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## NOTES AND COMMENTS

### A NEW CONSTITUTIONAL APPROACH TO THE DOCTRINE OF TRIBAL SOVEREIGNTY

Dario F. Robertson \*

#### *Introduction: The Nature of the Problem*

The traditional analytical approach to the doctrine of tribal sovereignty is reflected in Chief Justice John Marshall's observation that the "condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence."<sup>1</sup> Those often cited words have come to epitomize modern judicial thinking on the subject.<sup>2</sup> While the Indian's legal status may be correctly considered *sui generis* in many respects, such a superficial conceptualization is too often invoked as a surrogate for more cogent, precise analysis, obstructing the orderly development of Indian law as required by the implications of principle and precedent.<sup>3</sup> This note will argue that the long line of Supreme Court cases interpreting the doctrine of tribal sovereignty is in large measure the product of an ad hoc decision-making process unguided by a unifying analytical framework, and proposes an alternative constitutional approach which attempts to rectify the perceived theoretical shortcomings.

Two Supreme Court cases decided last term illustrate the need for a unifying theoretical explication of the doctrine of tribal sovereignty. In *Oliphant v. Suquamish Indian Tribe*,<sup>4</sup> the Court

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1. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). See also *United States v. Kagama*, 118 U.S. 375, 381 (1896).

2. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 554 (1974); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 173 (1973); *United States v. Kagama*, 118 U.S. 375, 381 (1886); F. COHEN, *FEDERAL INDIAN LAW* 90 (1942) [hereinafter cited as COHEN]; Rice, *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEGIS. & INT'L L. 79, 90 (1934).

3. E. LEVI, *INTRODUCTION TO LEGAL REASONING* 1-5 (1949). It is, of course, the very essence of Levi's thesis that the decisional processes of the courts rely upon a very fundamental form of reasoning by example as a means of assimilating each new factual scenario into the case law. It is the artfully crafted analogy that bridges disparate settings under the same legal theory. Where the theory and the facts are in some sense *sui generis*, analogies are less helpful, precedent easier to circumvent, principles less precise. See generally Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930).

4. 435 U.S. 191 (1978). In *Oliphant*, the petitioner-defendant had been charged with assaulting a tribal officer and resisting arrest during the Suquamish's annual Chief Seattle Days celebration. The Court also disposed of a companion case involving the arrest of a

considered the question of whether Indian tribal courts have criminal jurisdiction over non-Indians charged with the commission of offenses on a reservation.<sup>5</sup> Although neither the treaty entered into with the Suquamish<sup>6</sup> nor any other congressional enactment affirmatively divested the tribal courts of criminal jurisdiction over non-Indians, the Court held that this particular attribute of tribal sovereignty had been implicitly extinguished as a consequence of the tribe's acceptance of the supervening sovereignty of the United States. In short, the asserted jurisdiction was viewed as impliedly inconsistent with the tribe's dependent status.<sup>7</sup>

Some two weeks later, the Court handed down *United States v. Wheeler*,<sup>8</sup> holding that the inherent tribal sovereignty of the Navajos was sufficiently independent of federal sovereignty to trigger the "dual sovereignty" concept implicit in the double jeopardy clause of the fifth amendment. The Court permitted successive tribal and federal prosecutions of an Indian defendant for offenses arising out of the same incident, rejecting the argument that the jurisdiction of the tribal and federal courts sprang from the same sovereignty.<sup>9</sup> In reaching that result, the Court summarized the *quasi*-sovereign status of the tribes as follows:

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In

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non-Indian for recklessly endangering another person and injuring tribal property during a high-speed chase that ended in a collision with a tribal police car.

5. *Id.* at 195.

6. Treaty of Point Elliott, 12 Stat. 927 (1855).

7. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). Mr. Justice Rehnquist's majority opinion extensively surveys numerous other treaty provisions in an attempt to establish a long-standing congressional assumption that the various tribes were without criminal jurisdiction over non-Indians absent an express delegation of such power. *Id.* at 197-207. But this analysis is ostensibly rendered superfluous by the Court's conclusion that "even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians . . ." as such jurisdiction has been withdrawn by implication as a necessary result of their dependent status.

8. 435 U.S. 313 (1978). In *Wheeler*, the defendant-respondent, a member of the Navajo Tribe, had been convicted of disorderly conduct and contributing to the delinquency of a minor in violation of Title 17, § 321, of the Navajo Tribal Code (1969). Over a year later, respondent was indicted in federal district court under the Major Crimes Act, 18 U.S.C. § 1153 (1976). Respondent moved to dismiss the indictment arguing that because there was an identity of sovereignties between the tribal and federal courts and because he had already been convicted of a lesser included offense of statutory rape, the subsequent federal prosecution was barred. 435 U.S. at 315-16. See also Note, *Criminal Jurisdiction: Double Jeopardy in Indian Country*, this issue.

9. *Id.* at 329-30.

sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.<sup>10</sup>

The Court was careful to distinguish *Oliphant*, noting that the sovereign power to punish *Indian* offenders was not necessarily "lost by virtue of a tribe's dependent status."<sup>11</sup>

Both *Oliphant* and *Wheeler* are engulfed by the analytical quagmire that has plagued the doctrine of tribal sovereignty since its inception. First, tribal sovereignty, unlike that which inheres in other autonomous entities, is without an irreducible normative core. It is subject to complete defeasance. Second, the doctrine is so vague that any specific powers of self-government which remain vested in the tribes cannot be objectively determined in advance of a pronouncement by the Court. There is neither a principled method of determining which powers the tribes have retained nor which powers have been implicitly invested. The ill-defined principle of divestiture-by-implication announced in *Oliphant* must rely upon the unfettered, unguided discretion of the reviewing court for its containment or extension. No countervailing principle of limitation circumscribes the applicability of the *Oliphant* analysis to other sovereign tribal powers heretofore viewed as retained.

*Wheeler* is susceptible to a similar criticism. The Court in *Wheeler* purports to recognize a "primeval sovereignty"<sup>12</sup> in the tribes of sufficient independent integrity to justify the invocation of the dual sovereignty concept of the fifth amendment, yet simultaneously announces that whatever sovereignty the tribes retain may be completely eradicated by a simple majority of Congress. What kind of sovereignty can be said to exist at the whim of a superior sovereign? Is not tribal subservience to such plenary authority tantamount to a negation of any asserted residuum of sovereignty? The Court has never faced this apparent paradox,

10. *Id.* at 323.

11. *Id.* at 326. The majority opinion enumerated three areas in which implicit divestiture of sovereignty had been recognized by the Court. First, Indian tribes lost the sovereign power to alienate tribal lands freely to non-Indians as a result of their dependent status. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-68 (1974); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). Second, their sovereign capacity to enter into direct commercial or governmental relations with foreign nations has been impliedly terminated. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). Third, their sovereign power to assert criminal jurisdiction over non-Indians has been extinguished. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

12. *United States v. Wheeler*, 435 U.S. 317, 328 (1978).

nor has it attempted to derive a modern justification for this anachronistic doctrine.

The amorphous contours of the doctrine have discouraged courts from relying on the sovereignty concept, as recent cases prior to *Wheeler* make clear. The Court in *McClanahan v. Arizona Tax Commission*<sup>13</sup> noted that "the trend has been away from the idea of inherent Indian sovereignty . . ." toward reliance on the more familiar doctrines of federal preemption and administrative delegation.<sup>14</sup> The *McClanahan* Court concluded that "modern cases . . . tend to avoid reliance on *platonic notions of Indian sovereignty* and look instead to the applicable treaties and statutes . . ."<sup>15</sup> This understandable tendency to perceive notions of tribal sovereignty as undefined and antiquarian has led to a gradual but persistent doctrinal erosion.

This note will argue that the tribal sovereignty doctrine has gradually been incorporated into the conceptual fabric of modern federalism to such an extent as to allow courts to declare the doctrine explicitly constitutionalized. This would have the effect of conferring upon the tribes a degree of constitutionally inviolate sovereignty. Alternatively, it will be argued that absent explicit constitutionalization, courts should at the very least rely upon the state sovereignty doctrine as a dispositive analogue in adjudicating cases involving tribal sovereignty questions.

### *The Concept of Sovereignty*

The doctrine of tribal sovereignty is a unique theoretical construct floating amidst a vast sea of literature dealing with the concept of sovereignty.<sup>16</sup> Theorists in the classical and neo-classical normative tradition define sovereignty as a *right* to govern, as an inherent entitlement to the exercise of political power which does not depend on a present capability to exercise that power. Essen-

13. 411 U.S. 164 (1973).

14. *Id.* at 172. Rather than relying upon notions of inherent Indian sovereignty as a bar to state jurisdiction, courts have felt more comfortable construing federal statutes granting certain powers to tribes as indicative of an intention to occupy the field to the exclusion of the states.

15. Emphasis added. *See, e.g.,* *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (traditionally broad notions of tribal sovereignty have given way to more individualized treatment of specific treaties and statutes); *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962) (notion of Indian reservation as a distinct nation has been substantially eroded with the passage of time).

16. A detailed analysis of the multivarious theories of sovereignty is obviously beyond the scope of this note. For an excellent discussion of the history and diversity of modern sovereignty theories, *see generally* H. COHEN, *RECENT THEORIES OF SOVEREIGNTY* (1937); C. MERRIAM, *HISTORY OF THE THEORIES OF SOVEREIGNTY SINCE ROUSSEAU* (1900).

tially, normativists reduce sovereignty to a legal right.<sup>17</sup> Thus, the judiciary is attitudinally predisposed toward the normative theory because it renders the notion of sovereignty susceptible to the same sort of juridical analysis to which other legal rights are susceptible.<sup>18</sup>

When examined in these terms, the concept of sovereignty loses much of its mystique. Its explication becomes a preeminently juristic, nonlegislative function. With a synopsis of the broader implications of the doctrine of tribal sovereignty in mind, it will be much easier to put the following historical exegesis in the proper perspective.

### *The Evolution of the Doctrine of Tribal Sovereignty*

In addition to being ambiguous, the application of European concepts of sovereignty may rest on a historical fallacy. It should be emphasized at the outset that Western notions of sovereignty may be ill-suited to describe the reality of pre-Columbian tribal autonomy.<sup>19</sup> Perhaps sovereignty is a culturally tainted concept

17. This normative approach can be traced to the intellectual matrix of Medieval Europe which added a distinctive gloss to the newly rediscovered political theories of the classicists. One scholar of political theory explains that the "thought that State and Law exist by, for, and under each other was foreign to the Middle Ages. It solved the problem by opposing to Positive Law the idea of Natural Law. This idea, which came to it from Classical Antiquity, it proceeded to elaborate." O. GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* 74 (F. Maitland tr. 1900). Ultimately, other commentators suggest, "medieval theorists confounded the Law of Nature with the Law of God . . .," resulting in the coalescence of modern normative theorization. R. EASTWOOD & G. KEETON, *THE AUSTINIAN THEORIES OF LAW AND SOVEREIGNTY* 41, 43-60 (1929) (discussing the normative theories in contrast to Austinian positivism).

18. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793) ("Sovereignty is the right to govern.") See Note, *The American Indian-Tribal Sovereignty and Civil Rights*, 51 *IOWA L. REV.* 654, 655-56 (1966).

19. Tribal political structures varied significantly. Some structures appear more analogous to Western nation-states than others. The noted Indian historian Wilcomb Washburn has commented: "White assumptions about Indian political organization range all the way from the belief that they were totally autocratic to the conviction that they were totally anarchic. As usual the truth is complex and runs between these two poles." W. WASHBURN, *THE INDIAN IN AMERICA* 42 (1975). Even the Cherokees, who have long been regarded as possessing one of the most sophisticated tribal governments, may have historically lacked the degree of political coherence necessary to be accurately described as a sovereign nation. A recent study of Cherokee law made the following observations: "It is too strong to call the Cherokee nation a confederacy of towns. At best, it was a collection of towns populated by a common people. At worst—in times of strife—it was anarchy. Yet we cannot conclude that there was no national government. When the headmen of certain towns furnished a leadership that others could follow, the nation became a functional reality and this occurred as often as not." J. REID, *A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION* 33 (1970). See also A. WALLACE, *THE DEATH AND REBIRTH OF THE SENECA* 14-20 (1972). Cf. *Mackey v. Coxe*, 59 U.S. 100, 102 (1855) (noting that the Cherokees were "more advanced in civilization than other Indian tribes . . .").

that should not be applied to atypical political entities existing outside the self-conscious European community of nation-states. If indeed the original use of the term "sovereignty" cannot accurately and objectively describe the political condition of the tribes prior to the intervention of the United States, contemporary notions of *quasi*-sovereignty would seem to have built upon analytically infirm foundations. Perhaps the notion of tribal sovereignty is simply a juristic convention, a convenient rubric employed to describe a bundle of loosely linked legal entitlements conferred upon the Indians by treaties, statutes, judicial decisions, and common usage. Perhaps the term is only the cause of confusion and should be eliminated altogether.<sup>20</sup> Whatever the merits of such a position, it is clear that the term cannot be neatly expunged from the pages of the many opinions in which it appears. Since the law cannot be rid of the term, some attempt must be made to infuse it with a coherent, consistent meaning. Some attempt must be made to ascertain its contemporary constitutional significance. Such an undertaking must of necessity begin with a historical review of the doctrine's development. The discussion will adhere to a conceptual scheme of organization that roughly parallels the chronological evolution of the doctrine.<sup>21</sup>

### *Tribal Sovereignty as a Principle of Natural Law*

As the European nations initiated an aggressive bilateral campaign of Christianization and dispossession in the New World, a vigorous debate arose among various theologians and jurists concerning the appropriate theoretical justification, if any, for the unprecedented onslaught against the Indian. That debate was greatly intensified by reports that the American natives were being subjected to unbridled cruelty and treachery at the hands of the invading Europeans.<sup>22</sup> The prevailing misconception that the Indians were half-human barbarians, incapable of true political communi-

20. Even when used in conventional settings, the term is disfavored as one scholar explains: "The word sovereignty is ambiguous . . . . We propose to waste no time in chasing shadows, and will therefore discard the word entirely. The word 'independence' sufficiently indicates every idea embraced in the use of sovereignty . . . ." R. FOULKE, A TREATISE ON INTERNATIONAL LAW 69 (1920). Unlike a treatise author, judges cannot so effortlessly abandon a long-standing term of art.

21. See COHEN, *supra* note 2, at 46-47; W. WASHBURN, RED MAN'S LAND—WHITE MAN'S LAW 3-23 (1971) [hereinafter cited as WASHBURN]; Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43-47 (1947) [hereinafter cited as Cohen, *Original Indian Title*]; Robertson, *The Catholic Mission and Indian Reservations*, 3 SOC. THOUGHT 15 (1977) [hereinafter cited as Robertson].

22. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 9-11 (1942) [hereinafter cited as Cohen, *Indian Rights*].

ty or religious conversion, and the resultant abuse engendered by such ethnocentrism, prompted concerned theorists to derive a natural law construct of tribal sovereignty that might clothe Indian rights with some legitimacy.<sup>23</sup>

At the center of this intellectual vortex was the work of the Spanish jurist Francisco de Vitoria who was the first to argue in 1532 that lawful title to Indian lands could not be obtained merely by virtue of its discovery.<sup>24</sup> Vitoria held that good title could only be secured from the natives by treating with them as a sovereign power vested with a natural right of self-government.<sup>25</sup> Vitoria originated a novel natural law theory of limited sovereignty, based on a voluntary relinquishment of certain inherent powers of state to a sovereign protectorate. He applied his new theory to the tribes' relationship with the Spanish Crown.<sup>26</sup> Vitoria founded his natural law theory of tribal sovereignty on a recognition of the inherent capability of the natives to form a sophisticated political community governed by an overarching scheme of rationality.<sup>27</sup>

23. See L. HANKE, *THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA* 122-25 (1949) [hereinafter cited as HANKE]; Cohen, *Indian Rights*, *supra* note 22, at 9-16; Robertson, *supra* note 21, at 16-20. The humanist scholar Juan Gines de Sepulveda, writing in the middle of the sixteenth century, argued that the Indians constituted a classic example of a people who fit the Aristotelian description of natural slaves, being devoid of rationality and common humanity. In response to such erroneous theoretical speculation, Bartholomew de Las Casas, a missionary to the Indians, composed a voluminous treatise which did much to dispel many of the early misconceptions. WASHBURN, *supra* note 21, at 14-17. See also ARISTOTLE, *POLITICS*, in *THE WORKS OF ARISTOTLE* 1254a, 1256b (W. Ross ed. 1921); G. MACNUTT, *BARTHOLOMEW DE LAS CASAS, HIS LIFE, HIS APOSTOLATE AND HIS WRITINGS* 311, 314-16, 411-12 (1909); R. SCHLAIFER, *GREEK THEORIES OF SLAVERY FROM HOMER TO ARISTOTLE* 165-69, 182, 201-202 (1936); J. SEPULVEDA, *DEMOCRATES ALTER, SIVE DE JUSTIS BELLI CAUSIS APUD INDOS*, in *TRATADO SOBRE LAS JUSTAS CAUSAS DE LA GUERRA CONTRA LOS INDIAS* 104-105 (1941) (written in 1548 but not published as authorities thought doctrine unsound in light of Las Casas' writings).

24. F. VITORIA, *DE INDIS ET DE JURE BELLI RELECTIONES* § 2, 139 (E. Nys. ed. 1917) [hereinafter cited as VITORIA]. See also COHEN, *supra* note 2, at 46-47; D. MCKICKLE, *NATIVE AMERICAN TRIBALISM* 28-29 (1973); WASHBURN, *supra* note 21, at 9-13. The doctrine of title-by-discovery originally applied only where the lands sought were not already possessed. The doctrine was perverted when it was transformed into a theoretical justification for the dispossession of Indian lands. This shibboleth was disposed of on an analytical level by Vitoria, but his efforts failed to have a determinative practical effect on the designs of the Spanish emperors and their subjects in the New World. Cohen, *Original Indian Title*, *supra* note 21, at 44-45. See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543, 544 (1832) (discovery does not annul preexisting rights of the occupants in the land); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573-74 (1823) (nation making discovery receives the sole right of acquiring the soil from the natives); E. DE Vattel, *LE DROIT DES GENS* bk. 1, ch. 18, §§ 81, 209, at 38, 85 (C. Fenwick tr. 1916) [hereinafter cited as VATTEL].

25. VITORIA, *supra* note 24, at § 3, ¶ 16, at 159.

26. *Id.*

27. *Id.* at § 1, ¶ 23-24, at 127-28. In sharp contrast to the grisly exaggerations of Indian barbarism received in the early sixteenth century, Vitoria equanimously argued that "there is a certain method in their affairs, for they have definite marriage and magistrates,



Since the Indians were amenable to the rule of reason, a notion at that time inextricably bound to the law of God,<sup>28</sup> other nations could not arbitrarily transgress tribal sovereignty without themselves committing an irrational act violative of the law of nature.<sup>29</sup>

Vitoria's thesis was to have a profound effect on the shaping of the doctrine of tribal sovereignty for centuries to come, coloring even the early decisions of the Supreme Court<sup>30</sup> and formative pronouncements of the Continental Congress pertaining to Indian relations.<sup>31</sup>

Whatever the precise historical cause of the incorporation of a natural law theory of Indian rights into constitutional jurisprudence, it is clear that by the time *Johnson v. M'Intosh*<sup>32</sup> was decided, the Court had come to accept the theory as a necessary component of any analysis of Indian rights. Chief Justice Marshall reasoned that title by discovery and conquest overrode any natural law title the Indian might have held in the land.<sup>33</sup> Professor Storey objected to Marshall's tacit endorsement of the doctrine of discovery, contending that "in point of justice or humanity, or general conformity to the *law of nature*..."

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overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion...." See HANKE, *supra* note 23, at 51-52; WASHBURN, *supra* note 21, at 9.

28. See text and authorities accompanying note 17 *supra*.

29. VITORIA, *supra* note 24, at § 3, ¶ 16, 159.

30. A noted scholar of Indian law explains: "While Vitoria himself is not directly cited in any of the early opinions of the United States Supreme Court on Indian cases, these opinions frequently refer to statements by Grotius and Vattel that are either copied or adapted from the words of Vitoria. It is thus clear that the tradition of legal teaching carried Vitoria's theories on Indian rights to the judges and attorneys who formulated our legal doctrine in this field." Cohen, *Indian Rights*, *supra* note 22, at 17. For examples of the influence which Grotius and Vattel had on the natural law strand of the tribal sovereignty doctrine, see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543, 559-61 (1832); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 563, 568-69 (1823).

31. Vitoria's natural law theory of Indian rights received papal support in 1537 by the Bul' *Sublimis Deus* in which Pope Paul III declared that the arbitrary deprivation of liberty or dispossession of land to which the Indians were properly entitled would not be tolerated. Professor Cohen has contended that this papal declaration of human rights was repeated "[a]lmost word for word" in the first major congressional pronouncement affecting Indian relations: the Northwest Ordinance, Act of July 13, 1787, 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 340-41 (1904-1937). Cohen, *Indian Rights*, *supra* note 22, at 12; Hanke, *Pope Paul III and the American Indians*, 30 HARV. THEOLOGICAL REV. 67, 72-76 (1937). For an excellent summary of the significance of the Northwest Ordinance in Indian affairs, see F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 37-38 (1962) [hereinafter cited as PRUCHA].

32. 21 U.S. (8 Wheat.) 543 (1823). See also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (where Marshall's analysis laid the analytical foundation for his opinion in *M'Intosh*).

33. *Id.* at 574, 591-92. Chief Justice Marshall's analysis was given a degree of modern support in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 285 (1955).

politically "convenient" theory could not be vindicated.<sup>34</sup> Indian rights, insisted Storey, "stood upon original principles deductible from the law of nature, and could not be justly narrowed or extinguished without their own free consent."<sup>35</sup>

Chief Justice Marshall retreated from his position in *M'Intosh* in the landmark case of *Worcester v. Georgia*,<sup>36</sup> where he discredited the doctrine of discovery by deliberately imbuing the formerly disfavored natural law theory of tribal sovereignty with dispositive significance. In holding that Georgia was without jurisdiction to promulgate laws binding within the territory of the Cherokee Nation,<sup>37</sup> the Chief Justice emphasized that the Indian nations had always been considered "distinct, independent political communities, retaining their original *natural rights* . . . ."<sup>38</sup> These natural law rights were held to have survived discovery of the continent by the Europeans.<sup>39</sup> While the ultimate *ratio decidendi* of the case depended both on notions of inherent tribal sovereignty and the exclusivity of federal jurisdiction,<sup>40</sup> it was plain that a principle of natural law sovereignty had been effectively rendered constitutionally tenable. Although the natural law analysis of tribal sovereignty has fallen into disuse with the passage of time, it has never been affirmatively abandoned and may fairly be thought to underlie the many pronouncements of the modern Court affecting Indian rights.

### *Tribal Sovereignty as a Principle of International Law*

Once the early theorists had decided that sovereignty vested in the tribes as a natural right, the parallel conclusion logically followed that such a right should be accorded the protection of the

34. 1 J. STOREY, COMMENTARIES ON THE CONSTITUTION 4 (1833) (emphasis added).

35. *Id.* Professor Storey thereafter concluded: "There is no doubt, that the Indian tribes, inhabiting this continent at the time of its discovery, maintained a claim to the exclusive possession and occupancy of the territory within their respective limits, as sovereigns and absolute proprietors of the soil." *Id.* at 5. Thus, notions of Indian sovereignty and land title were conceived of as being inextricably bound to the law of nature. *Id.* at 3-15.

36. 31 U.S. (6 Pet.) 515 (1832). This decided shift in the Marshallian position was foreshadowed in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17 (1831), where the tribes are characterized as "domestic dependent nations . . ." constitutionally different from foreign nations. *Id.* at 17. Gone was the vague tendency to describe the tribes as natives with merely a right of occupancy.

37. *Worcester v. Georgia*, 31 U.S. (6 Pet.), 515, 561 (1832).

38. *Id.* at 559.

39. *Id.* at 543. The Chief Justice declared: "It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the preexisting rights of its ancient possessors."

40. *Id.* at 557.

*jus gentium* or the law of nations. Since the natural law was theoretically predicated on the common elements of humanity and rationality of mankind, and since international law was analyzed as a conceptual subset of this all-pervasive rational order, a principle recognized under natural law *a fortiori* should receive the solemn respect of the community of nations.<sup>41</sup>

Although the colonial powers of Europe may not have felt bound to recognize the sanctity of tribal sovereignty simply because the esoteric notions of the *jus gentium* so required, they were effectively constrained to acknowledge the sovereign status of the tribes by more practical political considerations. As long as the Indians possessed the power to make war, tribal sovereignty, as it was manifested in their assertions of dominion over their people and territory, could not be ignored.<sup>42</sup> In dealing with the Indians by treaty, a pattern of diplomacy that was to be continued by the United States, the colonial powers *ipso facto* gave credence to the notion that tribal sovereignty should receive the protection of international law, for as Chief Justice Marshall has stated "[a] treaty is in its nature a contract between two nations. . . ."<sup>43</sup> The Supreme Court would later come to rely on the fact that recognition of tribal sovereignty in the international arena antedated that of the United States.<sup>44</sup>

41. See, e.g., 1 H. GROTIUS, DE JURE BELLI ET PACIS ch. 2, § 4, at 38(W. Whewell tr. 1853). In another context Grotius asserted that there is an identity between the "*Jure naturalis*" and the "*Jure gentium*." In many cases, the discussions of natural and international law proceed *sub silentio* on the assumption that the two concepts of law are operatively indistinguishable. VATTEL, *supra* note 24; VITORIA, *supra* note 24, § 3, ¶ 16, at 159.

42. COHEN, *supra* note 2, at 39, 274. See also VATTEL, *supra* note 24, at bks 2, 3, chs. 7, 1, §§ 83, 4, at 138, 235.

43. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). See also 5 HACKWORTH, INTERNATIONAL LAW 1 (1943); VIENNA CONVENTION ON THE LAW OF TREATIES, Second Session Off. Rec., U.N. Doc. A/CONF. 39/27 art. 2 (1)(a) (1968-69); CRANDALL, TREATIES—THEIR MAKING AND ENFORCEMENT 93 (1904). Francis Paul Prucha, a leading scholar in the field of Indian history, has noted: "Treating with the Indians for the extinguishment of land titles on the basis of colony dealing with tribe, together with the diplomatic negotiations of war and peace, gave foundation and strength to the doctrine that the Indian tribes were independent nations with their own rights and sovereignty, rather than subjects of the colony or nation in whose territory they resided." PRUCHA, *supra* note 31, at 142.

44. Seneca Nation v. Christy, 162 U.S. 283 (1896); Porterfield v. Clark, 43 U.S. (2 How.) 76 (1849); Lattimer v. Poteet, 39 U.S. (14 Pet.) 4 (1840); Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Preston v. Browder, 14 U.S. (1 Wheat) 115 (1816).

Following the revolution, there was a substantial risk that the tribes might be deprived of their international standing as the young republic embraced the theory that Indian territory should be considered "conquered provinces." COHEN, *supra* note 2, at 48. Under this policy, a congressional commission, appointed in 1784, was to make clear to the tribes that their lands were forfeit as a consequence of the military victory. W. MOHR, FEDERAL INDIAN RELATIONS, 1774-1788, at 108 (1933). However politically expedient or theoretically defen-

Professor Felix Cohen has forcefully argued that under both the Articles of Confederation and under the Constitution, the national government, in the first few decades of the Republic, treated the Indian tribes as sovereign nations with all the then prevailing formalities of international diplomacy.<sup>45</sup> Cohen developed a typology of Indian treaties which attempted to illustrate the *de jure* sovereignty accorded the tribes through an analysis of agreements falling within five substantive categories. He found treaties which dealt with tribal capacity to make war,<sup>46</sup> territorial boundaries defining Indian country,<sup>47</sup> passport requirements for the entry of citizens into Indian country,<sup>48</sup> arrangements respecting the extradition of fugitives,<sup>49</sup> and the relations of tribes with nations other than the United States<sup>50</sup> paralleled the sort of bilateral compacts which completely independent nations might negotiate.<sup>51</sup>

The international status ostensibly accorded the tribes exacerbated the anomaly of their legal position.<sup>52</sup> How could the tribes be

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sible the policy might have been, the discontent it generated among the tribes led to its ultimate abandonment and an unequivocal return to treaty-making predicated on an acknowledgment of inherent Indian sovereignty. The "conquered provinces" theory never amounted to much more than an officially endorsed legal fiction for even while it was the declared policy of the national government, the Continental Congress continued its use of treaties, evincing the same solicitude for the tribes that had prevailed since the first treaty was concluded with the Delawares in 1778. Treaty with the Delawares of Sept. 17, 1778, 7 Stat. 13. Of this agreement, Chief Justice Marshall said: "The language of equality in which it is drawn evinces the temper with which the negotiation was undertaken . . ." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 549 (1832).

45. COHEN, *supra* note 2, at 39; PRUCHA, *supra* note 31, at 142-43.

46. See, e.g., Treaty of Dancing Rabbit Creek of Sept. 27, 1830 with the Choctaw Nation, 7 Stat. 333, 334 (recognizing the power of the Choctaws to make war); Treaty of July 22, 1814, with the Wiandots, 7 Stat. 118 (enlisting the aid of the tribe against Britain in the War of 1812); Treaty of Jan. 31, 1786, with the Shawanoe Nation, art. 4, 7 Stat. 26 (creating a mutual assistance pact in case of war). See also *Montoya v. United States*, 180 U.S. 261, 267 (1901).

47. Boundary lines between the Indian tribes and the United States or other tribes were fixed by treaty. Treaty of Jan. 21, 1785, with the Wiandot, Delaware, Chippewa, and Ottawa Nations, 7 Stat. 16; Treaty of Nov. 3, 1804, with the Sac and Fox, 7 Stat. 84; Treaty of July 4, 1805, with the Wiandot, Ottawa, Chippewa, Munsee, Delaware, Shawnee, and Pottawatomie nations, 7 Stat. 87. See also, 5 Op. Att'y Gen. (1848) (establishment of boundaries was primary purpose of some treaties with the tribes).

48. See, e.g., Treaty of Aug. 7, 1790, with the Creek Nation, art. 7, 7 Stat. 35, 37 (passport from state governor or President required for entry into Indian country); Treaty of July 2, 1791, with the Cherokee, art. 9, 7 Stat. 39, 40.

49. See, e.g., Treaty of Jan. 21, 1785, with the Wiandots, art. 9, 7 Stat. 16.

50. As late as 1835, Indian relations with other nations were officially recognized by the federal government. See, e.g., Treaty of Aug. 24, 1835, with the Comanche and others, art. 9, 7 Stat. 474 (recognizing Indian relations with the Republic of Mexico); Treaty of May 26, 1837, with the Kiowa and others, 7 Stat. 533 (recognizing Indian relations with the Republic of Texas).

51. COHEN, *supra* note 2, at 39-40.

52. Higgins, *International Law Considerations of the American Indian Nations by the United States*, 3 ARIZ. L. REV. 74, 78-81 (1961).

treated as independent sovereignties, and yet remain subservient to the government of the United States? Chief Justice Marshall attempted to answer this question in *Worcester v. Georgia*<sup>53</sup> by turning once again to the established principles of international law when he stated that "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection," citing Vattel in support of that conclusion.<sup>54</sup> Chief Justice Marshall described the tribes as "independent political communities . . .,"<sup>55</sup> after having portrayed them as "domestic dependent nations . . ." and "wards" of the government only a year earlier in *Cherokee Nation v. Georgia*,<sup>56</sup> where the Court explicitly rejected an argument predicated standing to sue on the tribe's status as a "foreign state" under Article III of the Constitution.<sup>57</sup> Thus, an integrative reading of these two cases would lead future courts to struggle with the paradoxical characterization of the relationship between the tribes and the United States as one of *independent dependence*. With such a confused theoretical background, it is little wonder that the supportive role which international law once played in preserving the doctrine of tribal sovereignty was gradually undermined as later courts hopelessly entangled themselves in the contradictory ramifications of precedent.<sup>58</sup>

This already perplexing legal scenario was complicated still further by a rider attached to the Indian Appropriation Act of 1871 which stated that:

[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an

53. 31 U.S. (6 Pet.) 515 (1832).

54. *Id.* at 560-61. See VATTEL, *supra* note 24, at bk. 1, chs. 1, 16, §§ 6-8, 192-99, at 11-12, 80-81. Marshall failed to mention a competing principle of international law which Vattel also discusses which stipulates that "a people which has passed under the rule of another is no longer a State, and does not come directly under the law of nations." *Id.*, ch. 1, 11, at 12. Marshall's declaration of tribal independence was quoted with approval in *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

55. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

56. 30 U.S. (5 Pet.) 1, 17 (1831).

57. *Id.* at 16-20; U.S. CONST. art. 3.

58. Subsequent decisions discussing the sovereignty of the Cherokee Nation illustrate the difficulties the early Court had in adhering to the principles of international law. See generally Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969). In *Parks v. Ross*, 52 U.S. (11 How.) 362, 374 (1850), the Cherokees were recognized as being "in many respects a foreign and independent nation . . ." yet simultaneously in a "state of pupilage . . . under the guardianship of the United States." Just five years later in *Mackey v. Cox*, 59 U.S. 100, 104 (1855), the Court unequivocally concluded that the legal standing of the Cherokee Nation was virtually indistinguishable from that of a "territory of the United States." The Court continued, "In no respect . . ." could the Cherokee Nation be "considered a foreign state or territory . . ."

independent nation, tribe or power with whom the United States may contract by treaty: *Provided, further*, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.<sup>59</sup>

In terminating the use of treaties in Indian affairs, had Congress effectively eviscerated the force of international law as it pertained to the doctrine of tribal sovereignty? By refusing to recognize the tribes as "independent" nations, was Congress implicitly endorsing Chief Justice Marshall's characterization of the tribes as "dependent" sovereign entities? Could such a pronouncement be interpreted as completely eradicating the doctrine of tribal sovereignty? Had Congress implicitly rejected the validity of the treaty-making power as a source of federal authority over the tribes?<sup>60</sup>

The legislative history of the Act offers no conclusive answers to these questions.<sup>61</sup> Apparently, the attachment of the rider was prompted by the resentment felt by the House of Representatives as a result of its exclusion from any substantial control of Indian affairs, rather than by any zealous congressional intention to undermine the international law underpinnings of the doctrine of tribal sovereignty.<sup>62</sup> Since the Senate alone ratified the treaties,<sup>63</sup> the House could resort only to fiscal retaliation by denying appropriations for the execution of treaties which it found objectionable.<sup>64</sup> The fact that Congress continued to enter into agreements which were the *de facto* equivalent of treaties further substantiates the position that the eradication of any notion of

59. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566. Note that this comprehensive approach was precipitated by the use of provisions in individual treaties calling for the cessation of treaty-making. See, e.g., Treaty with the Apache and Cheyenne of Feb. 18, 1861, art. 7, 12 Stat. 1163.

60. Professor Rice has answered this particular question in the affirmative: "The federal power over Indians having become firmly settled, Congress thus struck down or admitted to be false the chief constitutional basis of that power." Rice, *supra* note 2, at 83. Nonetheless, the courts have continued to recognize the treaty-making power as a basis of the plenary authority of Congress over Indian affairs. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

61. COHEN, *supra* note 2, at 66-67.

62. L. SCHMECKEBIER, *THE OFFICE OF INDIAN AFFAIRS: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 55-58 (1927). Schmeckebier explains that the underlying cause of the 1871 rider was that the treaties "ratified by the Senate were not acceptable to the House of Representatives." *Id.* at 55. See also F. WALKER, *THE INDIAN QUESTION* 5, 11-12 (1874).

63. U.S. CONST. art 2, § 2.

64. SCHMECKEBIER, *supra* note 62, at 55. For an example of expressions of fiscal retaliation by the House, see Act of Mar. 29, 1867, 15 Stat. 7, 9, *repealed by* Act of July 20, 1867, 15 Stat. 18.

tribal autonomy was not uppermost in the minds of the legislators.<sup>65</sup>

It would appear, however, that the tribes have, over the years, lost the attributes of sovereignty that are typically associated with a foreign state. It is quite conceivable that the force of international law in Indian affairs has been altogether extinguished by the logical implications of the *Cayuga Indian Claims Case*.<sup>66</sup> A treaty between the State of New York and the Cayuga Nation, a tribe of the Iroquois, concluded in 1789, provided that the Cayugas would receive a specified annuity in exchange for ceding certain tribal lands.<sup>67</sup> Following the Revolutionary War, a majority of the Cayugas, who had sided with the British, moved to Canada because most of their major settlements had been leveled in the scorched-earth campaign waged by the Continental troops.<sup>68</sup> The obligatory annuities were paid regularly to tribal leaders in Canada until the War of 1812, after which annuity payments were made only to tribal members residing in New York.<sup>69</sup> It was not until 1926 that Great Britain brought an action on behalf of the Cayugas against the United States before a special international arbitration tribunal.<sup>70</sup> Although the tribunal found equitable grounds on which to base a compensatory award,<sup>71</sup> it expressly

65. *Dick v. United States*, 208 U.S. 340, 359 (1908) (upholding the validity of bicameral pseudo-treaties.); Canfield, *The Legal Position of the Indian*, 15 AM. L. REV. 21, 25 (1881). For examples of these treaty-like agreements, see Act of Apr. 29, 1874, with the Utes, 18 Stat. 36; Act of July 10, 1882, with the Crows, 22 Stat. 157; Act of Mar. 1, 1901, with the Cherokees, 31 Stat. 848.

The Supreme Court, however, chose to read the House rider as further enfeebling Indian claims of tribal sovereignty. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1903). Discussions of the applicability of international law principles are infrequent in the opinions of the modern Court and rarely amount to more than dictum. See, e.g., *United States v. Wheeler*, 435 U.S. 313, 376 (1978).

66. 6 R. INT'L Arb. Awards 173, 20 AM. J. INT'L L. 574 (1926).

67. *Id.*, 20 AM. J. INT'L L. at 575-76.

68. *Id.* See also WALLACE, *supra* note 19, at 143.

69. 20 AM. J. INT'L L., *supra* note 66, at 576, 588.

70. It is significant that Britain had considered bringing this action in the United States Supreme Court as early as 1860. The Crown sought the advice of one Benjamin Curtis, a former Justice of the Supreme Court, on the question. He counseled Her Majesty that although the Cayugas did not have standing to maintain the suit in their own name after *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), Great Britain could sue the state of New York on their behalf. J. SCOTT, JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION 111-12 (1919); Rice, *supra* note 2, at 83. See text accompanying notes 56-57 *supra*.

71. In view of the fact that the proceedings were before an arbitration tribunal rather than world court strictly bound by the principles of international law, it was felt that "recourse . . . to generally recognized principles of justice and fairness . . ." required a compensatory award, especially when "a situation so *anomalous* . . ." presented itself. *Cayuga Indian Claims Case* (Britain v. United States), 20 AM. J. INT'L L. 574, 580-81 (1926) (emphasis added).

pointed out that an Indian "tribe is not a legal unit of international law . . .,"<sup>72</sup> and that the Cayuga Nation had no "international status."<sup>73</sup> In reaching that result, the tribunal repeatedly emphasized the line of Supreme Court opinions focusing on the subordinate, dependent, ward-like status of the tribes.<sup>74</sup> To the extent that the *Cayuga Indian Claims Case* represents a persuasive construction of international law, which could conceivably become the supreme law of the land should the Supreme Court choose to incorporate the holding of that case into constitutional jurisprudence,<sup>75</sup> it would appear that tribal sovereignty can no longer be vigorously defended as a doctrine owing its present validity to the law of nations.

### *Tribal Sovereignty as a Principle of Constitutional Law*

On a historical level, the logical processes which led the Marshall Court to conclude that the tribal sovereignty principle should be infused with the force of constitutional law are readily discernible. Since the principle of tribal sovereignty was viewed as belonging to an omnipresent body of natural and international law which was generally thought to have retained its binding legal effect under the unfolding canopy of constitutional jurisprudence, the metamorphosis of tribal sovereignty from an entirely extra-constitutional doctrine into a legitimate theory of constitutional law appeared logically inescapable to the early Justices. As originally conceived, the Court felt compelled to apply the tribal sovereignty principle by the mandate of natural and international law.

It may be, however, that today the original justification for the recognition of a tribal sovereignty principle has lost its *raison d'être*. No longer do courts feel bound by the natural law. No longer are the Indian tribes properly subjects of international law. Thus, it might be asked with good reason if there is anything left of the notion of inherent tribal sovereignty? By what authority

72. *Id.* at 577.

73. *Id.* at 580.

74. *Id.* at 577-80. The tribunal chose to cite only those cases supporting the view that the tribes are completely dependent on the federal government: *E.g.*, *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) (cited as establishing dependent ward-like status of the tribes); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (characterized tribes as "domestic, dependent nations"); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 578 (1823) (endorsed the discredited doctrine of discovery). It is puzzling that the court did not mention the analysis in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), which suggested the international status of the tribes.

75. *The Nereide*, 13 U.S. (9 Cranch) 388 (1815); *Talbot v. Seaman*, 5 U.S. (1 Cranch) 1 (1801).



may courts apply a principle which has been undermined with the passage of time? Aside from analytically infirm precedent, there would appear to be only two sources of authority upon which courts could rely in applying the tribal sovereignty principle as a rule of law: the Constitution and congressional legislation. As yet, the tribal sovereignty principle has not been expressly derived from any specific language in the Constitution.

Nor has there been, historically speaking, a basis for the recognition of tribal sovereignty in the legislative pronouncement of Congress. A review of congressional action over the last century clearly indicates a cyclical vacillation between the contradictory policies of Indian self-determination, which implicitly endorse the tribal sovereignty concept, and policies of tribal termination, which deemphasize tribal autonomy in order to effect the assimilation of the Indian into the American mainstream.<sup>76</sup> Thus, in the current state of theorization, the principle of tribal sovereignty is not, strictly speaking, a principle of constitutional law at all. It is a theory of Indian autonomy antedating the Constitution which has never been coherently integrated into constitutional jurisprudence. It has remained an anomaly. It is best

76. See, *Indian Affairs, the President's Message to the Congress*, 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 883, 905 (1970).

For example, the General Allotment (Dawes) Act, Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, authorized the President to allot tribal lands in portions of a specified acreage to reservation Indians in the hope that they would learn to accept the cultural values of the white civilization in preference to the perceived "barbarism" of their communal society through the private ownership of land. This policy was reversed by the Indian Reorganization (Wheeler-Howard) Act of 1934, ch. 576 § 16, 48 Stat. 984, 987, which vested "[a]ny Indian tribe . . ." with "the right to organize for its common welfare . . ." This statutory grant of sovereignty neither persuasively confirmed nor negated any notion of inherent sovereignty. The language can be viewed as an implicit recognition of an antecedent sovereignty or as a legislative substitution of inherent powers with delegated powers or both. The 1950's marked a return to a policy of termination which only recently has once again been abandoned. See, e.g., H.R. Con. Res. 108, Aug. 1, 1953, 67 Stat. B132. This concurrent resolution declared that it was the policy of Congress "as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States . . ." *Id.* Pursuant to this announced policy, Congress proceeded to pass Public Law 280 which extended the civil and criminal jurisdiction of certain states over Indian country and also provided for the assumption of such jurisdiction by other states upon meeting certain conditions. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, amending 18 U.S.C. §§ 1151, 1162, 28 U.S.C. §§ 1331, 1360. The law seriously circumscribed tribal sovereignty as it invalidated tribal ordinances inconsistent with the law of the states whose jurisdiction had been extended. See also H.R. REP. NO. 848, 83d Cong., 1st Sess. 3-8 (1953).

Congress then proceeded to pass a number of acts which explicitly provided for the termination of federal supervision of certain reservations, pending the completion of specific termination plans for each of the tribes affected. See, e.g., Act of June 17, 1954, ch. 303, 68 Stat. 250, 25 U.S.C. §§ 891-901 (1976) (Menominee); Act of Aug. 13, 1954, ch. 732, 68 Stat. 718, 25 U.S.C. §§ 564 (1976) (Klamath); Act of Aug. 23, 1954, ch. 831, 68 Stat. 768, 25 U.S.C. § 721 (1976) (Alabama and Coushatta tribes of Texas); Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099, 25 U.S.C. §§ 741-60 (Paiute).

described as an extra-constitutional doctrine which the Supreme Court has recognized largely for reasons of public policy, only to the extent necessary to avoid aggravating the many injustices to which the Indians have been subjected. It is a wholly discretionary doctrine lacking any sort of principled infra-structure. The result has been unpredictable applications of the doctrine without a definitive explication of its contemporary constitutional justification. This has led one commentator to the conclusion that "tribal sovereignty seems to be a mere tool used by the courts in reaching whatever decision they think best."<sup>77</sup> The need for a unifying constitutional approach is clear.

### *The Constitutionalization of the Doctrine of Tribal Sovereignty*

The doctrine of tribal sovereignty is presently in a very precarious state of development. The holding in *United States v. Wheeler*<sup>78</sup> gives operative effect to the sovereignty principle but without providing a systematic framework of analysis. Perhaps the doctrine's durability in the annals of the law is in part attributable to its powerful intuitive attractiveness as a means of ventilating a rather ill-defined residuum of uniquely Indian interests that have survived conquest and subjugation. Whatever the explanation behind its tenacious capacity to endure, it is clear that the doctrine should be put on a sounder constitutional footing. It is in desperate need of a cogent theoretical infra-structure that can withstand systemic political pressures and attitudinal bias.

Perhaps by explicitly constitutionalizing the doctrine, the Court could provide it with a tenable theoretical foundation in modern constitutional jurisprudence and bring analytical clarity to the field in a single stroke. Constitutionalization of the doctrine would entail the recognition that the sovereignty of tribes springs not from some independent, abstract normative system, but from the Constitution itself. Under this new approach, tribal sovereignty would be accorded the same sort of limited sovereignty as that enjoyed by the states with certain well-defined exceptions.<sup>79</sup> Only through constitutionalization can the doctrine meaningfully describe the new relationship which the tribes have developed

77. Oliver, *The Legal Status of American Indian Tribes*, 38 ORE. L. REV. 193, 232 (1959).

78. 435 U.S. 313 (1978).

79. Obviously, the sovereignty of the tribes would not be as complete as that of the states. For example, under this new approach, the sovereignty of the tribes would not be protected by the construction of the tenth amendment rendered in *National League of Cities v. Usery*, 426 U.S. 833 (1976), or by the guarantee of sovereign immunity from citizen suits embodied in the eleventh amendment.

with the federal government. In the alternative, it is submitted that absent explicit constitutionalization, at the very least tribal sovereignty questions should be resolved with reference to a state-analogue. In other words, tribes should be recognized as functionally more akin to the states of the Union, rather than foreign nations. This note will attempt to justify the proposed constitutionalization through three lines of analysis entailing (1) a new textual interpretation, (2) an evaluation of recent congressional pronouncements, and (3) an assessment of the significance of the frequent modern usage of analogies between state and tribal sovereignties in the case law.

### *A New Textual Interpretation*

Indians are mentioned twice in the Constitution. The first reference is to the exclusion of "Indians not taxed" from the population tally which once determined the number of representatives a state would receive.<sup>80</sup> This language has not been definitively construed by the judiciary nor was there any discussion of the phrase at the Constitutional Convention, but this should not forestall further inquiry. The meaning of the phrase can be gathered by its logical implication.

Why did the Framers assume that some Indians will not be taxed by the states? Perhaps it is an implicit recognition of the sovereign immunity of the tribes from state taxation, a doctrine that has long been applied by the Supreme Court. As a general rule, inherent tribal sovereignty immunizes the reservation Indians from state taxation unless Congress expressly authorizes the state levy.<sup>81</sup> Thus, there is plausibility in the assertion that the inclusion of such a phrase in the text of the Constitution tends to suggest that the Framers recognized some sort of sovereignty in the tribes. The phrase, however, is not very helpful in elucidating the precise nature of that sovereignty.

The second reference to Indians in the Constitution is much

80. U.S. CONST. art. 1 § 2 *as amended* by amend. XIV § 2 *and* amend. XV. The phrase "Indians not taxed" apparently refers to those Indians not taxed by the states. Today that would include only the reservation Indians. Rice, *supra* note 3, at 80.

81. See, e.g., *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-57 (1866) (holding that tribal sovereignty plus federal preemption barred application of state tax laws to tribal lands and members); *Pennock v. Commissioners*, 103 U.S. 44 (1880) (allowing state taxation of lands owned by Indians whose tribe had ceased to be a sovereign entity). The modern Court, however, while not abandoning the doctrine of tribal sovereignty, has preferred to rest its decision on the more familiar notion of federal preemption. See, e.g., *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172 (1973); *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 691-92 (1965). See also COHEN, *supra* note 2, at 256.

more illuminating. The third clause of Article I, Section 8 empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."<sup>82</sup> The history of this allusion to the tribes is revealing.

Under the Articles of Confederation, Congress had been granted the power of "regulating the trade and managing all the affairs with the Indians, not members of any of the States, provided that the legislative right of any state within its own limits be not infringed or violated . . . ."<sup>83</sup> As the court in *United States v. Forty-Three Gallons of Whiskey*<sup>84</sup> would later point out, the effective state veto over federal regulatory prerogatives created by the language in the Articles was viewed at the Constitutional Convention as rendering federal power "of no practical value."<sup>85</sup> James Madison argued at the Convention that the states were simply disregarding federal authority over Indian affairs.<sup>86</sup> In response to Madison's repeated protests, the Convention ultimately agreed to the wording currently found in the text, but only after the clause had been twice narrowed in committee.<sup>87</sup>

The second revision substituted in place of the words "and with the Indians, within the limits of any State, not subject to the laws thereof . . .," the streamlined version, "and with the Indian Tribes."<sup>88</sup> A possible inference is that the Founding Fathers felt that the words "Indian Tribes" adequately conveyed the meaning of the earlier phraseology. Since the Framers took it for granted that no tribe could be subject to state law under the Constitution, it might have been thought redundant to refer expressly to Indians "not subject" to state law. If indeed their object was the avoidance of redundancy, it would appear that by implication the Convention had recognized under the Constitution a broad principle of Indian sovereignty sufficient to immunize the tribes from the force of state law. This interpretation of the Framers' intent neatly cor-

82. U.S. CONST. art. 1, § 8, cl. 3.

83. ART. CONFEDERATION, art. 9, 4.

84. 93 U.S. 188 (1876).

85. *Id.* at 194. See PRUCHA, *supra* note 31, at 42.

86. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (1911-1937) [hereinafter cited as FEDERAL CONVENTION]. Madison's initial objection apparently went unheeded as the Committee of Detail, in charge of drafting the actual text of the Constitution, neglected to include any provision establishing congressional power over the Indians. *Id.*, vol. 2, 321; PRUCHA, *supra* note 31, at 42.

87. 2 FEDERAL CONVENTION, *supra* note 86, at 367, 493, 495, 499. Professor Prucha has noted that there is "little evidence that Indian matters entered into the debates over ratification of the Constitution." PRUCHA, *supra* note 31, at 42 n.2. The original proposal submitted by Madison was that Congress should have the power "to regulate affairs with the Indians . . . ." *Id.* See also C. WARREN, THE MAKING OF THE CONSTITUTION 588-89 (1928).

88. *Id.*

responds to the conclusion reached in *Worcester v. Georgia*<sup>89</sup> establishing that reservation tribes were beyond the pale of state jurisdiction.<sup>90</sup> Although this clause has typically been thought to establish a source of federal power over Indian tribes, it would appear that there is some historical evidence tending to prove that the clause may also be a source of a constitutionally cognizable principle of tribal sovereignty.

Historical interpretations aside, a reading of the clause in its entirety suggests an alternative rationale for constitutionalization. According to the well-established canon of language construction, *noscitur a sociis*, the meaning of a word may be derived from those which it accompanies. The canon is particularly helpful where the subject of construction consists of a string of phrases.

Applying that canon to Article I, Section 8, clause 3, it naturally follows that the meaning of "Indian Tribes" is reflected in the meaning of the words which it accompanies: "States" and "foreign Nations." Both states and foreign nations possess some degree of sovereignty. Hence, Indian tribes possess a degree of sovereignty. The sovereignty of foreign nations is entirely extra-constitutional. The sovereignty of states springs from the Constitution. Thus, by command of the canon, the sovereignty of the tribes must be akin to either the extra-constitutional sovereignty of foreign nations or the derivative sovereignty of the states.

Application of the canon invites the drawing of an analogy. It must be asked whether the sovereignty of the Indian tribes more closely resembles that of foreign nations or that of the federal states. Obviously, the Indian tribes today do not enjoy the unfettered prerogatives of foreign states. Before resolving the issue, the changing sociological conditions of the tribes and the evolutionary nature of Indian law must be taken into account. The answer must be formulated in the context of the Indian's contemporary political status in the scheme of modern federalism. In that light, the limited sovereignty of the tribes, at a functional level, most closely parallels that of the states. Thus, the commerce clause might be interpreted as having implicitly constitutionalized the doctrine of tribal sovereignty since it can be read (1) as recognizing some sort of limited sovereignty in the tribes, and (2) forging a persuasive juristic analogy between the sovereignty of the tribes and that of the states.

89. 31 U.S. (6 Pet.) 515 (1832).

90. *Id.* at 561.

## Congressional Policy Considerations

Although Congress has in the past equivocated between policies of self-determination and termination, recent legislative trends evidence steadfast support of a program of constitutionalization. The passage of the Indian Civil Rights Act of 1968<sup>91</sup> evidences this new congressional endorsement of constitutionalization. Prior to its passage, the general rule, whose parentage can be attributed to *Talton v. Mayes*,<sup>92</sup> had been that the Bill of Rights was not binding on tribal governments. In *Talton*, tribal immunity to the fifth amendment was predicated on the *quasi*-sovereign status of the Cherokees whose "powers of local self-government . . . existed prior to the Constitution . . ."<sup>93</sup> The 1968 Act responded to the inequities arising under the *Talton* rule<sup>94</sup> by replacing the separate extra-constitutional standard applicable to the tribes with one substantially the same as that applied to the state and federal governments.<sup>95</sup> While the Act overtly restricted the exercise of arbitrary power by tribal governments, it did concomitantly accord some congressional recognition of tribal sovereignty.<sup>96</sup> One study noted that the Act "represents a congressional effort to strengthen tribal institutions while drawing them nearer to non-Indian standards."<sup>97</sup> The Act illustrates the intention of Congress to bring the tribes within the conceptual scheme of federalism while simultaneously making more secure their right to tribal autonomy. As such it constitutes a "new policy, not directly descended from either the separationist or the assimilationist line."<sup>98</sup> The new policy is a hybrid policy, similar to the one advanced in this note, which seeks to lessen the anomalous nature of tribal autonomy by making it more analogous to other governmental entities within the federal system. The congressional policy, however, is founded only on a statutory analogy to the

91. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 77.

92. 163 U.S. 376 (1896).

93. *Id.* at 384. See also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 n.3 (1978).

94. See, e.g., *Colliflower v. Garland*, 342 F.2d 369, 377 (9th Cir. 1965); *United States v. Blackfeet Tribal Court*, 244 F. Supp. 474, 478 (D. Mont. 1965); W. BROPHY & S. ABERLE, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* 37 (1966); Comment, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1344 (1969).

95. 25 U.S.C. § 1302 (1970).

96. See *Hearings on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs*, 90th Cong., 2d Sess., ser. 23 at 16 [hereinafter cited as *Hearings on H.R. 15419*] (recognizing "quasi-sovereign" status of the tribes under the act). The language of the statute itself also suggests congressional recognition of residual tribal powers of self-government. 25 U.S.C. § 1301 (1970).

97. Comment, *The Battle for Self-Determination*, 58 CALIF. L. REV. 445, 481 (1970).

98. *Id.*

Constitution, not on the Constitution itself. It is nonetheless indicative of the need to bring theoretical coherence to the doctrine of tribal sovereignty by reworking its constitutional underpinnings.

### *Analogies between State and Tribal Sovereigns*

An additional indication of the trend toward conceptualizing tribal sovereignty in constitutional terms is evident in the frequent case law analogy utilized by modern courts, between the states of the Union and the various tribes. The judiciary probably does not consciously pursue this decisional pattern. Rather, the analytical difficulties which inhere in a *sui generis* legal doctrine such as tribal sovereignty inexorably cause the courts to rely on analogy.

The majority opinion in *United States v. Wheeler*<sup>99</sup> exemplifies this decisional process. The *Wheeler* Court invoked the dual sovereignty doctrine to allow successive tribal and federal prosecutions for offenses arising out of the same circumstances. The doctrine had formerly been applied only to the states.<sup>100</sup> Since the tribal courts in question had been created by congressional statute, there was substantial force in the argument ultimately rejected by the Court that there was an identity of sovereignties between tribal and federal courts. The majority resisted the temptation to analogize the tribe to territories,<sup>101</sup> municipalities,<sup>102</sup> or mere agencies of the federal government.<sup>103</sup> Instead, the Court chose the states as the appropriate analogue<sup>104</sup> in the face of many old precedents which might have been invoked to defeat the analogy.<sup>105</sup>

It is also interesting to note that the standard formulated in *Williams v. Lee*,<sup>106</sup> which tests the legitimacy of state regulatory intrusions on tribal sovereignty, is extremely similar to the standard developed by the Court in *National League of Cities v. Usery*,<sup>107</sup> which determines the legitimacy of federal regulatory intrusions

99. 435 U.S. 313 (1978).

100. *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847).

101. *United States v. Wheeler*, 435 U.S. 313, 318-19 (1978).

102. *Id.* at 320-21.

103. *Id.*

104. *Id.* at 330-32. The analogy is never made entirely explicit but is present in the Court's comparison of the consequences that flow from the application of the dual sovereignty doctrine to the states and to the tribes.

105. See, e.g., *Cherokee Nation v. So. K. Ry.*, 135 U.S. 641, 653 (1890).

106. 358 U.S. 217 (1959).

107. 426 U.S. 833 (1976).

on the sovereignty of the states. In both cases the Court decided that some regulation was permissible as long as it did not unreasonably circumscribe the inherent governmental prerogatives of a limited sovereign.<sup>108</sup> Thus, the Court's conceptualization of a constitutional standard designed to accommodate the competing interests of separate sovereignties in a federal system was strikingly similar where encroachment on state and tribal sovereignties was threatened.

### *Conclusion: The Consequences of Constitutionalization*

Several consequences flow from constitutionalization that appear logically self-evident. First, it should be made clear that the authority of Congress over the tribes would remain largely unimpaired. Constitutionalization, however, would probably extinguish the congressional power of tribal termination. Congress would be free to regulate the tribes just as it had done in the past, except that it could no longer terminate tribal existence. Such absolute power is *prima facie* inconsistent with any notion of constitutionally protected sovereignty. Termination could only be effected with the consent of the tribes. This development would probably be viewed with favor by contemporary Indians who can still remember the governmental and economic debacle that followed earlier congressional attempts to terminate the tribes.<sup>109</sup> Aside from this salutary restriction, Congress would continue to enjoy plenary authority over tribal affairs.

Second, constitutionalization would circumscribe the application of the divestiture-by-implication principle announced in *Oliphant v. Suquamish Indian Tribe*.<sup>110</sup> Constitutionalization would probably raise a strong presumption that the challenged tribal power had not been lost as a result of the intervention of the supervening sovereignty of the United States. Divestiture could only be achieved by meeting a very heavy burden of proof. Plaintiff would have to show, in essence, that the challenged tribal power is inherently inconsistent with subordinate sovereign status in a federal system. In short, plaintiff would have to show that the power which the tribe had attempted to exercise is one which would also be beyond the pale of state authority. Of course, where Congress has withdrawn the power, any attempted exercise

108. *Compare* National League of Cities v. Usery, 426 U.S. 833, 852 (1956), with Williams v. Lee, 358 U.S. 217, 223 (1959).

109. V. DELORIA, CUSTER DIED FOR YOUR SINS 60-82 (1969); WASHBURN, *supra* note 21, at 216.

110. 435 U.S. 191 (1978).



would be conclusively presumed invalid. Since the power denied the tribe in *Oliphant* was one which the states would not normally enjoy by virtue of their inherent constitutional sovereignty, but only by virtue of congressional delegation, that case can be read as being consistent with this new approach.<sup>111</sup>

111. In *Oliphant*, the Court denied the Suquamish Tribal Court the power to assert criminal jurisdiction over a non-Indian, *i.e.*, a citizen of a different sovereignty. Without express congressional consent, states may not assume criminal jurisdiction over the tribes. Here Congress had authorized the assertion of criminal jurisdiction. Thus, it would appear that there is no inherent state power to assert criminal jurisdiction over a citizen from a distinct sovereignty within the federal system.