1987

American Indians and the Bicentennial

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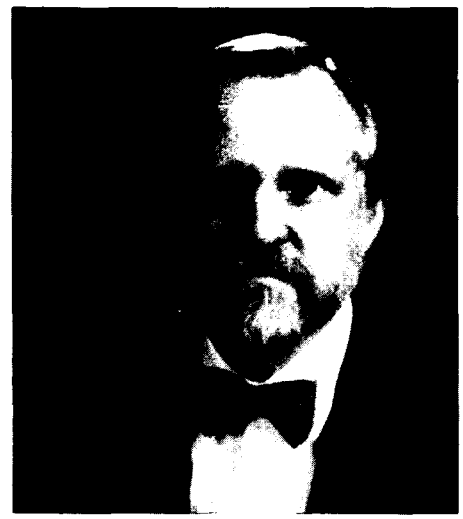

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The U.S. Constitution's Bicentennial, like other patriotic observances, tends toward sentimental encomiums and self-congratulation. The opportunity to indulge may have induced the Chief Justice of the U.S. Supreme Court to resign in favor of presiding over our celebrations, preferring the framers' reflected glow to more years of crime, school prayer, abortion and racial conflict. Justice Marshall got mostly negative press when he opined that the original document was a smidgen less than perfect from the perspective of black people and women. But his view had respectful notice in American Indian papers, where Columbus Day tends to be treated as an occasion for mourning. As Navajo leader Peterson Zah put it, Columbus was supposed to have found America, when in fact America was never lost.

The standard answer to Justice Marshall and other grinches is that the Constitution was as good toward blacks and women as could have been expected under 1787 conditions, that it (and the Civil War) has provided the structure for their achievement of legal equality in our time, and that they have shared in the stability, progress and prosperity that it has fostered. This is a serious answer and essentially true, although Justice Marshall's impatience with the soporific saccharinity of the current wave of framer-worship can be readily understood. Many of those assembled in Philadelphia were attended by slaves even and as they wrote, and slavery was peacefully ended under the British constitutional system decades before 1865.[1]

INDIAN TRIBES UNDER THE CONSTITUTION

The enduring tragedy of Indian people in this country must give pause to any claim of achievement for our institutions. Yet it is hard to make out a better alternative that could realistically have been adopted in 1787, and many worse turns of fortune can be surmised. We had a brief example of the ravages of unrestrained local popular sovereignty during the Texas Republic, when Indian tribes were deprived of their land and either driven out of Texas or killed by the Rangers.[2]

In the abstract, the constitutional issue is how a small and powerless racial minority, despised by a large part of the ruling group, can be reasonably protected in their lives and property. Because this goal has so seldom been achieved in human history, we should not be surprised that our arrangements have proved imperfect. Moreover, several of the basic institutions of our Constitution have provided indirect but important protections for Indian people and for their cultural survival.

Most Americans know the broad outline of what has happened. Treaties were made with Indian nations, and much that was promised was later taken away. Frontier wars were fought, in which some Indian leaders achieved lasting fame as fighters and strategists, but in the end the survivors were removed to reservations, where they and their descendants lived in poverty or left the reservations and blended into the general population. Reformers and land grabbers tried to take away even the reservations to force Indians to assimilate, producing even greater misery. The New Deal stopped the slide into oblivion, and official attitudes were mixed for a time. Since 1960, both major political parties have supported Indian self-determination. There has been a significant revival of pride, improvement of legal rights, and other social achievements among Indian people, although great problems persist. How important to this history, good and bad, were the Constitution and its institutions?

Myths and Realities of Indian Treaties

It is often said that Indian treaties are very important, and the Constitution expressly authorizes the federal government to make treaties and to regulate commerce with the Indian tribes.[3] But these provisions alone are not remarkable. Treaties with tribes were made by our Articles of

Confederation government, by the governments of several of the original states and by the British and French governments before them.[4] The new federal government did no more than continue an established practice, and the Constitution simply allowed it to do so. The government was not compelled to make treaties with tribes, and it formally ended the practice in 1871.[5] The major explicit treaty promise made to tribes was to respect and protect their land, and most of the land so honored has since been taken away.

Yet treaties were and are very important to Indian interests, and the Constitution is vital to this fact. Why this is so depends on several less obvious factors than the words of the treaties or those of the Constitution that authorized them.

A popular misconception about Indian treaties is that our government has directly dishonored large numbers of specific treaty guarantees. When holders of this belief actually read Indian treaties and review subsequent events, they are disappointed. The specific promises were to reserve and protect some of the tribes' ancestral land and to buy the rest for an agreed price. In most cases the price was paid, and in others the government paid later under claims judgments of the courts. The reserved land was subsequently taken away, but pursuant to later treaties or other agreements with the tribes. To be sure, Indian nations did not enter these agreements free of coercion, but even that turns out to be less than popular history leads us to expect. Compared with, say, Brazil, the formal record looks pretty good. Of course, the formal record does not reveal many sources of Indian suffering, such as the ravages of European diseases and the psychological burden of cultural hegemony, but these would have come under any likely form of government or constitution.

Land was a crucial feature of the treaties because tribal territory is essential to tribal existence. Loss of land has had devastating effects on some tribes, particularly those whose economic culture depended on migrating over large areas. But many tribes have retained large land holdings, and in some cases the land has proved valuable in ways not anticipated when the land was reserved to them. In a rough way, the degree of social disintegration of tribes is inversely proportional to the adequacy of retained lands to continue traditional economic ways of life. Tribes dependent on grazing, fishing or farming have often been able to continue these pursuits and are better off for it. Those dependent on migratory hunting have suffered much more severely under the reservation system because their source of self-respect was so suddenly and completely taken away.

What was as important as land but had nothing to do with any specific treaty provision was the government's decision to deal with tribes as nations rather than as corporate owners of real estate. In other words, the very making of treaties was at least as important as any actual provision in them. Recognition of tribal nationhood implied the tribes' right to continue to make their own internal laws as separate societies—to continue to exist as tribes. A crucial corollary was protection of this right from state interference. That tribes exercise internal sovereignty today, free of state interference, originated with the practice of making treaties.[6]

Enter the constitutional structure. The treaties would be forgotten relics under other forms of government. They are vital under ours because of the Constitution: its federal system, separation of powers, independent federal judiciary, and commitment of power over Indian affairs to the federal government rather than the states. White settlers closest to Indian communities have been the Indians' deadliest enemies. It is no accident that Andrew Jackson, the president most closely associated with the frontier, was also the most harmful to tribal interests.

Dispersal of power was a fundamental purpose of the framers, made out of the conviction that concentrated power is inherently corrupting. A basic reason was to protect minority interests from excesses of transient democratic majorities.[7] Indians were not one of the minorities the framers had in mind, but they have benefited from the scheme. Federal control of Indian affairs may not have been the most efficient arrangement, but it was much fairer than state and local alternatives would have been, and it was an essential counterbalance to local power based on proximity. Those who would take Indian property have had to run the gauntlet of national politics. The need for concurrence of two houses and the executive makes national legislation difficult to enact without broad political consensus, and eastern congressmen far from the frontier forced compromises that ameliorated many harsh proposals.

The Bureau of Indian Affairs ("BIA"), established to administer federal control, has a very negative public image. It is blamed for most failures of Indian policy and is the focus of the many just grievances of Indian people. But the BIA is commonly charged with errors or wrongs not of its making. The agency has had the contradictory duties of protecting Indian lives and property, and of carrying out ugly political decisions of others to harm Indians. Important decisions that harmed Indians have rarely originated in the bureaucracy, although it received the blame. At times, BIA efforts to protect Indian interests against politically powerful opponents have been courageous. The agency's inevitable inefficiency and occasional corruption cannot be overlooked, and we should continue to seek proper ways to reduce its role in favor of Indian self-determination. But most responsibility for past injustices should be laid elsewhere.

The Federal Judiciary and Indian Law

The other structural protection for Indians has come from the federal judiciary and its independent role under separation of powers. The framers deliberately insulated the judicial branch from immediate popular control, primarily to protect the federal government and private property interests.[8] As owners of substantial property, Indians have received some direct protection from this arrangement.

More important was judicial recognition of Indian sovereignty. The conclusion that making treaties implies national status was one easily disregarded by occasional politicians. President Jackson advocated repudiation of Indian treaties because Indian nations were too small and weak to justify national recognition. In the teeth of this political wind, the Supreme Court published its famous decisions in the Cherokee cases.[9] The Court carefully reviewed and explained the logical implications of federal treaties with tribes and of federal Indian statutes.

> The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[10]

A governmental institution more closely subject to popular control would not have reasoned so dispassionately under the political conditions of Jackson's first term.

Another misconception abroad in some circles is that the Supreme Court's recognition of tribal nationhood has attributes of a constitutional right immune from popular legislative control, akin to free speech or double jeopardy. The Court has never intimated that and has on many oc-

casions clearly stated the contrary: that federal legislation can eliminate tribal sovereignty at any time.[11] Moreover, it has uniformly sustained federal statutes that limit tribal powers. But the structure of our constitutional system has prevented the wholesale stripping of tribal rights.

The Court evolved three interpretative rules to distance Indian sovereignty and property from popular hostility. First, it construed federal Indian laws and treaties to preempt state laws very broadly, so that those who would lawfully take from Indians had to deal with Washington.[12] Second, the federal policy recognizing tribal nationhood, implied from the practice of making treaties, was carried over directly into interpretation of federal statutes and executive orders. Thus, tribal reservations set aside by statute or executive order are presumed to have the same rights of self-government and immunity from state control as reservations set aside by treaty.[13] This rule refutes another widely held misunderstanding about Indian affairs—that treaty rights are more significant than other federal Indian rights. The Court explicitly treats them alike. The treaties' unique significance was their original role as the source of the federal policy recognizing tribal sovereignty, rather than as the formal embodiment of that sovereignty in any particular case.

The third rule requires that ambiguities in Indian treaties and statutes be construed favorably to Indians.[14] The Court explicitly recognizes the power of Congress to reduce or eliminate tribal authority, but it requires this to be done openly and clearly. Technical dissembling by "learned lawyers" about legislative meaning is not sustained when contrary to the Indians' reasonable expectations at the time of making treaties or enacting statutes.[15] This rule has its moral roots in our highest democratic traditions. Congress has the power to take away Indian rights, but it is not subject to Indians' political consent. For much of our history, Indians could not vote, and since they have had the vote, they have been too few to act as a check on congressional power.[16] The Court's requirement that Congress act clearly to impair Indian interests is an important counterweight to this political imbalance. Because our legislative process is so complex and deliberate, a transient passion to sweep away Indian rights has difficulty becoming law, and the Court's clear-statement rule augments the barrier.

There were some attempts and near misses. The allotment scheme of 1854-1934 was meant to force a delayed end to tribal power by first breaking up the land base and making Indians into family farmers.[17] It failed for complex reasons, including massive Indian resistance. The termination scheme of the 1950s was intended to end tribal significance by cutting off federal protection one tribe at a time.[18] It was stopped and in some cases reversed by political action before it had time to have much impact nationally. Perhaps the nearest brush with tribal dissolution came during the Harding Administration, when Albert Fall was Secretary of the Interior. He persuaded the House of Representatives to pass a bill sweeping away all federal protection of tribes, but his removal and indictment interceded before Congress could agree on a bill, and his successors repudiated the effort.[19]

INDIANS AND INDIVIDUALISM

What of Indian people as individuals? What is their relation to a Constitution grounded in the liberalism of the European Enlightenment? Liberal individualism was profoundly alien to tribal peoples, and that tension has been the source of much conflict between Indians and whites. Well-meaning whites have often advocated forced assimilation of Indians to bring them the assumed blessings of private property and individual autonomy. Strong Indian resistance led to distinctly illiberal official measures to coerce, cajole or purchase Indian assimilation.

Those Indian people who elected to leave tribal societies, whether freely or under social or economic coercion, have individually fared much like other non-white minorities. Under Jim Crow laws in the South, they shared segregated institutions with blacks or in some cases comprised a third caste.[20] Intermarriage with whites produced a surer path out than for blacks; many persons of Indian and white ancestry have achieved great personal success, even in the ante-Lyndon Johnson South.[21] The most notable example was Hoover's vice-president, Charles Curtis.

Under modern civil rights laws, the barriers of race alone are much reduced. Indian people now run the Bureau of Indian Affairs, and tribes are led by college-educated members. Still another myth, widely believed in western Europe, is that Indians are legally confined to reservations much as South African blacks are limited to townships and homelands. The truth is rather the opposite; Indian people have fiercely resisted every government and private blandishment to give up tribal land and disappear into the mainstream. The official policies that ought to be criticized are those that have forcibly opposed continuing tribalism and have neglected reservation poverty.

The relationship of Indians to United States citizenship has had a curious history. The Constitution omitted "Indians not taxed" from the population count used to apportion seats in the House of Representatives.[22] This odd phrase meant, as a practical matter, noncitizen Indians maintaining tribal relations. The phrase was probably chosen because the franchise in 1787 was closely associated with land ownership, and Indians owned substantial amounts of land. Their land was not taxed by white governments, so this was a convenient way to identify their unique status.

In the 1850s, Indian citizenship became entangled in the complexities of the *Dred Scott* case.[23] A procedural issue was whether Dred Scott, a slave from Missouri, could obtain diversity of citizenship jurisdiction in federal court. This depended on whether he was born a citizen or became a citizen during a stay in Illinois, a free state, or in Wisconsin Territory, also free. Chief Justice Taney concluded that Scott was not a citizen, but was not content to rest the matter on any of several narrow grounds available to him. He reasoned that black people were not citizens and that neither Congress nor the states could make them citizens. (This had the honor of becoming the second Supreme Court decision to be overruled by constitutional amendment.)[24] Taney contrasted the status of black people with that of Indians. They also were not citizens under the Constitution, but Congress had power to naturalize them and had done so in a few treaties.

During the middle to late nineteenth century, federal policy was to treat citizenship for Indians as incompatible with tribal membership. Citizenship was granted in a few treaties that sought to end tribal status altogether.[25] When the Fourteenth Amendment made all those born in the United States citizens, it continued the exception for "Indians not taxed."[26] In 1887, the General Allotment Act declared Indians who accepted allotments to be citizens and subject to state legal jurisdiction.[27]

But only three years later congressional policy began to shift, when Indian residents of Indian Territory were allowed to become citizens without immediate allotment or breakup of tribal government.[28] Congress then altered the General Allotment Act to postpone citizenship, and the Supreme Court began to recognize that citzenship and tribal memberhip could be compatible.[29] In 1924, Congress declared

all Indians born in the United States to be citizens, and the statute did not alter tribal ties; it settled the legal issue in favor of compatibility.[30] While opponents of Indian rights occasionally argue that Indian citizenship implicitly abolished tribal autonomy, the courts uniformly reject the claim.[31] In short, citizenship was long used as a government weapon against tribalism, but once again the tribes outlasted official policy.

That national policy since 1960 has favored tribal self-determination may be the result of acculturation of another sort. The rest of us now have values less in conflict with Indians. We have learned the value of land in its natural state, of cutting only the trees we need, of hunting animals in moderation to allow regeneration. We have learned broader religious tolerance. We have even learned, as Indians knew, that gaming is a natural human activity, so we come to Indian country to play bingo.[32]

COLORADO TRIBES

The Colorado history of the Constitution's impact on the fate of Indian tribes is one of the less happy examples from the Indian perspective. The formal land ownership record looks typical. At the time of substantial white settlement in the 1850s, most of the state was occupied by three tribes. The Utes had controlled the mountains and western valleys for centuries. The Cheyennes and Arapahoes were relatively recent owners of the eastern plains, having migrated from the Great Lakes area after acquiring horses.[33] Colorado conflicts between whites and Indians varied between the eastern and western parts of the state, and the differences well illustrate the significance of federal rather than local control of Indian affairs.

The eastern land acquisition record was not unusual. By an 1861 treaty made at Fort Wise, the Cheyennes and Arapahoes reserved a large tract between the Arkansas River and Sand Creek and sold their other land rights for $450,000 over fifteen years.[34] An 1867 treaty at Medicine Lodge Creek, Kansas, ceded that reservation in exchange for land in the western part of Indian Territory, now Oklahoma.[35] They shared the fortune of many other tribes moved to Indian Territory from the east and midwest. Because their buffalo hunting culture was doomed, whatever reservation they retained would involve wrenching changes that would inevitably produce social disintegration.

The land record omits the real reason for removal of the plains tribes from Colorado—the ignominious Sand Creek Massacre, a strong candidate for the worst atrocity by American government toward Indian people.[36] In 1864, amid Civil War tensions, there were unfounded rumors of Cheyenne and Arapahoe Indians siding with the South, and there were attacks by small groups of Indians on trade routes and farms on the plains, attacks that violated the 1861 treaty and inflamed local passions. Governor Evans called on the Cheyennes and Arapahoes to surrender to the Army. Cheyenne and Arapahoe chiefs, such as Left Hand, favored peace and came to Denver with Major Wynkoop, commander of Fort Lyon (the new name of Fort Wise). Governor Evans told them to surrender their bands to Wynkoop at Fort Lyon, and they did so. The Army told them to camp some distance from the fort, on Sand Creek, where they understood themselves to be under Army protection.

But Governor Evans had earlier taken another measure on the erroneous assumption that his surrender call would be futile. He created a troop of 100-day citizen volunteer soldiers and placed it under the command of a politically ambitious officer named Chivington. While Governor Evans was in Washington, and goaded by taunts such as the *Rocky Mountain News* calling for a "few months of active extermination of the red devils,"[37] Chivington conducted a one-day Auschwitz. He led his troop on a surprise attack and ordered it to take no prisoners. The order was scrupulously obeyed, and most of those killed were women, children, aged, crippled, or men waving the white flag of surrender. Rape and corpse mutilation were followed by a ghoulish display of Indian scalps in Denver. The massacre provoked several years of warfare by surviving Cheyennes and Arapahoes, resulting in many needless white deaths as well.

Sand Creek was recognized as an outrage soon after it occurred and was officially condemned by Congress. It was a vivid illustration of the fact that those nearest to the Indians were most hostile and bloody toward them. The regular Army and officials in Washington were usually a tempering influence on frontier excesses. Sand Creek and the Texas experience suggest that the Indians' fate might have been far worse under plenary local sovereignty.

The experience of the Utes in western Colorado was typical of federal control. In 1868, they made a very favorable treaty with the United States, reserving to them most of the western quarter of the state, including the San Juan Mountains.[38] Gold discoveries soon led to cession pressures, and the San Juans were sold to the government under an 1873 agreement.[39] In 1878, Nathan Meeker was made agent to the Utes at White River. Frustrated at their failure to take up farming and schooling, he took measures to force acceptance, such as plowing up the Utes' horse pastures. The Utes defied him, and he called in the Army. The White River band of Utes intercepted the Army and stopped its advance, killed Meeker and other male employees of the agency, and took the women captive.[40]

Despite the provocation of the Meeker Massacre, the government's response, managed from Washington rather than Denver, was far more careful than at Sand Creek. The military did not retaliate in kind. In 1880, the Utes were forced or persuaded, depending on whose view we accept, to cede all the 1868 reservation, except for its southern strip, in exchange for a new reservation in central Utah.[41] Several bands, including the offending White River group, were removed to the Utah reservation, where their descendants live today. The southern strip was the only original Indian country left in Colorado.

Those after Indian land were not content to leave even the southern strip of the 1868 Ute Reservation in tribal hands. After several years of political give and take, those Ute people who were determined to keep common land were allowed to retain the barren western half of the strip, now called the Ute Mountain Ute Reservation in Montezuma County.[42] The eastern half, in La Plata and Archuleta Counties, was allotted in severalty to Utes willing to accept allotments, and the rest was opened to white settlement. Most of the good farmland was sold to whites. In 1934, Congress stopped allotment and homesteading, and unclaimed land was returned to tribal common ownership in 1938.[43] The boundaries of the eastern part, now called the Southern Ute Reservation, were settled by federal statute in 1984.[44]

CONCLUSION

Over most of our history, Indians inevitably have regarded the constitutional system from the perspective of lesser evil. From that viewpoint, the Constitution holds up rather well. By dispersing power broadly among competing political institutions, by allocating power over Indian affairs to Washington rather than the states, and by establishing an independent federal judiciary, the Constitution allowed most Indian tribes to survive more than a century and a half of popular hostility. While

much hardship was endured, the record in all probability would have been much more negative under likely alternative forms of government.

NOTES

1. An Act for the Abolition of Slavery throughout the British Colonies (The Slavery Abolition Act), 1833, 3 & 4 Will. 4, ch. 73.

2. *See,* Prucha, *The Great Father* 122-24 (abr. ed. 1986); Muckleroy, "The Indian Policy of the Republic of Texas," 26 *S. W. Hist. Q.* 1, 128 (1922).

3. U.S. Const., Art. I, § 8, cl. 3; Art. II, § 2, cl. 2.

4. *See,* Cohen, *Handbook of Federal Indian Law* 57-62 (Charlottsville: Miche Bobbs-Merrill, 1982 ed.).

5. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 546, codified at 25 U.S.C. § 71 (1982). Of course, many treaties made before 1871 remain in force. For many years after 1871, agreements between the federal government and Indian tribes were popularly called treaties.

6. *See,* Wilkinson, *American Indians, Time, and the Law* 53-86 (New Haven: Yale Univ. Press, 1987).

7. *See,* Corwin and Pelatson, *Understanding the Constitution* 72 (10th ed. 1985); *The Federalist Nos. 10, 51* (J. Madison) (Cooke ed. 1961).

8. *See,* Beard, *American Government and Politics* 58 (7th ed. 1935).

9. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831).

10. *Worcester v. Georgia, supra,* note 9 at 559-60.

11. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante,* 107 S.Ct. 971, 977 (1987).

12. *See,* Cohen, *supra,* note 4 at 259-79.

13. *Id.* at 27-42.

14. *Id.* at 221-25.

15. *Washington v. Fishing Vessel Ass'n,* 443 U.S. 658, 676 (1979), *quoting, Jones v. Meehan,* 175 U.S. 1, 11 (1899).

16. *See,* Cohen, *supra,* note 4 at 639-53.

17. *Id.* at 98-102, 127-43.

18. *Id.*at 152-80.

19. H. R. 13835, 67th Cong. (1923); 64 Cong. Rec. 2997, 67th Cong., 4th Sess. (1923).

20. *See, e.g., Bowman v. County School Bd.,* 382 F.2d 326, 330 (4th Cir. 1967)(separate school for Indian children, as well as for blacks and whites).

21. This is implicitly recognized in some southern race laws that defined as whites certain persons of mixed Indian and white ancestry. *See, e.g., Loving v. Virginia,* 388 U.S. 1, 5 n.4 (1967).

22. U.S. Const., Art. I, § 2.

23. *Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857).

24. U.S. Const., Amend. 14, § 1. The first was *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419 (1793), overruled by U.S. Const., Amend. 11.

25. *See,* Cohen, *supra,* note 4 at 643.

26. *Elk v. Wilkins,* 112 U.S. 94 (1884), *interpreting,* U.S. Const., Amend. 14.

27. Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 390, codified, as amended, at 25 U.S.C. § 349.

28. Act of May 2, 1890, ch. 182, § 43, 26 Stat. 81, 99.

29. Act of May 8, 1906, ch. 2348, 34 Stat. 182, codified at 25 U.S.C. § 349.

30. Act of June 2, 1924, ch. 233, 43 Stat. 253 (superseded 1940). *See,* Cohen, *supra,* note 4 at 644-45.

31. *Id.* at 640.

32. *See, California v. Cabazon Band of Mission Indians,* 107 S. Ct. 1083 (1987).

33. *See,* Berthrong, *The Southern Cheyennes* 1-26 (1963).

34. Treaty with the Arapahoes and Cheyennes, Feb. 18, 1861, 12 Stat. 1163.

35. Treaty with the Cheyennes and Arapahoes, Oct. 28, 1867, 15 Stat. 598.

36. *See,* Abbott, Leonard and McComb, *Colorado* 73-78 (rev. ed. 1982); Berthrong, *supra,* note 33 at 195-223; Hughes, *American Indians in Colorado* 57-61 (1977). The event has its apologists. *See, e.g.,* 1 *History of Colorado* 380-400 (Baker ed. 1927).

37. Abbott *et al., supra,* note 36 at 75.

38. Treaty with the Utes, Mar. 2, 1868, 15 Stat. 619.

39. *See,* Hughes, *supra,* note 36 at 62-69, 76.

40. *Id.*

41. *Id.*

42. *Id.* at 69-72, 77.

43. Act of June 18, 1934, ch. 576, §§ 1, 3, 48 Stat. 984, codified at 25 U.S.C. §§ 461, 463 (1982).

44. Act of May 21, 1984, Pub. L. No. 98-290, 98 Stat. 201.