservations.

Reservations from Oklahoma to Montana and Alaska sit atop large amounts of oil, natural gas and coal. Others in wind-swept regions of the Northern Plains and on the West Coast have huge renewable energy potential.

But existing government rules make it easier for energy companies to pursue projects on non-tribal land, some members of Congress and tribal leaders say. As a result, tribes often miss out on the chance to develop their natural resources.

“Tribes in some of the poorest counties in America have vast renewable energy resources that can help them overcome poverty,” said Joe Garcia, Chairman of the All Indian Pueblo Council of New Mexico.

Garcia and other tribal representatives want the Senate Indian Affairs Committee to intervene through legislation proposed by Sen. Byron Dorgan, the North Dakota Democrat who chairs the committee.

The tribes want to eliminate federal drilling fees, pare down the Interior Department’s bureaucracy, and shield tribes from state and local taxes on energy projects.

Dorgan’s bill has yet to be introduced.

The tribal leaders’ requests were welcomed Thursday by both Democrats and Republicans.

“Energy development means jobs,” said Sen. John Barrasso, a Wyoming Republican. “It means income for families. It means paying the heating bill.”

Nationwide, energy royalties paid to tribes through the federal government totaled more than $334 million in 2008, the most recent year with figures available. That was down sharply from 2007, driven largely by a drop in oil and gas prices.

More than 2 million acres of tribal land have been developed for oil, gas and coal, according to the government. Estimates show 15 million acres more have the same potential, with additional land suited for wind, solar and other renewable energy projects.

In 2005, Congress tried to promote development by making it easier for tribes to enter agreements with private companies.

Witnesses at Thursday’s hearings said those changes weren’t enough. They also criticized changes instituted since 2005, such as a $4,000 fee for drilling on public lands – including reservations, which are held in federal trust.

### 2AC case

#### Cognitive science says Try or Die is irrational/generally dumb

Sunstein 2 (Cass, Karl N. Llewellyn Distinguished Service Professor, University of Chicago, Law School and Department of Political Science, Probability Neglect: Emotions, Worst Cases, and Law, http://www.yalelawjournal.org/pdf/112-1/SunsteinFINAL.pdf)

If someone is predisposed to be worried, degrees of unlikeliness seem to provide no comfort, unless one can prove that harm is absolutely impossible, which itself is not possible.1 [A]ffect-rich outcomes yield pronounced overweighting of small probabilities . . . .2

On Sept. 11, Americans entered a new and frightening geography, where the continents of safety and danger seemed forever shifted. Is it safe to fly? Will terrorists wage germ warfare? Where is the line between reasonable precaution and panic? Jittery, uncertain and assuming the worst, many people have answered these questions by forswearing air travel, purchasing gas masks and radiation detectors, placing frantic calls to pediatricians demanding vaccinations against exotic diseases or rushing out to fill prescriptions for Cipro, an antibiotic most experts consider an unnecessary defense against anthrax.3

I. RISKS, NUMBERS, AND REGULATION Consider the following problems: • People live in a community near an abandoned hazardous waste site. The community appears to suffer from an unusually high number of deaths and illnesses. Many members of the community fear that the hazardous waste site is responsible for the problem. Administrative officials attempt to offer reassurance that the likelihood of adverse health effects, as a result of the site, is extremely low.4 The reassurance is met with skepticism and distrust. • An airplane, carrying people from New York to California, has recently crashed. Although the source of the problem is unknown, many people suspect terrorism. In the following weeks, many people who would otherwise fly are taking trains or staying home. Some of those same people acknowledge that the statistical risk is exceedingly small. Nonetheless, they refuse to fly, in part because they do not want to experience the anxiety that would come from flying.

• An administrative agency is deciding whether to require labels on genetically modified food. According to experts within the agency, genetically modified food, as such, poses insignificant risks to the environment and to human health. But many consumers disagree. Knowledge of genetic modification triggers strong emotions, and the labeling requirement is thought likely to have large effects on consumer choice, notwithstanding expert claims that the danger is trivial. How should we understand human behavior in cases of this sort? My principal answer, the thesis of this Essay, is that when intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood.

That is, they are not closely attuned to the probability that harm will occur. At the individual level, this phenomenon, which I shall call “probability neglect,” produces serious difficulties of various sorts, including excessive worry and unjustified behavioral changes. When people neglect probability, they may also treat some risks as if they were nonexistent, even though the likelihood of harm, over a lifetime, is far from trivial. Probability neglect can produce significant problems for law and regulation. As we shall see, regulatory agencies, no less than individuals, may neglect the issue of probability, in a way that can lead to either indifference to real risks or costly expenditures for little or no gain. If agencies are falling victim to probability neglect, they might well be violating relevant law.5

Indeed, we shall see that the idea of probability neglect helps illuminate a number of judicial decisions, which seem implicitly attuned to that idea, and which reveal an implicit behavioral rationality in important pockets of federal administrative law. As we shall also see, an understanding of probability neglect helps show how government can heighten, or dampen, public concern about hazards. Public-spirited political actors, no less than self-interested ones, can exploit probability neglect so as to promote attention to problems that may or may not deserve public concern. It will be helpful to begin, however, with some general background on individual and social judgments about risks.

A. Cognition On the conventional view of rationality, probabilities matter a great deal to reactions to risks. But emotions, as such, are not assessed independently; they are not taken to play a distinctive role.6 Of course, people might be risk-averse or risk-inclined. For example, it is possible that people will be willing to pay $100 to eliminate a 1/1000 risk of losing $900. But analysts usually believe that variations in probability should matter, so that there would be a serious problem if people were willing to pay both $100 to eliminate a 1/1000 risk of losing $900 and $100 to eliminate a 1/100,000 risk of losing $900. Analysts do not generally ask, or care, whether risk-related dispositions are a product of emotions or something

else.

Of course, it is now generally agreed that in thinking about risks, people rely on certain heuristics and show identifiable biases.7 Those who emphasize heuristics and biases are often seen as attacking the conventional view of rationality.8 In a way they are doing just that, but the heuristicsand- biases literature has a highly cognitive focus, designed to establish how people proceed under conditions of uncertainty. The central question is this: When people do not know about the probability associated with some risk, how do they think? It is clear that when people lack statistical information, they rely on certain heuristics, or rules of thumb, which serve to simplify their inquiry.9 Of these rules of thumb, the “availability heuristic” is probably the most important for purposes of understanding risk-related law.10 Thus, for example, “a class whose instances are easily retrieved will appear more numerous than a class of equal frequency whose instances are less retrievable.”11 The point very much bears on private and public responses to risks, suggesting, for example, that people will be especially responsive to the dangers of AIDS, crime, earthquakes, and nuclear power plant accidents if examples of these risks are easy to recall.12

This is a point about how familiarity can affect the availability of instances. But salience is important as well. “The impact of seeing a house burning on the subjective probability of such accidents is probably greater than the impact of reading about a fire in the local paper.”13 So, too, recent events will have a greater impact than earlier ones. The point helps explain much risk-related behavior. For example, whether people will buy insurance for natural disasters is greatly affected by recent experiences.14 If floods have not occurred in the immediate past, people who live on flood plains are far less likely to purchase insurance.15 In the aftermath of an earthquake, the proportion of people carrying earthquake insurance rises sharply—but it declines steadily from that point, as vivid memories recede.16 For purposes of law and regulation, the problem is that the availability heuristic can lead to serious errors of fact, in terms of both excessive controls on small risks that are cognitively available and insufficient controls on large risks that are not.17 The cognitive emphasis of the heuristics-and-biases literature can be found as well in prospect theory, a departure from expected utility theory that explains decision under risk.18 For present purposes, what is most important is that prospect theory offers an explanation for simultaneous gambling and insurance.19 When given the choice, most people will reject a certain gain of X in favor of a gamble with an expected value below X, if the gamble involves a small probability of riches. At the same time, most people prefer a certain loss of X to a gamble with an expected value less than X, if the gamble involves a small probability of catastrophe.20 If expected utility theory is taken as normative, then people depart from the normative theory of rationality in giving excessive weight to lowprobability outcomes when the stakes are high. Indeed, we might easily see prospect theory as emphasizing a form of probability neglect. But in making these descriptive claims, prospect theory does not specify a special role for emotions. This is not a puzzling oversight, if it counts as an oversight at all. For many purposes, what matters is what people choose, and it is unimportant to know whether their choices depend on cognition or emotion, whatever may be the difference between these two terms.

B. Emotion

No one doubts, however, that in many domains, people do not think much about variations in probability and that emotions have a large effect on judgment and decisionmaking.21 Would a group of randomly selected people pay more to reduce a 1/100,000 risk of getting a gruesome form of cancer than a similar group would pay to reduce a 1/200,000 risk of getting that form of cancer? Would the former group pay twice as much? With some low-probability events, anticipated and actual emotions, triggered by the best-case or worst-case outcome, help to determine choice. Those who buy lottery tickets, for example, often fantasize about the goods associated with a lucky outcome.22 With respect to risks of harm, many of our ordinary ways of speaking suggest strong emotions: panic, hysteria, terror. People might refuse to fly, for example, not because they are currently frightened, but because they anticipate their own anxiety, and they want to avoid it. It has been suggested that people often decide as they do because they anticipate their own regret.23 The same is true for fear. Knowing that they will be afraid, people may refuse to travel to Israel or South Africa, even if they would much enjoy seeing those nations and even if they believe, on reflection, that their fear is not entirely rational. Recent evidence is quite specific.24 It suggests that people greatly neglect significant differences in probability when the outcome is “affect rich”—when it involves not simply a serious loss, but one that produces strong emotions, including fear.25

To be sure, the distinction between cognition and emotion is complex and contested.26 In the domain of risks, and most other places, emotional reactions are usually based on thinking; they are hardly cognition-free. When a negative emotion is associated with a certain risk—pesticides or nuclear power, for example—cognition plays a central role.27 For purposes of the analysis here, it is not necessary to say anything especially controversial about the nature of the emotion of fear. The only suggestion is that when emotions are intense, calculation is less likely to occur, or at least that form of calculation that involves assessment of risks in terms of not only the magnitude but also the probability of the outcome.

Drawing on and expanding the relevant evidence, I will emphasize a general phenomenon here: In political and market domains, people often focus on the desirability of the outcome in question and pay (too) little attention to the probability that a good or bad outcome will, in fact, occur. It is in such cases that people fall prey to probability neglect, which is properly treated as a form of quasi-rationality.28 Probability neglect is especially large when people focus on the worst possible case or otherwise are subject to strong emotions. When such emotions are at work, people do not give sufficient consideration to the likelihood that the worst case will actually occur. This is quasi-rational because, from the normative point of view, it is not fully rational to treat a 1% chance of X as equivalent, or nearly equivalent, to a 99% chance of X, or even a 10% chance of X. Because people suffer from probability neglect, and because neglecting probability is not fully rational, the phenomenon I identify raises new questions about the widespread idea that ordinary people have a kind of rival rationality superior to that of experts.29 Most of the time, experts are concerned principally with the number of lives at stake,30 and for that reason they will be closely attuned, as ordinary people are not, to the issue of probability.

By drawing attention to probability neglect, I do not mean to suggest that most people, most of the time, are indifferent to large variations in the probability that a risk will come to fruition. Large variations can, and often do, make a difference—but when emotions are engaged, the difference is far less than the standard theory predicts. Nor do I suggest that probability neglect is impervious to circumstances. If the costs of neglecting probability are placed “on screen,” then people will be more likely to attend to the question of probability.31 In this light it is both mildly counterintuitive and reasonable, for example, to predict that people would be willing to pay less, in terms of dollars and waiting time, to reduce lowprobability risks of an airplane disaster if they are frequent travelers. An intriguing study finds exactly that effect.32 For similar reasons, market pressures are likely to dampen the impact of probability neglect, ensuring that, say, risks of 1/10,000 are treated differently from risks of 1/1,000,000, even if individuals, in surveys, show relative insensitivity to such differences.

Acknowledging all this, I emphasize three central points. First, differences in probability will often affect behavior far less than they should or than conventional theory would predict. Second, private behavior, even when real dollars are involved,33 can display insensitivity to the issue of probability, especially when emotions are intensely engaged. Third, and most important, the demand for legal intervention can be greatly affected by probability neglect, so that government may end up engaging in extensive regulation precisely because intense emotional reactions are making people relatively insensitive to the (low) probability that the relevant dangers will ever come to fruition.

C. Law It is not at all clear how the law should respond to probability neglect. But at a minimum, the phenomenon raises serious legal issues in administrative law, at least under statutes banning agencies from acting unless they can show a “significant risk”34 or can establish that the benefits of regulation outweigh the costs.35 If agencies are neglecting the issue of probability (perhaps because the public is doing so as well), they may well be acting unlawfully. Indeed, the law of judicial review shows an inchoate understanding of probability neglect, treating it as a problem for which judicial invalidation is a solution.36 The only qualification is that the relevant law remains in an embryonic state. There is much to be done, especially at the agency level, to ensure that government is alert to the probability that harm will actually occur.

Outside of the context of administrative law, an understanding of probability neglect will help us to make better predictions about the public “demand” for law. When a bad outcome is highly salient and triggers strong emotions, government will be asked to do something about it, even if the probability that the bad outcome will occur is low. Political participants of various stripes, focusing on the worst case, are entirely willing to exploit probability neglect. Those who encourage people to purchase lottery tickets, focusing on the best case, do the same. An understanding of probability neglect simultaneously helps show why jurors, and ordinary officials, are not likely to be moved much by a showing that before the fact, the harm was not likely to occur. For many people, what matters is that the harm did occur, not that it was unlikely to do so before the fact. For law, many of the most difficult questions are normative in character: Should government take account of variations in the probability that harms will occur? Should government respond to intense fears that involve statistically remote risks? When people suffer from probability neglect, should law and policy do the same thing? At first glance, we might think that even if people are neglecting probability, government and law at least should not—that the tort system and administrators should pay a great deal of attention to probability in designing institutions. If government wants to insulate itself from probability neglect, it will create institutions designed to ensure that genuine risks, rather than tiny ones, receive the most concern. Such institutions will not necessarily require agencies to discuss the worst-case scenario.37 And if government is attempting to increase public concern about a genuine danger, it should not emphasize statistics and probabilities, but should instead draw attention to the worst-case scenario.

If government is attempting to decrease public concern with a risk that has a tiny probability of coming to fruition, it may be ineffective if it emphasizes the issue of probability; indeed, it may do better if it changes the subject or stresses instead the affirmative social values associated with running the risk.38 On the other hand, public fear, however unwarranted, may be intractable, in the sense that it may be impervious to efforts at reassurance. And if public fear is intractable, it will cause serious problems, partly because fear is itself extremely unpleasant and partly because fear is likely to influence conduct, possibly producing wasteful and excessive private precautions. If so, a governmental response, via regulatory safeguards, would appear to be justified if the benefits, in terms of fear reduction, justify the costs.

II. PROBABILITY NEGLECT: THE BASIC PHENOMENON When it comes to risk, a key question is whether people can imagine or visualize the worst-case outcome.39 When the worst case produces intense fear, surprisingly little role is played by the stated probability that that outcome will occur.40 An important function of strong emotions is thus to drive out quantitative judgments, including judgments about probability, by making the best case or the worst case seem highly salient.41 But it is important to note that probability neglect can occur even when emotions are not involved. A great deal of evidence shows that whether or not emotions are involved, people are relatively insensitive to differences in probabilities, at least when the relevant probabilities are low.

A. Insensitivity to Variations Among Low Probabilities Do people care about probability at all? Of course they do; a risk of 1/100,000 is significantly less troublesome than a risk of 1/1000. But many people, much of the time, show a remarkable unwillingness to attend to the question of probability. Several studies show that when people are seeking relevant information, they often do not try to learn about probability at all. One study, for example, finds that in deciding whether to purchase warranties for consumer products, people do not spontaneously point to the probability of needing repair as a reason for the purchase.42 Another study finds that those making hypothetical, risky managerial decisions rarely ask for data on probabilities.43 Or consider a study involving children and adolescents,44 in which the following question was asked: Susan and Jennifer are arguing about whether they should wear seat belts when they ride in a car. Susan says that you should. Jennifer says you shouldn’t . . . . Jennifer says that she heard of an accident where a car fell into a lake and a woman was kept from getting out in time because of wearing her seat belt . . . . What do you think about this?45 In answering that question, many subjects did not think about probability at all.46 One exchange took the following form: A: Well, in that case I don’t think you should wear a seat belt. Q (interviewer): How do you know when that’s gonna happen? A: Like, just hope it doesn’t! Q: So, should you or shouldn’t you wear seat belts? A: Well, tell-you-the-truth we should wear seat belts. Q: How come? A: Just in case of an accident. You won’t get hurt as much as you will if you didn’t wear a seat belt. Q: Ok, well what about these kinds of things, when people get trapped? A: I don’t think you should, in that case.47 These answers might seem odd and idiosyncratic, but we might reasonably suppose that some of the time, both children and adults focus primarily on bad scenarios, without thinking a great deal about the question of probability.

Many studies find that significant differences in low probabilities have little impact on decisions. This finding is in sharp conflict with the standard view of rationality, which suggests that people’s willingness to pay for small risk reductions ought to be nearly proportional to the size of the reduction.48 Perhaps these findings reflect people’s implicit understanding that in these settings, the relevant probability is “low, but not zero,” and that finer distinctions are unhelpful. (What does a risk of 1/100,000 really mean? How different is it, for an individual, from a risk of 1/20,000 or 1/600,000?) In an especially striking study, Kunreuther and his coauthors found that mean willingness to pay insurance premiums did not vary among risks of 1/100,000, 1/1,000,000, and 1/10,000,000.49 They also found basically the same willingness to pay for insurance premiums for risks ranging from 1/650, to 1/6300, to 1/68,000.50

The study just described involved a “between subjects” design; subjects considered only one risk, and the same people were not asked to consider the various risks at the same time. Low probabilities are not likely to be terribly meaningful to most people, but most educated people would know that a 1/100,000 risk is worse than 1/1,000,000 risk. When low-probability risks are seen in isolation and are not assessed together, we have an example of the problem of “evaluability.”51 For most people, most of the time, it is very difficult to evaluate a low probability, and hence isolated decisions will pick up small or no variations between people’s assessments of very different risks.

But several studies have a “within subjects” design, exposing people simultaneously to risks of different probabilities, and even here, the differences in probabilities have little effect on decisions. An early study examined people’s willingness to pay (WTP) to reduce various fatality risks. The central finding was that the mean WTP to reduce such risks was, for over 40% of the respondents, unaffected by a large variation in the probability of harm, even though expected utility theory would predict significant effects from such variations.52 A later study found that for serious injuries, WTP to reduce the risk by 12/100,000 was only 20% higher than WTP to reduce the same risk by 4/100,000, even though standard theory would predict a WTP three times as high.53 These results are not unusual. Lin and Milon attempted to elicit people’s willingness to pay to reduce the risk of illness from eating oysters.54 There was little sensitivity to variations in probability of illness.55 Another study found little change in WTP across probability variations involving exposure to pesticide residues on fresh produce.56 A similar anomaly was found in a study involving hazardous wastes, where WTP actually decreased as the stated fatality risk reduction increased.57

There is much to say about the general insensitivity to significant variations within the category of low-probability events. It would be difficult to produce a rational explanation for this insensitivity; recall the standard suggestion that WTP for small risk reductions should be roughly proportional to the size of the reduction.58 Why don’t people think in this way? An imaginable explanation is that in the abstract, most people simply do not know how to evaluate low probabilities. A risk of 7/100,000 seems “small”; a risk of 4/100,000 also seems “small.”59 Most people would prefer a risk of 4/100,000 to a risk of 7/100,000, and I have noted that joint evaluation improves evaluability, which would otherwise be extremely difficult.60 But even when the preference is clear, both risks seem “small,” and hence it is not at all clear that a proportional increase in WTP will follow. As suggested by the findings of Kunreuther and his coauthors, it is likely that in a between-subjects design, WTP to eliminate a risk of 4/100,000 would be about the same as WTP to eliminate a risk of 7/100,000, simply because the small difference would not matter when each risk is taken in isolation.

#### Flip structure solves Lack of PTC

Meisen 8—President Global Energy Network Institute (Peter, Renewable Energy on Tribal Lands, [www.geni.org/globalenergy/research/renewable-energy-on-tribal-lands/Renewable-Energy-on-Tribal-Lands.pdf](http://www.geni.org/globalenergy/research/renewable-energy-on-tribal-lands/Renewable-Energy-on-Tribal-Lands.pdf))

The Flip Structure combines the best of both contracting out and tribal ownership. The need for the flip structure comes from the fact that Tribes are not taxable entities and, therefore, the production tax credits (PTC) which make wind power affordable do not easily apply to Tribes developing wind. While complex, a flip arrangement manages to both preserve tribal ownership and allow the Tribe to take advantage of whatever tax credits are available. ¶ To start the process, a Tribe, combined with other investors, loans a company money to build a large wind or solar farm. The Tribe also leases the land required for the project to the company. For the next ten years, the company builds and operates the project, during which they hold 90% of the ownership of the project with the Tribe retaining 10%. This allows the project to take advantage of the ten year long PTCs, because the company which has ownership of the project is a taxable entity. During the first ten years, the Tribe receives payments of interest on the loan and on the land-lease. After the first ten years, the company makes a balloon payment for the value of the original lease. At the same time, the Tribe buys the wind or solar farm from the company for the value of the original lease. This creates a “flip” in ownership so the Tribe then holds 90% of the ownership and the company holds 10% of the ownership of the facility. 29 This creates a debt free facility that has all of the advantages of a tribally owned project while taking advantage of any tax incentives.

#### Native control good---it’s the key determinant of economic success

Cornell and Kalt 5—Ph.D. Director Professor of Sociology and of Public Administration and Policy Faculty Associate, Native Nations Institute—AND—Ford Foundation Professor of International Political Economy, Emeritus, Co-Director Harvard Proj. on American Indian Econ. Development (Stephen and Joseph, Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn’t, [www.jopna.net/pubs/jopna\_2005-02\_Approaches.pdf](http://www.jopna.net/pubs/jopna_2005-02_Approaches.pdf))

This development—the move to practical sovereignty or genuine self-rule—turns out to be a key to sustainable development. There are two primary reasons why. Self-governance puts the development agenda in Indian hands. When federal bureaucrats, funding agencies, or some other set of outsiders sets the reservation development agenda, that agenda inevitably reflects their interests, perceptions, or concerns, not those of Indian nation citizens. When decisions move into tribal hands, agendas begin to reflect tribal interests, perceptions, and concerns. Self-governance marries decisions and their consequences, leading to better decisions. In the standard approach to reservation development, outsiders make the major decisions about development strategy, resource use, allocation and expenditure of funds, and so forth. But if those outsiders make bad decisions, they seldom pay the price. Instead, the Indian community pays the price. This means that outside decisionmakers face little in the way of compelling discipline; the incentives to improve their decisions are modest. After all, it’s not their community whose future is at stake. But once decisions move into Indian hands, then the decisionmakers themselves have to face the consequences of their decisions. Once they’re in the driver’s seat, tribes bear the costs of their own mistakes, and they reap the benefits of their own successes. As a result, over time and allowing for a learning curve, the quality of their decisions improves. In general, Indian nations are better decision-makers about their own affairs, resources, and futures because they have the largest stake in the outcomes. There are concrete, bottom-line payoffs to tribal self-rule. For example, a Harvard Project study of 75 tribes with significant timber resources found that, for every timber-related job that moved from BIA forestry to tribal forestry—that is, for every job that moved from federal control to tribal control—prices received and productivity in the tribe’s timber operations rose. 16 On average, tribes do a better job of managing their forests because these are their forests. But the evidence is even broader. After fifteen years of research and work in Indian Country, we cannot find a single case of sustained economic development in which an entity other than the Indian nation is making the major decisions about development strategy, resource use, or internal organization. In short, practical sovereignty appears to be a necessary (but not sufficient) condition for reservation economic development.

### 2ACCourts

#### “Federal Government” doesn’t mean “all three branches”

Chicago 7(University of Chicago Manual of Style, “Capitalization, Titles”, http://www.chicagomanualofstyle.org/CMS\_FAQ/CapitalizationTitles/CapitalizationTitles30.html)

Q. When I refer to the government of the United States in text, should it be U.S. Federal Government or U.S. federal government? A. **The government of the** United States **is** not a single official entity. **Nor is it when it is referred to as the** federal government or the U.S. government or the **U.S. federal government**. **It’s just a government**, which, like those in all countries, **has some official bodies that** act and operate in the name of government: the **Congress**, the **Senate**, the **Department of State, etc**.

#### Restrictions must block usage i.e. on-paper shit that isn’t enforced/doesn’t inhibit production isn’t a restriction

Berger 1 Justice Opinion, INDUSTRIAL RENTALS, INC., ISAAC BUDOVITCH and FLORENCE BUDOVITCH, Appellants Below, Appellants, v. NEW CASTLE COUNTY BOARD OF ADJUSTMENT and NEW CASTLE COUNTY DEPARTMENT OF LAND USE, Appellees Below, Appellees. No. 233, 2000SUPREME COURT OF DELAWARE776 A.2d 528; 2001 Del. LEXIS 300April 10, 2001, Submitted July 17, 2001, Decided lexis

We disagree. Statutes must be read as a whole and all the words must be given effect. 3 The word "restriction" means "a limitation (esp. in a deed) placed on the use or enjoyment of property." 4 If a deed restriction has been satisfied, and no longer limits the use or enjoyment of the property, then it no longer is a deed restriction -- even though the paper on which it was written remains. [\*\*6] Thus, the phrase "projects containing deed restrictions requiring phasing…," in Section 11.130(A)(7) means presently existing deed restrictions. As of June 1988, the Acierno/Marta Declaration contained no remaining deed restrictions requiring phasing to coincide with improvements to the transportation system. As a result, the Acierno/Marta projects should not have been included in the scope of the Budovitches' TIS.

#### Links to elections and doesn’t solve signal

Campbell 2K Colton, Professor of Government, “CONGRESS CONFRONTS THE COURTS”, p. 22

The final situation in which the judiciary usurps the legislative power may be equally dangerous to the legitimacy of the Court. This is when an ideological majority (on some issues a very narrow majority) on the Court is not behind public a opinion but too far ahead of it, and proceeds to overturn long-standing laws in the name of a 'living constitution' or the Court's higher constitutional authority to protect rights and minorities. When this happens, unfortunately for the Court, it is likely to provoke a widespread popular backlash that will be reflected in the other branches of the federal government that are more responsive to the popular will, even if elite opinion is on the side of the Court. The decisions of the later Warren and early Burger courts clearly appear to fit this pattern, when the Supreme Court emboldened by its success in changing national policy on civil rights attempted to change state and federal law on matters such as criminal suspects' rights, school prayer, the death penalty, school busing, and abortion, when a national consensus for change' as not yet apparent or on some of these issues (such as the death penalty and suspects' rights) was actually moving n the opposite direction. And while the Court may succeed in changing the law in defiance of a majority of the public, the sustained hostility engendered toward the legislative branch is not healthy for the Court's authority. A Supreme Court perceived as arrogant, elitist, and out-of-touch is unlikely to be respected.

#### The CP would be send a massive signal of unpredictability to investors

Ford 5Matthew Ford, Law Student at St John's University School of Law in New York. 9/15, “John Roberts, Stare Decisis, and the Return of Lochner: An Impetus to Jump-Start the Labor Movement.” Mr. Zine Magazine, A Project of the Monthly Review. http://mrzine.monthlyreview.org/ford180905.html

Our common law system is based largely on the idea of "stare decisis," the idea that the rulings of judges are generally binding. Such a system is designed to create continuity so as to send a signal to society about what sort of behavior society will or will not tolerate, to avoid confusion certain to arise if laws are constantly changing, and to diminish the likelihood of agitating society as a whole or creating a backlash by overturning laws that are widely valued. However, as Judge Roberts put it, "[S]tare decisis is not an inexorable command" ("Transcript: Day Two of the Roberts Confirmation Hearings," 13 September 2004). The Supreme Court can overturn precedent when it sees fit, or, in the words of Roberts, "You have to consider whether [precedent has] created settled expectations that should not be disrupted in the interest of regularity in the legal system" ("Transcript: Day Two of the Roberts Confirmation Hearings," 13 September 2004). If Roberts sticks to his word, large, well-organized, militant groups such as the Women's Rights Movement should find comfort in the fact that Roberts has implicitly acknowledged that the overturning of such a key precedent as Roe v. Wade would likely lead to large-scale upheaval by the well-organized feminist movement that would shake society so forcefully that to even fathom overturning the ruling is to start trouble.

#### Kills solvency

Morris 7/12—Associate Editor, Power Engineering, Renewable Energy World (7/12/12,Lindsay, Wind Turbine Manufacturers Say U.S. Market Will Grow in Time, [www.renewableenergyworld.com/rea/news/article/2012/06/wind-turbine-manufacturers-say-u-s-market-will-grow-in-time](http://www.renewableenergyworld.com/rea/news/article/2012/06/wind-turbine-manufacturers-say-u-s-market-will-grow-in-time))

Harm Toren, vice president and chief service officer of Mitsubishi Power Systems, said about 90 percent of Mitsubishi’s wind turbines are installed in the U.S., but expressed concern regarding the unpredictable nature of the market due to policy uncertainty. “The stop-start nature of the U.S. regulations really prohibits the long-term nature of R&D and planning for sales. If we have a repeat of 2004, it will be difficult for us to deliver due to the suppliers and supply chain not being able to catch up.”¶ Borja Negro, CEO of Spanish company Gamesa, said the supply chain in the U.S. has been built steadily over the last decade, and a lack of policy certainly could hinder continued growth. “Uncertainty doesn’t just affect employment; it affects supply chain.”

### 2AC 2nd CP

#### The CP triggers a slew of federal regulations that kill solvency---TERA’s key

Dreveskracht 11—Associate at Galanda Broadman PLLC, of Seattle, an American Indian majority-owned law firm. His practice focuses on representing businesses and tribal governments in public affairs, energy, gaming, taxation, and general economic development (Ryan, The Road to Alternative Energy in Indian Country: Is It a Dead End?, http://www.wsba.org/Legal-Community/Sections/Indian-Law-Section/~/media/Files/Legal%20Community/Sections/Indian%20Law/Indian%20Newsletters/Summer%202011%20Vol%2019%20No%202.ashx)

Yet, as of February 2011, only one commercial scale renewable energy project is operating in Indian country. 9 What gives?¶ On April 1, 2011, the U.S. House of Representatives, Committee on Natural Resources, set out to find the answer. 10 In his opening statement, Committee Chairman Don Young set the tone for testimony to follow: “[B]ecause of outdated or duplicative federal regulations and laws, tribes often feel that the federal government is treating them unfairly…. These rules and policies often slow energy development and discourage businesses to invest on tribal lands.” 11 Tribal officials identified the following impediments:¶ • Erroneous Bureau of Indian Affairs (BIA) records, which cause significant delay in the preparation of environmental documents and overall land records necessary for the approval of business transactions. 12¶ • A lack of BIA staffing necessary to review and approve the required instrumentalities within a timely fashion. 13¶ • The inability to enter into long-term fixed price contracts necessary to underpin the commercial framework needed for long-term projects. 14¶ • A lack of standardization and coordination between Department of the Interior (DOI) offices. 15¶ • A lack of DOI communication with state and local governments – with tribes bearing the brunt of the cost via legal attacks on their sovereignty. 16¶ • General apprehension to issue National Environmental Protection Act (NEPA) compliance decisions at the Environmental Protection Agency, likely due to fear of litigation. 17¶ • BIA delays in approving Rights-of-Way. 18¶ • The practical inability to tax non-Indian energy developments on leased lands due to state and local governments in many instances already taxing the project. 19¶ • Tribes’, as owners, inability to take advantage of the production/investment tax credits and accelerated depreciation incentives available to non-Indian project investors. 20¶ Stripped down, many the hindrances referred to in Hearing testimony are a direct result of the federal approval process. Pursuant to 25 U.S.C. § 415, transactions involving the transfer of an interest in Indian trust land must be approved by the BIA. 21 But even where the tribe structures the project without leasing its land, 25 U.S.C. § 81 requires that the BIA approve contracts that could “encumber” Indian lands for a period of seven or more years. 22 Secretarial approval is also necessary for rights of-way on Indian lands. 23 In these instances the BIA approval process constitutes a “federal action,” which triggers a slew of federal laws that the BIA must comply with. 24 This includes NEPA, the National Historic Preservation Act, and the Endangered Species Act, among others. Compliance with NEPA alone can take over 12 years to complete and can generate millions of dollars in additional cost 25 – not to mention the inevitable litigation that will ensue. 26 Although there has been some headway in removal of the outdated tribal energy regime, according to recent congressional testimony there is much work to be done.¶ The Road to Nowhere¶ Congress began to address the development of renewables in Indian country in the early nineties. Such legislation included the EPAct of 1992, 27 which authorized the Department of Energy (DOE) to provide grants and loans to tribes wishing to develop solar and wind energy; the Indian Energy Resource Development Program, 28 which awarded development grants, federally-backed loans, and purchasing preferences to Indian tribes pursuing energy development projects 29 ; culminating in the Indian Energy Act of 2005 (IEA), 30 the most comprehensive Indian-specific energy legislation to date.¶ Until 2005, much of the federal push for energy development had focused on creating incentives for investment rather than a restructuring of the antiquated legal structures involved. 31 Much of the IEA, however, was devoted to the creation of a new framework for the management and oversight of energy development in Indian country – the Tribal Energy Resource Agreement (TERA). 32 This section of the IEA allowed a tribe to enter into a master agreement (the TERA) with the Secretary of the Interior, granting the tribe the ability to enter into leases and other business agreements and to grant rights of way across tribal lands without Secretarial approval. 33¶ To date, however, no tribe has entered into a TERA. For many tribes, the cost simply outweighs the benefits 34 – TERAs allow tribes the leeway to skip secretarial approval for specific projects, “but only on terms dictated by the federal government rather than on the tribes’ own terms.” 35 First, in applying for the TERA, the tribe must consult with the director of the DOI before submitting the application. 36 The director must hold a public comment period on the proposed TERA application and may conduct a NEPA review of the activities proposed. 37 Thereafter, the DOI has 270 days to approve the TERA. 38 Second, the TERA requires that tribes create a NEPA-like environmental review process. 39 This “tribal NEPA” must have a procedure for public comment and for “consultation with affected States regarding off-reservation impacts” of the project. 40 Third, the TERA must include a clause guaranteeing that the tribe and its partner will comply “with all applicable environmental laws.” 41 In so doing, tribes must allow the Secretary to review the tribe’s performance under the TERA – annually for the first three years and biannually thereafter. 42 If in the course of such a review the Secretary finds “imminent jeopardy to a physical trust asset,” the Secretary is allowed to take any action necessary to protect the asset, including assuming responsibility over the project. 43 Fourth, the TERA must address public availability of information and record keeping by designating “a person … authorized by the tribe to maintain and disseminate to requesting members of the public current copies of tribal laws, regulations or procedures that establish or describe tribal remedies that petitioning parties must exhaust before instituting appeals ….” 44 Finally, agreements for developing alternative energies are subject to a 30-year limit, renewable only once for another 30-year term. 45¶ Roadblocks¶ Commentators have noted that the TERA imposes more stringent environmental standards upon tribes than non-Indian developers elsewhere. 46 But even where a tribe is compelled to go through the burdensome TERA process – which may still be a good idea 47 – many tribes simply do not have the resources necessary to fulfill the TERA requirements. The regulations impose an extremely heavy burden on tribal governments to demonstrate that they have the requisite expertise, experience, laws, and administrative structures in place to assume the responsibility of a TERA. “Few tribes at present have the in-house geologists, engineers, hydrologists, and other experts, or the financial wherewithal to hire or train them,” in order to provide the tribe with the capacity necessary to obtain secretarial approval under the TERA regulations. 48¶ The irony is that those tribes with TERA capacity are likely in a position to skip the approval process altogether by implementing alternative energy projects on their own, which do not require secretarial approval. 49 Where no lease, contract, or right-of-way is involved, the approval process – and the insurmountable burdens of federal law that come along with it – is not necessary. 50 The majority of tribes, however – tribes that are most in need of economic development and would most benefit from the implementation of an alternative energy project – have to seek an outside partner, which puts them “at a terrific disadvantage for developing their own resources.” 51¶ The Road Ahead¶ The doctrine of self-determination acknowledges that tribal control over development is the best way to strengthen tribal governance and improve economic selfsufficiency. 52 According to much of the testimony offered at the recent Hearing before the Subcommittee on Indian and Alaska Native Affairs, self-determination must also include freedom from the yoke of federal energy oversight and regulation.¶ On May, 4-5, 2011, the U.S. Department of Energy (DOE) held its first Tribal Summit. 53 The goal of the Summit, much like that of the most recent Hearing, is to identify and “break down bureaucratic barriers that have prevented tribal nations from developing clean energy with the ultimate goal of prosperity and energy security for both Indian country and the nation as a whole.” 54 For many, the Summit reflects the nation’s “continued commitment to partnering with Native Americans to support the development of clean energy projects on tribal lands ….” 55 But will it be enough?¶ Having identified “unnecessary laws and regulations” hindering alternative energy development in Indian country, it is now time for Congress to write necessary legislation to allow tribes to pursue energy self-determination. 56 If the words of Doc Hastings, Chairman of the House Committee on Natural Resources, hold any bearing, the current regulation of energy resources in Indian country may soon be upset: “Tribes know best how to meet their own land management objectives.” 57 This axiom should not be lost. Indeed, in order to effectively realize the twin goals of promoting tribal self-determination and encouraging the efficient development of tribal energy resources, 58 it will be necessary to emphasize the former to bring about the latter.

### 2AC K

#### No link---the plan subverts contemporary capitalist development by rendering it submissible to Native culture---the K inscribes a false distinction b/w modern and traditional that effaces Natives

O’Neill 4—Associate Professor, Utah State (Collen, Rethinking Modernity and the Discourse of Development in American Indian History, an Introduction, http://www.upcolorado.com/excerpts/9780870818592.pdf)

Modernity is a culturally specific, historical construct, yet the concept remains stubbornly reified as some sort of natural historical phenomenon. As Joseph Gusfield described in 1967, “We cannot easily separate modernity and tradition from some specific tradition and some specific modernity, some version which functions ideologically as a directive. The modern comes to the traditional society as a particular culture with its own traditions.” 39 The use of universal categories of capitalist development defines a particular kind of historical narrative. Theoretical paradigms that posit subsistence ways of life against proletarian experiences and the traditional versus the modern render historically invisible economic systems that do not fit within those dualistic parameters. Recognizing the coexistence of modernity and tradition within the same historical time and space and refusing to think of culture as purely a terrain of resistance reveals a much more complicated and compelling story. As historian Kathy Walker suggests from her study of Chinese peasants, “Alternative pasts indicate a counter-appropriation of history that simply cannot be reduced to a logic of capitalist development or universalized modernity. They must be explained on their own terms.” 40 Reaching for historical specificity does not mean ignoring the bigger picture or abandoning the work of capitalist theory. On the contrary, moving beyond the “discourse of development,” to use Arturo Escobar’s term, means creating new theoretical models to help make sense out of the multiple histories that are bound to emerge once we remove the paradigmatic blinders.¶ American historians can learn a great deal from scholars studying the ways rural peoples in the Third World have shaped and been shaped by capitalist development. Peasant and subaltern studies scholars have chipped away at assumptions that had previously characterized peasant societies as undifferentiated, or “traditional,” and peasant uprisings as reactive and conservative. In effect, they opened Marx’s “sack of potatoes” to look inside. What they found were complex societies divided along wealth, gender, and age hierarchies and united by kinship and other socially constructed identities. Third World social scientists found that peasants, a social category once defined as “precapitalist,” existed within capitalist structures as well as on the periphery of the world system. These scholars wondered how the internal dynamics of peasant cultures mediated their interactions with the world economy, how they resisted absorption into the capitalist market, as well as how they accommodated to it. This type of scholarship produced a nuanced view that expanded definitions of resistance beyond collective uprising and revolution to oppositional popular culture, nationalism, gender antagonism, and subtle subversion encoded in “hidden transcripts.” 41 Still, revealing the agency of historical actors does not necessarily shed light on the power structures within which they operate. However, these types of studies revealed how complex the dance between power structures and historical agents can be. 42 ¶ NATIVE PATHWAYS: COMMERCIAL INCORPORATION¶ The capitalist market has taken its toll on American Indian communities, particularly since incorporation has usually meant a devastating loss of land and other natural resources—elements of central economic and cultural significance. Yet the way indigenous communities recovered in the twentieth century shows a creative engagement with the market. By contesting the terms of incorporation, either as laborers or as tribal capitalists, American Indians are challenging the cultural assumptions of modernity itself.¶ Native Pathways reflects much of the exciting scholarship done by Third World scholars since the mid-1980s. This volume helps to flesh out what historian Florencia Mallon has described as “that skeleton historians call the development of capitalism.” She examines how Andean peasants used “traditional relationships” to shape their villages’ transition to a capitalist economy, and in the process those “weapons of the weak” transformed the villagers and their communities. 43 Paul Rosier’s chapter on Blackfeet oil leasing demonstrates the importance of understanding the “culture of political economy” implicit in the incorporation of indigenous societies into the capitalist market economy. Even though American Indians do not dictate the terms of their incorporation, they may in fact shape its impact. For example, Rosier shows that the revenue earned from oil leasing did not necessarily subvert Blackfeet culture. Instead, tribal members incorporated it into their established cultural practices, such as giveaways, which helped to “mitigate against incipient class conflict” through a redistribution of tribal income. Cultural practices changed, but they remained no less Blackfeet in their reincarnation.¶ Whereas cultural practices might temper the effects of incorporation, Tressa Berman describes ways informal women’s networks served as a buffer against the surrounding capitalist market, helping to “spread the risks of survival across households.” American Indian women on the Fort Berthold Reservation intermixed their production for the market with ceremonial use so that those realms have become interdependent. Mandan, Hidatsa, and Arikara women pooled resources such as commodity food issued by the federal government, wages, or star quilts and redistributed them for ceremonial purposes or to aid kin who were in need. As a result, Berman states, “[in] both their structural adaptation and their community-based resistance the core cultural life remains intact, such that new strategies emerge from the maintenance of traditional practices.”¶ David Arnold’s chapter on Tlingit fishermen describes a similar cultural dynamic. Although development of a commercial salmon industry in southeastern Alaska drew Tlingits into the market economy, it did not necessarily undermine their subsistence practices. Indeed, customary fishing traditions and seasonal cannery work allowed Tlingits to retain some autonomy from the market. And like the Blackfeet, the revenue they earned in the commercial market and from wages in the canneries could be redistributed through ceremonial activities and community feasts.¶ David La Vere’s analysis of the Kiowa-Comanche-Apache Business Committee in the early twentieth century shows a similar use of “tradition” to build, protect, and enhance tribal resources. In this example, kinship obligations remained central to the goals of the Business Committee “as a way of navigating the white man’s road.” In this vein, the council developed a process of adopting people into the tribes—a well-worn tradition among the Comanche and the Kiowa—as a way to build tribal membership and resources. Jeffrey Shepherd’s history of the Hualapai describes a similar dynamic. Like the wealthier peasants Mallon describes in Yanamarca Valley, who drew on their influence at the village level to fashion a system of wage-based, commercial agricultural from a kinship-based system, participation in the market economy as labor contractors provided Hualapai elites with a new avenue of power and prestige. According to Shepherd, incorporation into the market economy actu-ally encouraged tribal cohesion and strengthened Hualapai identity instead of eroding it. 44¶ The history of American Indians’ relationship to the developing capitalist market involves multiple strands of analysis. Although it is important to think about how Indians responded to the cultural and economic demands of incorporation and how they fashioned strategies that rejected the incipient cultural logic of twentieth-century capitalism, the more compelling story involves the new institutions they created out of the conflict. Duane Champagne’s chapter raises these issues in important ways. As he suggests, although American Indians formed tribal governments under pressure from the federal government, those tribal councils did not always behave in the ways the federal government had hoped. He argues that in fact, many “[t]ribal governments continue to operate within the holistic orientations of native community life. Unlike U.S. society, institutional relations among economy, community, kinship, and politics are not separated.” For example, whereas the federal government created many of the modern tribal councils in an effort to extract valuable natural resources such as oil, timber, or other resources Western capitalists coveted, the tribal councils became something else indeed. Champagne’s examples show that American Indians embraced capitalism yet developed a system that embodies native values. As American Indians have been drawn into the capitalist economy, they have also been able to transform the institutions originally intended to control and exploit them.¶ Jessica Cattelino’s and Nicolas Rosenthal’s chapters on gaming offer interesting examples of what tribal capitalism looks like. Although American Indian sovereignty and the morality of gaming dominate the public debate, how and why those operations are “different” from the gaming establishments in Las Vegas or Atlantic City are often overlooked. Yet as Cattelino and Rosenthal demonstrate, American Indians have crafted a new pathway of development. For the most part, American Indians have crafted capitalist endeavors that redistribute and redirect profits for community benefit. The success of gaming is unparalleled. However, these chapters show that gaming did not emerge in a vacuum. The Seminoles and the southern California tribes developed gaming enterprises as one in a long line of development initiatives.

#### The alternative is complicit with the ongoing domination of Native peoples and reentrenches colonialism---the aff is necessary to reorient class relations

Churchill 8—former prof @ UC Boulder (Ward, I Am Indigenist, www.zcommunications.org/i-am-indigenist-by-ward-churchill)

Leaving aside questions concerning the validity of various treaties, the beginning point for any indigenist endeavor in the United States centers, logically enough, in efforts to restore direct Indian control over the huge portion of the continental United States that was plainly never ceded by native nations. Upon the bedrock of this foundation, a number of other problems integral to the present configuration of power and privilege in North American society can be resolved, not just for Indians, but for everyone else as well. It is probably impossible to solve, or even to begin meaningfully addressing, certain of these problems in any other way. But still, it is, as they say, "no easy sell" to convince anyone outside the more conscious sectors of the American Indian population itself of the truth of this very simple fact.¶ ¶ In part, uncomfortable as it may be to admit, this is because even the most progressive elements of the North American immigrant population share a perceived commonality of interest with the more reactionary segments. This takes the form of a mutual insistence upon an imagined "right" to possess native property, merely because they are here, and because they desire it. The Great Fear is, within any settler-state, that if indigenous land rights are ever openly acknowledged, and native people therefore begin to recover some significant portion of their land, the immigrants will correspondingly be dispossessed of that which they have come to consider "theirs" (most notably, individual homes, small farms, ranches and the like).¶ ¶ Tellingly, every major Indian land recovery initiative in the United States during the second half of the twentieth century—the Western Shoshone, those in Maine, the Black Hills, the Oneida claims in New York State are prime examples—has been met by a propaganda barrage from right-wing organizations ranging from the Ku Klux Klan to the John Birch Society to the Republican Party warning individual non-Indian property holders of exactly this "peril."36¶ ¶ I will debunk some of this nonsense in a moment, but first I want to take up the posture of self-proclaimed leftist radicals in the same connection. And I will do so on the basis of principle, because justice is supposed to matter more to progressives than to rightist hacks. Let me say that the pervasive and near-total silence of the left in this connection has been quite illuminating. Non-Indian activists, with only a handful of exceptions, persistently plead that they cannot really take a coherent position on the matter of Indian land rights because, "unfortunately," they are "not really conversant with the issues" (as if these are tremendously complex).¶ ¶ Meanwhile, they do virtually nothing, generation after generation, to inform themselves on the topic of who actually owns the ground they are standing on. The record can be played only so many times before it wears out and becomes just another variation of "hear no evil, see no evil." At this point, it does not take Einstein to figure out that the left does not know much about such things because it has never wanted to know, or that this is so because it has always had its own plans for utilizing land it has no more right to than does the status quo it claims to oppose.¶ The usual technique for explaining this away has always been a sort of pro forma acknowledgment that Indian land rights are of course "really important stuff" (yawn), but that one "really does not have a lot of time" to get into it (I'll buy your book, though, and keep it on my shelf even if I never read it). Reason? Well, one is just "overwhelmingly preoccupied" with working on "other important issues" (meaning, what they consider to be more important things). Typically enumerated are sexism, racism, homophobia, class inequities, militarism, the environment, or some combination. It is a pretty good evasion, all in all. Certainly, there is no denying any of these issues their due; they are all important, obviously so. But more important than the question of land rights? There are some serious problems of primacy and priority imbedded in the orthodox script.¶ To frame things clearly in this regard, let us hypothesize for a moment that all of the various non-Indian movements concentrating on each of these issues were suddenly successful in accomplishing their objectives. Let us imagine that the United States as a whole were somehow transformed into an entity defined by the parity of its race, class and gender relations, its embrace of unrestricted sexual preference, its rejection of militarism in all forms and its abiding concern with environmental protection (I know, I know, this is a sheer impossibility, but that is my point).¶ When all is said and done, the society resulting from this scenario is still, first and foremost, a colonialist society, an imperialist society in the most fundamental sense and with all that this implies. This is true because the scenario does nothing at all to address the fact that whatever happens is on someone else's land, not only without their consent, but with an adamant disregard for their rights to the land. Hence, all it means is that the immigrant or invading population has rearranged its affairs in such a way as to make itself more comfortable at the continuing expense of indigenous people. The colonial equation remains intact and may even be reinforced by a greater degree of participation and vested interest in maintenance of the colonial order among the settler population at large.37¶ ¶ The dynamic here is not very different from that evident in the American Revolution of the late eighteenth century, is it? And we all know very well where that led. Should we therefore begin to refer to socialist imperialism, feminist imperialism, gay and lesbian imperialism, environmentalist imperialism, Afroamerican and la Raza imperialism? I would hope not.38 I would hope this is all just a matter of confusion, of muddled priorities among people who really do mean well and who would like to do better. If so, then all that is necessary to correct the situation is a basic rethinking of what it is that must be done, and in what order. Here, I would advance the straightforward premise that the land rights of "First Americans" should be a priority for anyone seriously committed to accomplishing positive change in North America.¶ ¶ But before I suggest everyone jump up and adopt this priority, I suppose it is only fair that I investigate the converse of the proposition: If making things like class inequity and sexism the preeminent focus of progressive action in North America inevitably perpetuates the internal colonial structure of the United States, does the reverse hold true? I will state unequivocally that it does not.¶ ¶ There is no indication whatsoever that a restoration of indigenous sovereignty in Indian Country would foster class stratification anywhere, least of all in Indian Country. In fact, all indications are that when left to their own devices, indigenous peoples have consistently organized their societies in the most class-free manner. Look to the Haudenosaunee (Six Nations Iroquois Confederacy) for an example. Look to the Muscogee (Creek) Confederacy. ¶ Look to the confederations of the Yaqui and the Lakota, and those pursued and nearly perfected by Pontiac and Tecumseh. They represent the very essence of enlightened egalitarianism and democracy. Every imagined example to the contrary brought forth by even the most arcane anthropologist can be readily offset by a couple of dozen other illustrations along the lines of those I just mentioned.39¶ ¶ Would sexism be perpetuated? Ask the Haudenosaunee clan mothers, who continue to assert political leadership in their societies through the present day. Ask Wilma Mankiller, recent head of the Cherokee Nation, a people who were traditionally led by what were called "Beloved Women." Ask a Lakota woman—or man, for that matter—about who owned all real property in traditional society, and what that meant in terms of parity in gender relations. Ask a traditional Navajo grandmother about her social and political role among her people. Women in most traditional native societies not only enjoyed political, social, and economic parity with men, but they also often held a preponderance of power in one or more of these spheres.¶ ¶ Homophobia? Homosexuals of both genders were, and in many settings still are, deeply revered as special or extraordinary, and therefore spiritually significant, within most indigenous North American cultures. The extent to which these realities do not now pertain in native societies is exactly the extent to which Indians have been subordinated to the morés of the invading, dominating culture. Insofar as restoration of Indian land rights is tied directly to the reconstitution of traditional indigenous social, political, and economic modes, one can see where this leads; the Indian arrangements of sex and sexuality accord rather well with the aspirations of feminism and gay rights activism.40¶ ¶ How about a restoration of native land rights precipitating some sort of "environmental holocaust?" Let us get at least a little bit realistic here. If one is not addicted to the fabrications of Smithsonian anthropologists about how Indians lived,41 or George Weurthner's eurosupremicist Earth First! fantasies about how we beat all the woolly mammoths and mastodons and sabertoothed cats to death with sticks,42 then this question is not even on the board. I know it has become fashionable among Washington Post editorialists to make snide references to native people "strewing refuse in their wake" as they "wandered nomadically" about the "prehistoric" North American landscape.43 What is this supposed to imply? That we, who were mostly "sedentary agriculturalists" in any event, were dropping plastic and aluminum cans as we went?¶ ¶ As I said, let us get real. Read the accounts of early European invaders about what they encountered: North America was invariably described as being a "pristine wilderness" at the point of European arrival, despite the fact that it had been occupied by fifteen or twenty million people enjoying a remarkably high standard of living for nobody knows how long. 40,000 years? 50,000 years?44 Longer? Now contrast that reality to what has been done to this continent over the past couple of hundred years by the culture Weurthner, the Smithsonian and the Post represent, and you tell me about environmental devastation.45¶ ¶ That leaves militarism and racism. Taking the last first, there really is no indication of racism in traditional indigenous societies. To the contrary, the record reveals that Indians habitually intermarried between groups and frequently adopted both children and adults from other groups. This occurred in precontact times between Indians, and the practice was broadened to include those of both African and European origin, and ultimately Asian origin as well, once contact occurred. Those who were naturalized by marriage or adoption were considered members of the group, pure and simple. This was always the native view.46¶ The Europeans and subsequent Euroamerican settlers viewed things rather differently, however, and foisted off the notion that Indian identity should be determined primarily by "blood quantum," an outright eugenics code similar to those developed in places like nazi Germany and apartheid South Africa. Now, that is a racist construction if there ever was one. Unfortunately, a lot of Indians have been conned into buying into this anti-Indian absurdity, and that is something to be overcome. But there is also solid indication that quite a number of native people continue to strongly resist such things as the quantum system.47¶ ¶ As to militarism, no one will deny that Indians fought wars among themselves both before and after the European invasion began. Probably half of all indigenous peoples in North America maintained permanent warrior societies. This could perhaps be reasonably construed as "militarism." But not, I think, with the sense the term conveys within the European/Euroamerican tradition. There were never, so far as anyone can demonstrate, wars of annihilation fought in this hemisphere prior to the Columbian arrival. None. In fact, it seems that it was a more-or-less firm principle of indigenous warfare not to kill, the object being to demonstrate personal bravery, something that could be done only against a live opponent. There is no honor to be had in killing another person, because a dead person cannot hurt you. There is no risk.¶ ¶ This is not to say that nobody ever died or was seriously injured in the fighting. They were, just as they are in full-contact contemporary sports like football and boxing. Actually, these kinds of Euroamerican games are what I would take to be the closest modern parallels to traditional Indian warfare. For us, it was a way of burning excess testosterone out of young males and not much more. So, militarism in the way the term is used today is as alien to native tradition as smallpox and atomic bombs.48¶ ¶ Not only is it perfectly reasonable to assert that a restoration of native control over unceded lands within the United States would do nothing to perpetuate such problems as sexism and classism, but the reconstitution of indigenous social standards that this would entail stands to free the affected portions of North America from such maladies altogether. Moreover, it can be said that the process should have a tangible impact in terms of diminishing such things elsewhere. The principle is this: Sexism, racism, and all the rest arose here as a concomitant to the emergence and consolidation of the eurocentric nation-state form of sociopolitical and economic organization. Everything the state does, everything it can do, is entirely contingent upon its maintaining internal cohesion, a cohesion signified above all by its pretended territorial integrity, its ongoing domination of Indian Country.¶ Given this, it seems obvious that the literal dismemberment of the nation-state necessary for Indian land recovery correspondingly reduces the ability of the state to sustain the imposition of objectionable policies within itself. It follows that realization of indigenous land rights serves to undermine or destroy the ability of the status quo to continue imposing a racist, sexist, classist, homophobic, militaristic order upon non-Indians.¶ A brief aside: Anyone with doubts as to whether it is possible to bring about the dismemberment from within of a superpower state in this day and age, ought to sit down and have a long talk with a guy named Mikhail Gorbechev. It would be better yet if one could chew the fat with Leonid Breznev, a man who we can be sure would have replied in all sincerity, only twenty years ago, that this was the most outlandish idea he'd ever heard. Well, look on a map today, and see if you can find the Union of Soviet Socialist Republics. It ain't there, folks. Instead, you are seeing—and you will see it more and more—the reemergence of the very nations Léon Trotsky and his colleagues consigned to the "dustbin of history" clear back at the beginning of the century. These megastates are not immutable. They can be taken apart. They can be destroyed. But first we have to decide that we can do it and that we will do it.¶ ¶ So, all things considered, when indigenist movements like AIM advance slogans like "U.S. Out of North America," non-Indian radicals should not react defensively. They should cheer. They should see what they might do to help. When they respond defensively to sentiments like those expressed by AIM, what they are ultimately defending is the very government, the very order they claim to oppose so resolutely. And if they manifest this contradiction often enough, consistently enough, pathologically enough, then we have no alternative but to take them at their word: that they really are at some deep level or another aligned, all protestations to the contrary notwithstanding, with the mentality that endorses our permanent dispossession and disenfranchisement, our continuing oppression, our ultimate genocidal obliteration as self-defining and self-determining peoples. In other words, they make themselves part of the problem rather than becoming part of the solution.

#### Alt fails

**Grossberg 92** – Communication Studies Professor, UNC (Lawrence, We Gotta Get Out of This Place, p 388-90)

If it is capitalism that is at stake, our moral opposition to it has to be tempered by the realities of the world and the possibilities of political change. Taking a simple negative relation to it, as if the moral condemnation of the evil of capitalism were sufficient (granting that it does establish grotesque systems of inequality and oppression), is not likely to establish a viable political agenda. First, it is not at all clear what it would mean to overthrow capitalism in the current situation. Unfortunately, despite our desires, "the masses" are **not waiting to be led into revolution**, and it is not simply a case of their failure to recognize their own best interests, as if we did. Are we to decide-rather undemocratically, I might add-to overthrow capitalism in spite of their legitimate desires? Second, as much as capitalism is the cause of many of the major threats facing the world, at the moment it may also be one of the few forces of stability, unity and even, within limits, a certain "civility" in the world. The world system is, unfortunately, simply too precarious and the alternative options not all that promising. Finally, the appeal of an as yet unarticulated and even unimagined future, while perhaps powerful as a moral imperative, is simply too weak in the current context to effectively organize people, and **too vague to provide** **any** **direction**.

### 2AC Elections

#### Gridlock means CTBT won’t pass

**Zelizer 12** (Julian, CNN staff, 4/23/12, <http://www.cnn.com/2012/04/23/opinion/zelizer-winning-governing/index.html>)

If Barack Obama and Mitt Romney are staying up late worrying about whether they can win the election, they should ponder another, ultimately more important, question: Will their campaign rhetoric make it impossible for them to be effective if elected president? The decisions that each man makes in his effort to defeat the other will shape the political environment in January 2013. Although we often consider the campaign phase of a presidency to be entirely separate from governing, the truth is that the two are intimately connected. Whoever takes office in January will face many difficult challenges that will force him to compromise, adjust and move away from campaign promises that no longer fit the reality of the times. The Bush tax cuts expire at the end of the year, along with the payroll tax cut designed to boost the economy. The pressure will be on for the president and Congress to make deep spending cuts and revenue increases. Julian Zelizer The president's health care law will either need to be implemented and funded, or it will have been ruled unconstitutional, thus pushing to the forefront once again the skyrocketing costs of health care. In foreign policy, the Middle East, Iran, North Korea and China all point to hot spots that are volatile and unpredictable. And these are just the known challenges, let alone the crises we can't yet see coming. For Obama, the dangers are significant. To keep Democrats excited about a second term, it appears that he will continue to focus on the rhetoric of economic populism as well as on attacking the do-nothing Congress. Although he has governed like a moderate, his speeches have increasingly stressed the liberal themes of progressive economic policy, criticism of Wall Street and big business and, to some extent, laments about the growing inequality in American life. In his State of the Union Address, Obama castigated Wall Street with populist rhetoric, saying that the problems in the economy had stemmed from the fact that "Wall Street was allowed to play by its own set of rules." He promised that this time around, "It's time to apply the same rules from top to bottom: No bailouts, no handouts and no copouts." The danger for Obama is twofold. One the one hand, if the president veers too far to the left on the campaign trail, he will offer more fodder to his opponents who want to paint his every move as being those of a left-of-center Democrat. This will be even more problematic than it was in 2009 and 2010, when Obama still enjoyed political capital from his election, which allowed him to rebuff some of these charges and push through his legislative agenda. After his re-election, Republicans wouldn't have any fears about retribution and they wouldn't have any reason to compromise. As with every second-term president, he would be a lame duck from day one. Just as important, many moderate Democrats could be leery about supporting him unless they were sure that doing so wouldn't hurt their chances for re-election. At the same time that a rhetorical shift to the left could alienate possible legislative support, it could also create inflated expectations within the Democratic base. Just as many of Obama's supporters have been disappointed in his decisions after a campaign that promised transformation, liberals would be doubly dejected if his populism proved to be pure posturing. He could leave many Democrats deeply disappointed over the dim chance of ever delivering on these core ideas. Finally, in the coming months, Obama will continue to succumb to the lure of big money. With all his talk about change, this election looks awfully familiar. The Obama campaign has embarked on an aggressive fundraising project, including relying on super PACS. The kind of fundraising and interest group mobilization that will occur might very well define Obama by the end of this season as much as any of the bills that Congress has passed. Romney has challenges of his own. Romney's most obvious campaign struggle will be what to do about the right. The tea party Republicans will continue to pressure Romney to play to the base so he can prove he is not the Etch A Sketch candidate his critics present him to be. Romney will face a strong temptation to echo their positions as he looks to the tea party to mobilize supporters to vote in swing states. But if Romney pushes too hard in this direction, trying to overcompensate for his perceived centrism, he would make it difficult to appeal to moderate Democrats in a first term. Without the support of at least a handful of moderates, persuading Congress to pass legislation will be extraordinarily difficult. Romney will also face growing pressure to promise that he will oppose any kind of revenue increase, including an assurance that he would support an extension of the Bush tax cuts for wealthier Americans. Given the size of the deficit, such promises would put him in a difficult bind, setting him up for the kind of challenge with the Republican base that faced George H.W. Bush in 1990 when he had to settle for revenue increases after promising in his campaigning that he wouldn't agree to any new taxes. The enormity of the deficit will require revenue increases in addition to spending cuts. If the next president and Congress decide that they must significantly lower the deficit, these painful choices would be on the table.. He will need to keep bargaining room to raise taxes so that this doesn't haunt him. Some presidents have faced trouble as a result of the way they campaigned. Most famously, President Harry Truman pulled off a stunning upset against Thomas Dewey in 1948 by running against a "Do Nothing Congress." Although Truman's victory is often recounted, what is usually forgotten is that his relationship with Congress was terrible over the succeeding few years. Many of the Republicans who had worked closely with the Democratic Truman in 1947 and 1948 were furious at the campaign theme. Sen. Arthur Vandenberg of Michigan, who had been Truman's key ally in the creation of the national security system, complained to one Republican operative that, "Not even Wallace [third party candidate Henry Wallace] is saying things better calculated to split the country into snarling vendettas at a moment when our destiny cannot afford these soap box luxuries." The result was bitter conflict over domestic issues such as civil rights and the war against communism Yet there have been times when campaigning and governance went hand in hand. In 1964, Lyndon Johnson of Texas used his campaign to define his agenda broadly, contrasting himself with right-wing Sen. Barry Goldwater of Arizona and extolling the virtues of liberalism. During the campaign, Johnson took part in staged events extolling programs that Congress had passed. The election increased the Democratic majority in the Congress, giving him needed support for passing bills such as Medicare and federal aid to education, and became a platform to govern. Obama and Romney will have to navigate this difficult path. As they focus on each other and the kinds of tactics that will be needed for victory, they must also consider what happens if they do win and how the campaign will help or hinder their chances as president. The decisions that give Romney or Obama the best chance to win in the Electoral College may make success almost impossible to achieve in the White House.

#### Romney win---national polls best---state polls suck

Horowitz 10/26—writes for the Madison Project (Daniel, A Wide Electoral/Popular Vote Split Won’t Happen, [www.redstate.com/2012/10/26/a-wide-electoralpopular-vote-split-wont-happen/](http://www.redstate.com/2012/10/26/a-wide-electoralpopular-vote-split-wont-happen/))

There is an emerging narrative percolating throughout the political world; the prospect that Romney could win the popular vote but lose the Electoral College. The theory is predicated on the seemingly contradictory data between state and national polls. National polls seem to show Romney with a consistent 2-4% lead, while state polls show the candidates tied or Obama slightly ahead in Ohio, Iowa, and Wisconsin.¶ Some analysts are attempting to harmonize the state and national polls by theorizing that Romney’s national lead is driven by historic gains among whites in red states and a strong showing in Pennsylvania and Michigan. They suggest that ultimately the Electoral College boils down to Ohio (or Wisconsin, if Romney loses Ohio), a state where Obama’s much-vaunted ground game and oversaturation of ads could flip the state and the entire election to Obama.¶ This analysis is dead wrong. Either the state polls are correct, and this is a dog fight, or the national polls are correct, and this is a Romney win. The both cannot reflect reality.¶ It’s not just that the national polls show Romney ahead by 3%; it’s that 3 respected, yet diverse, national polls converged yesterday on the exact same number in one day – Romney 50% Obama 47% (today Gallup is Romney +5 and ABC/WaPost is Romney +1). So Romney is at 50% and the incumbent is at 47% (how ironic!) with undecided voters likely to break against him in an election defined by the stagnating economy. But it’s more than that. The Washington Post poll has Romney leading by 19-20 among Independents; Rasmussen shows him with a 17-point lead. Romney is now crushing Obama on the economy and even leading in favorability. It is almost impossible to lose the Electoral College under normal circumstances when leading by more than 1% nationally. It’s certainly impossible to lose when polling this well in all the internals.¶ In order for Romney to win by such margins in the popular vote, yet lose the Electoral College, he would have to outperform Bush in a number of non-swing-states, though he is unlikely to do so.¶ The math doesn’t add up.¶ Bush won the popular vote by 2.46% in 2004. In order to assume that Romney wins by roughly the same margin as Bush (or probably more, based on the internal numbers of the national polls), yet loses the Electoral College, one has to find a number of places where Romney outperforms Bush. But look around the map. Bush did really well in red states and probably won a number of them by more than Romney will. Bush won Montana by 21 points – something Romney will not do. The latest Rasmussen poll had him up just 8.¶ What about the blue states? People forget that Bush did pretty well in many Democrat states. He came within 7.6 in Delaware; 6.7 in NJ, 4 in Oregon, 3.5 in MN, and 9 in Maine. Heck, he only lost California by 10 points – a somewhat unlikely outcome for Romney.¶ What about the swing states? He won CO by 4.5; VA by 8; FL by 5; and NC by a whopping 13. He even won New Mexico – a state that Romney will not come close to winning (unless the Gallup national poll is correct).¶ What about Romney dramatically overperforming in Wis, MI, and PA, yet still losing? Well, that’s already baked into Bush’s 2.46% national margin. He lost Wis. by the slimmest of margins, PA by 2.5, and MI by 3.5.¶ Across the board, this is a much better showing in many states than Romney is expected to win, even in the best case scenario. Yet, he still only won the popular vote by 2.46% overall. So the idea that Romney could match this margin or even more nationally, yet lose the Electoral College, but make up the difference by overperfroming Bush in a number of areas, is crazy talk. Where would those votes come from?¶ Bottom line: if Romney wins the popular vote by 2-3%, he will clearly run the table on all the swing states, and possibly come very close in MI or PA, if not win them outright. Oh, and what’s all that talk of ads running in Minnesota?¶ So what about the state polls? If you look at most of the samples, they are more Democratic than the 2008 turnout model. It’s becoming clear that the early voting, which is disproportionately comprised of Democrats, is distorting the likely voter screens of most state polls. That’s why they are all showing a high D turnout, despite the ubiquitous enthusiasm gap.¶ Additionally, notice how Romney’s surge has stalled out in the state polls even as it continues in the national polls. He has even stalled in some Colorado and Virginia polls, states where Obama is clearly losing. The stagnation in all the state polls began right around the time when early voting picked up in earnest. If we are to believe the national polls, which are hard to disregard due to the convergence, the only plausible theory about the divergence of state polling is that they are inflating Democrat strength by 2-4% due to early voting.¶ If you reconstruct a turnout model that is only slightly more favorable for Republicans than 2008, Romney is ahead in most of the important states. Take this Gravis Marketing poll of Iowa, for example. They show Obama up 4 points, but the party ID is D +6 (D 41, R 35, I 24). In 2008, it was D +1 (D 34, R 33, I 33), and in 2004 it was R +2 (D 34, R 36, I 30). Here’s the kicker: the poll shows Romney leading by 12 among independents. Remember that of all swing states, Republicans improved their voter registration edge the most in Iowa. Additionally, there is a tremendous enthusiasm gap. Yet, if we merely reconstruct the 2008 turnout, which was evenly split among all three affiliations, a 12-point Indy win would clearly tip the state to Romney.¶ We’re seeing the same thing with the latest ARG poll in Ohio. They have Obama up 49-47, yet Romney is winning Independents by a gargantuan 21 points. The sample is D+9, even though it was D+5 in 2008.¶ It’s becoming clear that the national polls could easily work with the state polling data if we adjust for the likely turnout distortions from early voting. To a certain extent, we are seeing a reflection of the national polling in the Rasmussen state polls that factor in respondents who are certain to vote. However, whether this theory is correct or not, one thing is certain: Romney will not win Independents nationally by 15-19 points and lose the Electoral College.

\*\*\*in agenda\*\*\*

#### Tribes like the plan

Brown 10 -- AP (Matthew, Indian tribes to Congress – Streamline energy development, [www.buffalopost.net/?p=8525#more-8525](http://www.buffalopost.net/?p=8525#more-8525))

American Indian leaders on Thursday asked Congress to streamline the development of energy projects on tribal lands by curbing some federal oversight and providing incentives for companies to strike deals with reservations.¶ Reservations from Oklahoma to Montana and Alaska sit atop large amounts of oil, natural gas and coal. Others in wind-swept regions of the Northern Plains and on the West Coast have huge renewable energy potential.¶ But existing government rules make it easier for energy companies to pursue projects on non-tribal land, some members of Congress and tribal leaders say. As a result, tribes often miss out on the chance to develop their natural resources.¶ “Tribes in some of the poorest counties in America have vast renewable energy resources that can help them overcome poverty,” said Joe Garcia, Chairman of the All Indian Pueblo Council of New Mexico.¶ Garcia and other tribal representatives want the Senate Indian Affairs Committee to intervene through legislation proposed by Sen. Byron Dorgan, the North Dakota Democrat who chairs the committee.¶ The tribes want to eliminate federal drilling fees, pare down the Interior Department’s bureaucracy, and shield tribes from state and local taxes on energy projects.¶ Dorgan’s bill has yet to be introduced.¶ The tribal leaders’ requests were welcomed Thursday by both Democrats and Republicans.¶ “Energy development means jobs,” said Sen. John Barrasso, a Wyoming Republican. “It means income for families. It means paying the heating bill.”¶ Nationwide, energy royalties paid to tribes through the federal government totaled more than $334 million in 2008, the most recent year with figures available. That was down sharply from 2007, driven largely by a drop in oil and gas prices.¶ More than 2 million acres of tribal land have been developed for oil, gas and coal, according to the government. Estimates show 15 million acres more have the same potential, with additional land suited for wind, solar and other renewable energy projects.¶ In 2005, Congress tried to promote development by making it easier for tribes to enter agreements with private companies.¶ Witnesses at Thursday’s hearings said those changes weren’t enough. They also criticized changes instituted since 2005, such as a $4,000 fee for drilling on public lands – including reservations, which are held in federal trust.

#### The Native American vote is hugely impactful in key swing states --- courting their vote can impact outcome

Terrance H. Booth 9-27, Sr. -- Tsimshian Tribe, 2012 Presidential Race Decided Upon Swing Vote States, OpEdNews, 9-27-12, <http://www.opednews.com/articles/2012-Presidential-Race-Dec-by-Terrance-H-BoothSr-120926-619.html> (\*\*\*ITALICS IN ORIGINAL\*\*\*)

"The 2012 Presidential election is very close can be decided upon 10 swing vote states; including: Politico identifies 10 swing states that will most likely decide the 2012 election. Obama leads in nine of them: Colorado, Florida, Iowa, Michigan, Nevada, New Hampshire, Ohio, Virginia, and Wisconsin. Romney leads Obama by one percent in the swing state of North Carolina." [1] ¶ The following states being targeted by Native Vote, National Congress of American Indian, a non-partisan and non-profit to educate and register new voters. Alaska Native and Native American population on voter education and registration for following states: Alaska, ***Florida, Michigan, Nevada***, North Dakota, South Dakota, Arizona, ***Iowa***, Minnesota, New Mexico, Oklahoma, Washington, ***Colorado***, Massachusetts, Montana, and ***North Carolina***, Oregon and ***Wisconsin*** where the voting numbers are increasing with efforts having the largest Alaska Native and Native American voter turnout in 2012 elections. The States in bold and in italics are the swing state **Native Vote is working upon which is six of the ten states both presidential candidates are targeting** with a close vote by both candidates the Alaska Native and **Native American voters are in a position to elect the** Office of the **President**. [2] ¶ "If these swing vote states hold up in an election that requires 270 out of 538 electoral votes to win a majority, Obama would gain 111 electoral votes to Romney's 15. States that appear solid or leaning for Obama give him an additional 221 electoral votes. Romney's solid or leaning state electoral votes total 191. These figures add up to 332 for Obama and 206 for Romney, more than enough to give Obama the winning total." [3] ¶ **Bloc voting is not new to Native American voters:** "Ridge to Johnson; the result was unsurprising. In the year, 2000 election in Washington State the Native American vote made a difference in the outcome of a new US Senator. Comment on the Native American participation after the election. The result in Washington State in 2000 **was not lost on Capitol Hill**. Whether it was Party strategists, Members of Congress, lobbyists, the media or the political commentaries, the message is that the Alaska Native and **Native Americans are** now important political players**.** Native Vote should be feared and/or courted, especially in states with a substantial Native population where a race could be close. [4] Alaska Native and Native American Voters let us make a resounding voice and let us be heard this election year.

#### Energy won’t switch votes even if they campaign on it

Farnam 12 T.W. is a writer at WashPost politics. “Energy ads flood TV in swing states,” 6/27, http://www.washingtonpost.com/politics/energy-ads/2012/06/27/gJQAD5MR7V\_story.html

**Energy issues don’t spark much excitement among voters**, ranking below health care, education and the federal budget deficit — not to mention jobs and the economy.¶ And yet those same voters are being flooded this year with campaign ads on energy policy. Particularly in presidential swing states, the airwaves are laden with messages boosting oil drilling and natural gas and hammering President Obama for his support of green energy. The Cleveland area alone has heard $2.7 million in energy-related ads.¶ The disconnect between what voters say they care about and what they’re seeing on TV lies in the money behind the ads, much of it coming from oil and gas interests. Those funders get the double benefit of attacking Obama at the same time they are promoting their industry.¶ Democrats also have spent millions on the subject, defending the president’s record and tying Republican candidate Mitt Romney to “Big Oil.”¶ Overall, more than $41 million, about one in four of the dollars spent on broadcast advertising in the presidential campaign, has gone to ads mentioning energy, more than a host of other subjects and just as much as health care, according to ad-tracking firm Kantar Media/Cmag.¶ In an election focused heavily on jobs and the economy, all of this attention to energy seems a bit off topic. But the stakes are high for energy producers and environmentalists, who are squared off over how much the government should regulate the industry. And attention has been heightened by a recent boom in production using new technologies such as fracking and horizontal drilling, as well as a spike in gas prices this spring just as the general election got underway.¶ When asked whether energy is important, more than half of voters say yes, according to recent polls. But asked to rank their top issues, **fewer than 1 percent mention energy.**

#### No vote switching

Sawyers 10/25—publisher of the Times-Tribune (Willie, Publisher's Notebook: Voters’ minds already made up, http://www.sentinel-echo.com/opinion/x1400199904/Publishers-Notebook-Voters-minds-already-made-up)

The political blather will increase ten fold the next two weeks approaching the November 6 election. But it won’t matter much. This presidential campaign has been going on for two years now and most people, like me, already have made up their minds up about who they are going to vote for.¶ People should realize they are wasting their time at this stage trying to sway others to their point of view. After watching three debates and thousands of political advertisements, voters surely have picked their candidate. So, the next thousand ads until the 6th will just be overkill.

#### Winners win – the plan key to consolidate Obama’s momentum

**Creamer 12** (Robert, political organizer and strategist, "Why GOP Collapse on the Payroll Tax Could be a Turning Point Moment", 1/2, [www.huffingtonpost.com/robert-creamer/why-gop-collapse-on-the-p\_b\_1167491.html](http://www.huffingtonpost.com/robert-creamer/why-gop-collapse-on-the-p_b_1167491.html))

Strength and victory are enormous political assets. Going into the New Year, they now belong to the President and the Democrats. One of the reasons why the debt ceiling battle inflicted political damage on President Obama is that it made him appear ineffectual - a powerful figure who had been ensnared and held hostage by the Lilliputian pettiness of hundreds of swarming Tea Party ideological zealots. In the last few months -- as he campaigned for the American Jobs Act -- he has shaken free of those bonds. Now voters have just watched James Bond or Indiana Jones escape and turn the tables on his adversary. Great stories are about a protagonist who meets and overcomes a challenge and is victorious. The capitulation of the House Tea Party Republicans is so important because it feels like the beginning of that kind of heroic narrative. Even today most Americans believe that George Bush and the big Wall Street Banks - not by President Obama -- caused the economic crisis. Swing voters have never lost their fondness for the President and don't doubt his sincerity. But they had begun to doubt his effectiveness. They have had increasing doubts that Obama was up to the challenge of leading them back to economic prosperity. The narrative set in motion by the events of the last several weeks could be a turning point in voter perception. It could well begin to convince skeptical voters that Obama is precisely the kind of leader they thought he was back in 2008 - a guy with the ability to lead them out of adversity - a leader with the strength, patience, skill, will and resoluteness to lead them to victory. That now contrasts with the sheer political incompetence of the House Republican Leadership that allowed themselves to be cornered and now find themselves in political disarray. And it certainly contrasts with the political circus we have been watching in the Republican Presidential primary campaign. 3). This victory will inspire the dispirited Democratic base. Inspiration is the feeling of empowerment - the feeling that you are part of something larger than yourself and can personally play a significant role in achieving that goal. It comes from feeling that together you can **overcome** challenges and win. Nothing **will do more to inspire** committed **Democrats than** the sight of their leader -- President Obama - out **maneuvering** the House **Republicans and forcing them into complete capitulation.** The events of the last several weeks will send a jolt of electricity through the Progressive community. The right is counting on Progressives to be demoralized and dispirited in the coming election. The President's victory on the payroll tax and unemployment will make it ever more likely that they will be wrong. 4). When you have them on the run, that's the time to chase them. The most important thing about the outcome of the battle over the payroll tax and unemployment is that it shifts the political momentum at a critical time. Momentum is an independent variable in any competitive activity - including politics. In a football or basketball game you can feel the momentum shift. The tide of battle is all about momentum. The same is true in politics. And in politics it is even more important because the "spectators" are also the players - the voters. People follow - and vote -- for winners. The bandwagon effect is enormously important in political decision-making. Human beings like to travel in packs. They like to be at the center of the mainstream. Momentum shifts affect their perceptions of the mainstream. For the last two years, the right wing has been on the offensive. Its Tea Party shock troops took the battle to Democratic Members of Congress. In the Mid-Terms Democrats were routed in district after district. Now the tide has turned. And when the tide turns -when you have them on the run - that's the time to chase them.

### 1AR

#### The Secretary of the Interior can grant leases ANYWHERE in the OCS – this authority is explicitly regulatory

U.S. Code ‘12

43 USC § 1337 - Leases, easements, and rights-of-way on the outer Continental Shelf, Last Updated 2012

<http://www.law.cornell.edu/uscode/text/43/1337>

(a) Oil and gas leases; award to highest responsible qualified bidder; method of bidding; royalty relief; Congressional consideration of bidding system; notice¶ (1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 1335 of this title. Such regulations may provide for the deposit of cash bids in an interest-bearing account until the Secretary announces his decision on whether to accept the bids, with the interest earned thereon to be paid to the Treasury as to bids that are accepted and to the unsuccessful bidders as to bids that are rejected. The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of—¶ (A) cash bonus bid with a royalty at not less than 121/2 per centum fixed by the Secretary in amount or value of the production saved, removed, or sold;¶ (B) variable royalty bid based on a per centum in amount or value of the production saved, removed, or sold, with either a fixed work commitment based on dollar amount for exploration or a fixed cash bonus as determined by the Secretary, or both;¶ (C) cash bonus bid, or work commitment bid based on a dollar amount for exploration with a fixed cash bonus, and a diminishing or sliding royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 121/2 per centum at the beginning of the lease period in amount or value of the production saved, removed, or sold;¶ (D) cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;¶ (E) fixed cash bonus with the net profit share reserved as the bid variable;¶ (F) cash bonus bid with a royalty at no less than 121/2 per centum fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;¶ (G) work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold;¶ (H) cash bonus bid with royalty at no less than 12 and 1/2 per centum fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspensions may vary based on the price of production from the lease; or¶ (I) subject to the requirements of paragraph (4) of this subsection, any modification of bidding systems authorized in subparagraphs (A) through (G), or any other systems of bid variables, terms, and conditions which the Secretary determines to be useful to accomplish the purposes and policies of this subchapter, except that no such bidding system or modification shall have more than one bid variable.

#### OCS Moratorium areas are NOT prohibitions – BOEMRE offers leases within moratorium boundaries

Hagerty ‘11 - Specialist in Energy and Natural Resources Policy for the Congressional Research Service

Curry L. Hagerty is, May 6, 2011, “Outer Continental Shelf Moratoria on Oil and Gas Development”, http://www.fas.org/sgp/crs/misc/R41132.pdf

Bureau of Ocean Energy Management, Regulation and Enforcement

(BOEMRE)32

Footnote 32 Begins…

32 BOEMRE is a bureau in the U.S. Department of the Interior that manages the nation’s oil, gas, renewable, and other¶ mineral resources on the outer continental shelf (OCS). Secretarial Order 3299, “Establishment of the Bureau of Ocean¶ Energy Management, the Bureau of Safety and Environmental Enforcement, and the Office of Natural Resources¶ Revenue,” issued May 19, 2010, renamed the Minerals Management Service (MMS) as BOEMRE. This order was¶ amended on June 18, 2010, to extend the deadline for development of a schedule for implementing agency¶ reorganization from “within thirty (30) days,” or by June 19, 2010, to “by July 9, 2010.”

Footnote 32 End…

As mentioned above, regulated oil and gas activities on the OCS are administered pursuant to the¶ Outer Continental Shelf Lands Act (OCSLA). The chief agency for administering the oil and gas¶ leasing program is the Bureau of Ocean Energy Management, Regulation and Enforcement¶ (BOEMRE) in the Department of the Interior.¶ To clarify, BOEMRE is authorized to administer the leasing program, but it is not required to¶ lease specific areas. BOEMRE can opt to defer oil and gas development in any OCS area, even¶ when such action may appear to be inconsistent with other federal policies. BOEMRE has¶ deferred offering OCS areas numerous times over the years in response to recommendations from¶ state governors, stakeholders, and others.33¶ In rare cases, BOEMRE has designated OCS leasing in moratorium areas. In the current Five-¶ Year Plan, which took effect on July 1, 2007, BOEMRE (then the Minerals Management Service,¶ or MMS) proposed a lease sale in an area under moratorium offshore of the commonwealth of¶ Virginia.34 Sale 220 was proposed while the area was under a moratorium prohibiting leasing¶ activities; by 2009, however, the area was no longer under moratorium, and was eligible for¶ leasing consideration. Since that time Sale 220 has been removed from the lease sale schedule.

#### Political barriers mean no major legislation for Romney

O'Brien 6/29 (Michael, NBC News Political Unit, “Mission Impossible: Romney's ambitious first term agenda”, http://firstread.nbcnews.com/\_news/2012/06/29/12483319-mission-impossible-romneys-ambitious-first-term-agenda?lite)

Presidents often enjoy a “honeymoon” in which they’re able to advance a major element of their platform. Bush got education reform and his signature tax cuts; Obama got his stimulus bill.¶ And that’s to assume, the Republicans maintain control of the House and take over the Senate – in which case, prospective Majority Leader Mitch McConnell (R-KY) would be tasked with convincing a non-trivial number of Democrats to join the GOP in advancing Romney’s agenda.¶ Romney could seek the repeal of health care as his first priority, something he might accomplish by using the process of budget reconciliation. House Majority Leader Eric Cantor (R-VA) suggested Friday on “Morning Joe” that Republicans could use this tactic, which allows the Senate to approve legislation with a simple majority of votes, to gut the heart of Obama’s law.¶ But even if this were to be achievable practically, it would be a bloody fight on which Romney would have to spend considerable political capital.¶ “He comes into office, and Day One is getting your secretary of State or secretary of Treasury confirmed!” said former Delaware Sen. Ted Kaufman (D), who long served as an aide in the chamber before succeeding Joe Biden in the chamber, of a new president’s traditional to-do list.¶ “You’re just going to declare war on the Democrats from the first day you get into office?” Kaufman said. “Obama didn’t do that, and he had 60 votes.”¶ There are always foreign policy crises and the unexpected issues – like 2010’s oil spill in the Gulf of Mexico – that can divert from the business of governing.¶ “If the Democratic leadership wants to criticize a President Romney for fulfilling his promises, it's not something that's going to play well with voters,” said the House Republican aide, evaluating the broad range of issues Romney has promised to advance.¶ On some of those issues, too, Romney is boxed in politically. Republicans in Congress have so frequently voted to repeal the president’s health care law – the next vote is set for July 11 – in part because they made it a cornerstone of their 2010 campaign. ¶ “If Romney is to win, that's a major part of what he's run on,” the GOP aide said of Romney’s vow to repeal the law. “Despite protestations from Democrats, some of whom will vote for repeal, that A) depoliticizes it, but B) is also part of why he's running.”¶ But Romney will also have to reckon with the so-called “fiscal cliff” – the cocktail of expiring tax cuts, automated spending cuts and necessary extension of the nation’s debt ceiling – early in his term, unless Congress were to reach a deal in its lame-duck session, an unlikely prospect.

“You may be critical of Obama – why’d he use up all of his mojo on health care reform?” Kaufman noted. “You’re going to need mojo just to get a debt limit vote and figure out what we’re doing on the Bush tax cut.”¶ Even after all of this has been addressed, even in the best case scenario for Romney, in which the GOP controls both chambers, he’ll be dealing with a Congress that prides itself on regular order. Romney has prepared few detailed plans or pieces of legislation to drop on Capitol Hill’s doorstep; in fact, when asked earlier this month on CBS about which tax exemptions he’d kill to finance tax reform, Romney said he’d “go through that process with Congress.”¶ That process can be lengthy, though, and force any president to prioritize agenda items. And congressional Republicans are cognizant of that.¶ “It's something that could be moved through a process,” the GOP aide said of Romney’s immigration reform plans. “Does it end up at a president's desk? That remains to be seen. Things that are comprehensive take a long time.”