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A Unified Theory of Indian Tribal Sovereignty

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Introduction

In the rapidly developing field of Indian law, no topic is more frequently the focal point of heated controversy than Indian tribal sovereignty. This debate is due not only to the subject's intrinsic importance in the field, but also to the fact that it is still surrounded by uncertainty after 200 years of treaties, statutes, and court decisions in Indian affairs.

The past two centuries have produced three general areas of legal concern in which sovereignty is considered relevant, but no unified consensus as to its nature and extent has evolved. The purpose of this Article is to derive the proper role of sovereignty in each legal context in which it appears and to interrelate these roles to evolve a theoretically sound and unified concept of Indian tribal sovereignty.

The three distinct subject-matter areas in which sovereignty is an operative principle, and the confused notion of sovereignty which results from looking at each of them in isolation, are illustrated by the arguments presented in *Oliphant v. Suquamish Indian Tribe*,[1] recently decided by the Supreme Court. The issue in *Oliphant* was whether an Indian tribe had jurisdiction to try a non-Indian for a crime committed on its reservation. The Suquamish Tribe argued that sovereignty gave it the power to exercise jurisdiction.[2] The State of South Dakota, as *amicus*, argued that sovereignty is only a tool for measuring the extent of state jurisdiction over Indians.[3] The State of Washington, another

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1. 98 S. Ct. 1011 (1978).

2. Brief for Respondent at 8-9, 11-15.

3. Brief for State of South Dakota at 7-10. The State noted, however, that in this area sovereignty has given way to a preemption analysis. For a discussion of this debate, see notes 146-217 & accompanying text *infra*.

amicus, argued that sovereignty is only a tool for upholding Indian-affairs legislation against equal protection challenges.[4] The role of sovereignty in each of these three areas, tribal power, state jurisdiction and equal protection, will be discussed in turn. A unified and comprehensive theory of sovereignty will then be postulated.

Tribal Sovereignty and Tribal Power

The Constitutional Basis

Direct Reference to the Tribes

At the outset, determining whether tribal sovereignty is conferred or recognized by the Constitution is essential. One direct reference in the Constitution to Indian tribes provides that "Congress shall have Power [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[5] This provision simply grants regulatory power to the federal government. In contrast to the tenth amendment, which specifically divides power between the federal government, the states and the people,[6] and omits any reference to Indian tribes, this provision does not confer or reserve any tribal power.

At the time of the constitutional convention, and for several decades thereafter, Indian tribes were not yet completely within the federal system;[7] hence there was no question of whether the tribes should

4. Brief for State of Washington at 11.

5. U.S. CONST., art. 1, § 8, cl. 3. The two other constitutional references to Indians, which are not references to Indian tribes, are the "Indians not taxed" provisions. *Id.* § 2, cl. 3; *id.* amend. XIV, § 2.

6. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* amend. X.

7. During this period the position of the tribes with respect to the federal system was such that they were not entirely foreign and independent, but neither were they completely subjugated and within the system. The tribes were still an alien force to be reckoned with. "In many regions where settlement impinged on their territory, the tribes were a force that commanded respect, and a people struggling to create a new nation was in no position to stir up needless hostility. Expediency, if no other cause, almost required that sound relations be maintained." D. MCNICKLE, THE INDIAN TRIBES OF THE UNITED STATES 28 (1962) [hereinafter cited as MCNICKLE]. *See also* N. FEY & D. MCNICKLE, INDIANS AND OTHER AMERICANS 51-52, 63 (1959) [hereinafter cited as FEY & MCNICKLE]. The tribes were not able to maintain this imposing status as the nation grew westward. "In later years the tendency was to forget those early years of colonial and national experience, when settlement often could proceed only with the consent of the Indians of a region, and Indian adherence to an agreement was prayerfully sought. Forgetting those earlier times, the tendency was to hold Indian treaties in contempt. Andrew Jackson himself, before he became Chief Executive, reflected the sentiment. Writing to President Monroe, in 1817, he declared: 'I have long viewed treaties with the Indians an absurdity not to be reconciled to the principles of our government.'" MCNICKLE, *supra*, at 34-35. *See also* FEY & MCNICKLE, *supra*, at 91-92. "The same doctrine was bluntly set forth by Jackson's attorney general, John M. Ber-

have independent power within that system. From the time of the Articles of Confederation[8] through the constitutional convention,[9] the predominant issue appears to have been only whether Indians and Indian tribes would be subject to state or federal regulation. There was no concern with whether to accord an independent status to the tribes within the constitutional framework. Thus, when the tribes eventually became fully subject to federal power, they "entered" the federal system without a constitutionally defined place. Their status under the Constitution is that of separate entities, recognized as such by the commerce clause, but entities without defined governmental authority because no power was delegated to or recognized as residing within the tribes under the tenth amendment. In addition, although the issue of whether state or federal law should govern the tribes was resolved in favor of the federal government in the commerce clause, the division of power in the tenth amendment implies that once a tribal member left the tribe, or a tribe itself became disestablished, state law would govern the individual member.

The treaty power

The power granted to the President and the Senate to make treaties[10] is considered to be a constitutional provision implicitly dealing with the status of Indian tribes.[11] Now, however, the provision must

rien, who insisted that the United States had granted peace to the Cherokees in 1785 as a 'mere grace of the conqueror.' The argument might have sounded plausible in 1830, but it should be considered in light of the actions of the Continental Congress in 1783 and the years following, when a most nervous anxiety to get peace signed with the Indians was indicated. Congress did not look much like a conqueror imposing terms on the conquered Indians. She was seeking to keep the Indians at peace at all costs, rather than risk any more hostilities, which the new weak nation could ill afford." F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 236-37 (1962) (footnote omitted).

8. Article IX of the Articles of Confederation gave Congress the right to regulate trade and manage affairs with the Indians as long as there was no infringement of state legislative power.

9. The constitutional convention limited federal power to the regulation of commerce only, and deleted language concerning Indians who were subject to state law. James Madison introduced a proposal giving Congress power to "regulate affairs with the Indians as well within as without the limits of the United States." A committee narrowed this to give Congress the power to "regulate commerce with foreign nations and among the several states, and with the Indians, within the limits of any state, not subject to the laws thereof." F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 42 (1962). The deletion of any reference to state authority was deemed significant by Chief Justice Marshall in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558-59 (1832).

10. U.S. CONST. art. II, § 2, cl. 2.

11. The commerce and treaty making powers and the power to make war were said to confer upon the federal government "all that is required for the regulation of our intercourse with the Indian tribes." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

be read together with the Act of March 3, 1871, which provided that the United States would no longer make treaties with Indian tribes: "[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ."[12] Cessation of the practice of treating with the tribes reflects the historical developments that occurred between 1789 and 1871. The demographics of the growing nation had changed dramatically, with the eastern tribes subjugated and removed, and total Indian land holdings greatly reduced.[13] Legally, the tribes were no longer dealt with as partially outside and separate from the federal system,[14] but rather as having come fully within it.[15]

12. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544 (codified at 25 U.S.C. § 71 (1976)).

13. The effect of the events of the times upon many of the southern, eastern and Great Lakes tribes has been summarized as follows: "In the succeeding ten years [after 1830] the Atlantic and Gulf States were cleared of the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles . . . .

The Ohio River and Great Lakes tribes were also rounded up and removed . . . .

. . . .

. . . Hardly had some of the tribes settled down, in Kansas, Iowa, and Nebraska, than they were told they could not stay . . . .

The tribes from the south-east, now come to be designated the Five Civilised Tribes because of the progress they had made in adopting the white man's culture, establishing schools, courts, tax systems, and formal governments, they too found that perpetuity had a short life." MCNICKLE, *supra* note 7, at 40-41. During the 50 years following 1830, the "geography of the country [was] dramatically altered and Indian occupancy reduced to something rather similar to its present land base." Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV.1213, 1223 (1975). *See also* FEY & MCNICKLE, *supra* note 7, at 93.

14. For a discussion of the relationship between the events of the mid-nineteenth century and the 1871 statute, see MCNICKLE, *supra* note 7, at 44; Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1347 (1969) [hereinafter cited as Note].

15. The direct impetus for the 1871 statute was the desire of the House of Representatives to have an equal role with the Senate in the formulation of Indian policy. Antoine v. Washington, 420 U.S. 194, 202 (1975). The statute had direct application only to the question of how Congress would henceforth deal with the tribes. *Id.* at 203. *See also Hearings on the Constitutional Rights of American Indians Before the Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 87th Cong., 1st Sess. 16 [hereinafter cited as *1961 Hearings*], in which an Interior Department official remarked that "the legal philosophy that a tribe constituted an autonomous dependent group for other purposes remained unchanged."

Although the statute did not affect the federal power over Indian affairs and did not destroy the tribes as autonomous groups for all purposes, it did reflect the diminished position in which the tribes had been placed. MCNICKLE, *supra* note 7, at 44; FEY & MCNICKLE, *supra* note 7, at 59. For whatever reasons, Congress prohibited "recognition of Indian nations and tribes as sovereign independent nations." Antoine v. Washington, 420 U.S. 194, 201 (1975). The Act thus confirms the fact that the tribes had come fully within the federal system. The federal government would no longer recognize them as external

Discontinuance of treating with the tribes in 1871 is a practical illustration that the Constitution does not require continuing recognition of tribes as governmental entities.[16] The present relevance of the treaty power lies in the broad legislative power regarding Indian affairs conferred on Congress by past treaties.[17] Areas of activity arguably outside the scope of the commerce power were entered upon by the federal government under the treaty-making power. These areas are now appropriate subjects for congressional enactments.[18] Thus the treaty clause has come to be a source of federal legislative power over Indian affairs.[19]

Moreover, Congress may, by statute, modify or completely abrogate treaties,[20] or continue them in force. In the 1871 Act, Congress provided for the general continuation of treaties already in force.[21] In theory, any element of tribal sovereignty expressly or impliedly recognized in the treaties remained in force after the 1871 Act. If a treaty made before 1871 provided for tribal self-government, the right of self-government was continued. If a treaty contained or implied a recognition of some lesser kind or degree of tribal sovereignty, that sovereignty was continued.[22] Thus, when the tribes came fully within the federal system, most of them retained, by consent of Congress, some degree of sovereignty.

While the Constitution did not itself guarantee tribal sovereignty, it provided the means by which the federal government could choose to recognize tribal governmental authority. The federal government did in fact treat with the tribes as sovereign entities until 1871, when it determined that tribes would not be recognized as sovereigns prospectively. Varying degrees of sovereignty, as embodied in particular trea-

sovereigns, but would allow them to retain some degree of autonomy by legislative grace. This change indicates a congressional recognition and adoption of the principle that "Indian tribes—brought into our system by force and continuing geographically apart from other citizens—are culturally much more different from mainstream America than any other group within our system."

16. The same can be said of several later statutes, which abolish tribal organizations or reduce tribal powers. See notes 24-54 & accompanying text *infra*.

17. See text accompanying notes 221-85 *infra*.

18. A prior treaty may have the effect of conferring upon Congress legislative power which it would not otherwise possess. Missouri v. Holland, 252 U.S. 416 (1920).

19. See note 11 *supra*.

20. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

21. See note 12 & accompanying text *supra*.

22. Williams v. Lee, 358 U.S. 217, 221 (1958), held that the 1868 treaty with the Navajos contained an implied grant of tribal governmental power over internal affairs, and that the treaty right "survived" the 1871 Act. *Id.* at 221 n.7.

ties, are continued to the present day, unless modified by subsequent statutes.

Legislative Treatment

The Trade and Intercourse Acts

The history of congressional dealings with Indian tribes reflects the inconsistency in attitudes among the American people toward the Indian tribes. Before the 1871 Act, the most significant legislative acts relating to tribal government were the Trade and Intercourse Acts, enacted between 1790 and 1834. The acts provided for the licensing of Indian traders, prohibited the sale of lands by Indians without federal consent, and established a scheme for the regulation of criminal conduct in Indian country.[23] These acts were an early and comprehensive exercise by the federal government of the power to regulate Indian affairs recently conferred by the Constitution. The content of the acts reflects the relatively foreign position the tribes occupied with respect to the federal system. The acts were designed to minimize and regulate contact between settlers and Indians. When westward expansion rendered the policies of isolation, containment, and removal inadequate, the General Allotment Act was passed to inaugurate a new federal policy.

The Allotment Acts

The General Allotment Act of 1887[24] had a major impact on tribal government and embodied the dominant federal Indian policy for approximately five decades. It provided for the allotment of tribally held lands in severalty to individual Indians. The allotments were to be held in trust for the individuals by the federal government, with restrictions on the individual's right to use and alienate the land, for a period of twenty-five years. The "surplus" land in a reservation that was not required for the allotments was opened to settlement by non-Indians. Individual Indian allottees were declared American citizens, and were to become subject to state law when the twenty-five year trust period

23. Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743 (expired); Act of May 19, 1796, ch. 30, 1 Stat. 469 (expired); Act of Mar. 1, 1793, ch. 19, 1 Stat. 329 (repealed); Act of July 22, 1790, ch. 33, 1 Stat. 137 (obsolete). *See generally* F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS (1962).

24. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 381 (1976)).

ended.[25]

The General Allotment Act provided that the President could make allotments on any reservation.[26] In some cases, a treaty already included a provision allowing for allotments to be made in the future.[27] Usually, Congress did not wait for the President to act under the General Allotment Act or treaties, but passed a specific statute directing the making of allotments on a particular reservation and the opening of the surplus lands to settlement. Such acts were the normal congressional response for the forces of westward expansion. In many cases, Congress disestablished a reservation or portion of a reservation by the opening legislation, although not every surplus-land act had this effect.[28]

In some treaties, the provision for possible future allotments required tribal consent to the allotment process. In *Lone Wolf v. Hitchcock*,[29] the Supreme Court held that Congress could unilaterally make allotments and open surplus lands without the tribal consent specified by a treaty. Although the tribal lands were sometimes allotted without tribal consent, there normally was some provision made for compensation to the tribe.[30]

The allotment acts were intended to achieve the dissolution of tribal governments and the assimilation of Indians into the federal/state

25. *Id.* § 6.

26. *Id.* § 1.

27. *E.g.*, Treaty with the Sioux, April 29, 1868, 15 Stat. 635, art. VI; Treaty with the Yancton Sioux, April 19, 1858, 11 Stat. 743, art. X; Treaty with the Washington Tribes, Jan. 22, 1855, 12 Stat. 927, art. VII. In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1977), the relevant treaty did not mandate allotments but required the consent of the members of the tribe before tribal land could be allotted. *See also* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

28. *Compare* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) *and* DeCoteau v. District County Court, 420 U.S. 425 (1975) *with* Mattz v. Arnett, 412 U.S. 481 (1973) *and* Seymour v. Superintendent, 368 U.S. 351 (1962). The Congressional Record during the period of these statutes contains numerous clear statements that the policy of the era was to partially or completely disestablish the reservations. *E.g.*, 19 CONG. REC. 1928 (1888); 26 CONG. REC. 6236, 7689-697 (1894); 36 CONG. REC. 1278-281 (1903); *see* Comment, *New Town, et al.: The Future of an Illusion*, 18 S.D.L. REV. 85 (1973).

29. 187 U.S. 553 (1903).

30. In some cases the land was made available on a "free homestead" basis, while in others the settlers were required to make payments in order to claim the land. The payments made were normally placed in an account to be held in trust for the members of the tribe. DeCoteau v. District County Court, 420 U.S. 425, 432 (1975). Regarding the management of the trust account, see Note, *Indian Tribal Trust Funds*, 27 HASTINGS L.J. 519 (1975).

governmental structure as individual citizens.[31] By unilaterally directing the disposal of tribal lands, Congress verified that there is no right of tribal self-government enforceable against the federal government. Like the 1871 statute, the allotment acts did not remove *de jure* any tribal powers or any particular elements of sovereignty the tribes possessed. In terms of practical effect, however, the allotment acts dealt tribal government a more debilitating blow than had the 1871 statute, which expressly ended the tribes' sovereign status prospectively.

The acts also reflected the growing desire of the states to legislate as to matters of state concern within state territory. In fact, the most significant general legislation regarding Indians between 1887 and the 1930's authorized the states to enforce state health, sanitation, and school-attendance laws on reservations and tribal lands.[32]

The Indian Reorganization Act

The next general legislation dealing with tribal power was the Indian Reorganization Act of 1934.[33] The Act gave tribes authority to adopt constitutions and corporate charters.[34] The Secretary of the Interior was given authority to restore surplus lands to tribal ownership,[35] to create new reservations,[36] and to acquire land in trust for Indians.[37] Further allotment of tribal lands was prohibited.

The Reorganization Act was intended to preserve[38] and "stabilize the tribal organization . . . with real, though limited, authority."[39] Section 16 of the Act provided as follows:

31. DeCoteau v. District County Court, 420 U.S. 425, 432 (1975). See also note 28 *supra*.

32. 25 U.S.C. § 231 (1976).

33. Act of June 18, 1934, Pub. L. No. 383, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-79 (1976)).

34. *Id.* §§ 476-77.

35. *Id.* § 463.

36. *Id.* § 467.

37. *Id.* § 465.

38. *Id.* §§ 461-77. The Act clearly was intended to enhance tribal government in the short run. It is not clear, however, whether it was intended to preserve tribal government permanently. Both the Meriam Report, which resulted from a study requested by the government, and a summary of the Roosevelt Administration policy adopted the goal of facilitating the economic advancement of Indians so that they would be "absorbed into the prevailing civili[z]ation" as "an integral part of American life." *See* MCNICKLE, *supra* note 7, at 56-57. The strengthening of tribal governments may have been intended as only a step in the process of integration, or it may have been intended to be the permanent means by which Indians were to take their place in the spectrum of American life. *See* JOSEPHY, AMERICAN INDIAN POLICY 51 (1971); FEY & MCNICKLE, *supra* note 7, at 132.

39. S. REP. NO. 1080, 73rd Cong., 2d Sess. 1 (1934).

> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel . . . to prevent the sale, disposition, lease, or encumbrance of tribal lands . . . and to negotiate with the Federal, State, and local Governments.[40]

The exact meaning of this section is not clear from the Act, but it would appear that powers originally held by tribes that were recognized and allowed to be retained by treaties or prior statutes, as well as any additional powers conferred in the same manner, would be retained by tribes that accepted the terms of the 1934 Act. This provision made it clear to tribes choosing to come under the Act that they would not be giving up powers derived from other laws.[41] The provision is consistent with the act's purpose of enhancing tribal government in that it recognized and reconfirmed those powers a tribe may already have had as a government.

Section 16 is also completely consistent with the 1871 statute quoted above. Both statutes prescribed a new prospective role for the tribal entities without removing whatever rights and powers had been conferred upon or allowed to be retained by each tribe in the past. By enacting comprehensive legislation establishing and defining powers of tribes, Congress once again exercised its power to regulate tribal affairs without interference from any constitutional right of tribal sovereignty.

Public Law 280 and the Termination Acts

A partial exercise of the congressional power over tribal government occurred in the 1940's and 1950's when Congress conferred limited jurisdiction over reservation Indians upon certain states.[42] In 1953, Congress passed the law that is now commonly referred to as "Public Law 280," giving federal consent to states that desired to acquire civil and criminal jurisdiction over tribal Indians.[43]

40. 25 U.S.C. § 476 (1976).

41. Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085, 1086 n.4 (8th Cir. 1977).

42. Crain v. First Nat'l Bank, 324 F.2d 532 (9th Cir. 1963). *See also* Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Menominee Tribe v. United States, 391 U.S. 404 (1968).

43. Act of June 8, 1940, Pub. L. No. 565, 54 Stat. 249 (repealed 1948) (current version at 18 U.S.C. § 3243 (1976)) (Kansas); Act of May 31, 1946, Pub. L. No. 394; 60 Stat. 229 (North Dakota); Act of June 30, 1948, Pub. L. No. 846, 62 Stat. 1161 (Iowa); Act of July 2, 1948, Pub. L. No. 881, 62 Stat. 1224 (New York). By the Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588, Congress conferred full or partial jurisdiction as to both criminal offenses and civil causes of action arising within Indian country upon California, Minnesota, Nebraska, Oregon and Wisconsin. Alaska was added to this list by the Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545. Regarding the experience in California, see Note, *The*

In the 1950's and 1960's, Congress exercised the power to regulate Indian affairs in a manner even less hospitable to tribal governments. Under various "termination acts," the tribal governmental authority of specified tribes was completely extinguished.[44] While the policy of those acts has subsequently come into disfavor,[45] the acts have been held to be constitutionally valid.[46] It is evident, then, that tribal sovereignty as an independent right of self-government exists only by authority and permission of Congress. Termination could not have taken place if a constitutional right of tribal sovereignty existed.

The Indian Civil Rights Act

In an attempt to reverse federal hostility towards tribal self-government while bolstering rights of tribal members,[47] Congress passed the Indian Civil Rights Act in 1968. This Act made provisions similar to those in the Bill of Rights applicable to Indian tribal government.[48] This Act restricted tribal sovereignty by imposing limitations on the manner in which tribal powers could be exercised; it did not, however, destroy specific sovereign powers a tribe might possess. From the broad guarantees of individual rights imposed upon tribal governments it can be implied that Congress recognized that the tribes had general governmental powers. The relatively insignificant powers enumerated in the 1934 Reorganization Act and conferred upon tribes would not have required any guarantees of the type imposed by the Civil Rights Act; obviously, general governmental powers were considered to be among the powers "vested . . . by existing law" in most tribes.[49]

Extension of County Jurisdiction over Indian Reservations in California: Public Law 280 and the Ninth Circuit, 25 HASTINGS L.J. 1451 (1974).

44. Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588. The Act was amended in 1968 to require that an affected tribe consent to assumption of jurisdiction by a state pursuant to this federal consent. Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 78 (codified at 25 U.S.C. §§ 1321-1326 (1976)).

45. *E.g.*, 25 U.S.C. § 564 (1976) (Klamath tribe); 25 U.S.C. § 691 (1976) (Western Oregon Indians); 25 U.S.C. § 741 (1976) (Paiutes); 25 U.S.C. § 891 (1976) (Menominees); 25 U.S.C. § 971 (1976) (Poncas). Various treaties that provided for allotment of tribal lands to members and dissolution of the tribe also evidence the federal power to completely terminate the tribal entity. *See, e.g.*, Treaty with the Ottowas and Chippewas, July 31, 1855, 11 Stat. 621; Treaty with the Wyandottes, Jan. 31, 1855, 10 Stat. 1159.

46. Bryan v. Itasca County, 426 U.S. 373, 387-89 (1976); MESSAGE OF PRESIDENT NIXON TO CONGRESS, JULY 8, 1970, H.R. DOC. NO. 91-363, 91st Cong., 2d Sess. (1970).

47. Santa Clara Pueblo v. Martinez, 98 S. Ct. 1670, 1679-80 (1978).

48. 25 U.S.C. § 1302 (1976). The Bill of Rights itself does not apply to Indian tribes. Talton v. Mayes, 163 U.S. 376 (1896); *cf.* United States v. Wheeler, 98 S. Ct. 1079 (1978) (double jeopardy does not bar federal prosecution after tribal court trial for lesser included offense).

49. 25 U.S.C. § 476 (1976). Indeed, at least one staff document prepared in connection

The focus of the Civil Rights Act was upon the rights, particularly constitutional rights, of American Indian tribal members. The Act, however, applies to any person affected by the exercise of tribal power.[50] The congressional understanding behind the Act seems to have been that tribes had extensive power over their members and some unspecified power over nonmembers.[51] The criminal jurisdiction provisions of the Intercourse Act amendments had placed crimes in Indian country under federal jurisdiction, except that the tribes had jurisdiction over crimes between their own members and "any case" where jurisdiction was given to the tribe by treaty.[52] The reference to "any case" indicates that some tribes may have been given jurisdiction by treaty over crimes committed by nonmembers,[53] along with the full criminal jurisdiction the tribes exercised over their members.[54] In the recent case of *Oliphant v. Suquamish Indian Tribe*,[55] the Supreme Court deemed the purpose of the application of the ICRA to non-Indians to have been to cover special cases where jurisdiction over non-Indians was conferred upon a tribe by treaty or statute.[56]

Summary

The Constitution and statutes show that Indian tribes, while recognized as separate entities by the Constitution, do not have constitutionally guaranteed powers as sovereigns, enforceable against the two sovereigns of the federal system. Through the Constitution, the states

with the Indian Civil Rights Act subscribed to the theory that tribal powers are inherent and retained unless limited by federal action: "Treaties, applicable State and Federal law, and the body of relevant administrative law and practice are to be viewed, thus, as limitations on—and not as conferrals of—the powers of tribal government." SUBCOMM. ON CONST. RIGHTS OF THE SENATE JUDICIARY COMM., 89TH CONG., 2D SESS. SUMMARY REPORT ON THE CONSTITUTIONAL RIGHTS OF AMERICAN INDIANS, 1 (Comm. Print 1966).

50. Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969).

51. No hearings were held on possible infringement of the rights of non-Indians by tribes. In fact, a comment on the Civil Rights Act made the flat statement that the tribes have no jurisdiction over non-Indians. Note, *supra* note 14, at 1356-57. The testimony in the Indian Civil Rights 1961 Hearings, however, on which this statement is based, was actually to the effect that particular tribal constitutions and codes did not permit the exercise of nonmember jurisdiction. *1961 Hearings, supra* note 15, at 385, 679.

52. Act of Mar. 27, 1854, ch. 25, 10 Stat. 269 (current version at 18 U.S.C. § 1152 (1976)).

53. Some early treaties expressly provided for such jurisdiction. Treaty with the Wyandottes, Jan. 21, 1785, art. V, 7 Stat. 16; Treaty with the Cherokees, July 2, 1791, art. VII, 7 Stat. 39.

54. This language has been carried forward and is presently contained in 18 U.S.C. § 1152 (1976).

55. 98 S. Ct. 1011 (1978).

56. *Id.* at 1014 n.6.

relinquished their power to negotiate treaties and regulate commerce with the tribes to the federal government. The federal government recognized tribal sovereignty in fact in varying degrees. Early on, attributes of sovereignty were conferred upon tribes or allowed to be retained by them, through both treaties and legislation, because the tribes in fact possessed elements of external sovereignty during the period of actual hostilities.[57] When the tribes came fully within the federal system, the federal power to deal with them came to be exercised entirely by legislation, rather than by treaty. The attributes of sovereignty which are retained are retained by Congressional permission.

Judicial Interpretations

The early period

The Supreme Court generally has kept pace with the changing attitude of the federal government toward the tribes, as outlined by the Constitution and statutes. No real question of constitutional tribal status could exist while a relatively weak federal government tried to make peace with the strong, hostile, and distinctly sovereign tribes.

While the status of the tribes during the beginning of the expansionist period is best described, with the benefit of hindsight, as in a state of flux, it was not necessarily so perceived at the time. The difficulty in defining the tribes' status as late as 1831 is reflected in the opinions in *Cherokee Nation v. Georgia*.[58] The issue was whether the tribe was a "foreign state" for purposes of the original jurisdiction of the Supreme Court. The majority opinion by Chief Justice Marshall held that the tribe was a state in that it had powers of sovereignty over its members and affairs, but that it was not a foreign state, being within the jurisdictional limits of the congressional power to regulate commerce.[59] Marshall also noted that the tribe was partly dependent upon the federal government under the terms of its treaties, and called it a "domestic dependent nation."[60] The dissent by Justice Thompson agreed that the tribe was sovereign on its remaining lands, but disagreed that it was a domestic dependent nation, finding it to be a foreign state.[61] Finally, the concurrences of Justices Johnson and Baldwin maintained that the tribe was completely conquered and no

57. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1971).
58. 30 U.S. (5 Pet.) 1 (1831).
59. *Id.* at 16-17.
60. *Id.*
61. *Id.* at 53.

longer a sovereign state.[62] It could, therefore, regain its sovereign status only by departing entirely from the domain of the conqueror.[63] Thus, one view found the tribe to be a sovereign, foreign to the federal system; one found it to be completely within the federal system and no longer sovereign; and the opinion of the Court found a compromise status for the tribe, and a federal-tribal relationship "perhaps unlike that of any other two people in existence."[64] Justice Marshall's opinion coincides with the interpretation of the status of the tribes under the Constitution discussed above:[65] the tribes were separate governmental entities which were sovereign as to internal affairs, but which possessed no external authority and consequently were subject to regulation by the federal government under the commerce clause. In *Worcester v. Georgia*,[66] Justice Marshall also addressed the question of the tribes' status under the tenth amendment division of powers.

In *Cherokee Nation* the tribe had sought to enjoin enforcement of certain state statutes. In *Worcester v. Georgia*, a non-Indian was prosecuted for violating one of these statutes, a Georgia law governing activities within the territory of the Cherokee. The state statutes were held unconstitutional under the supremacy clause, as inconsistent with treaties and the Intercourse Acts.[67] The treaties and acts were construed as leaving the tribe a distinct political community with "territorial boundaries, within which their authority is exclusive."[68] The opinion, again written by Marshall, does not explicitly state whether the tribal powers of self-government were derived directly from the treaties and statutes, or whether the powers were inherent tribal powers never divested by the United States. The opinion states that by making treaties with the Indians the United States "admits their rank among those powers who are capable of making treaties,"[69] and that the treaty in question "explicitly recogniz[ed] the national character of the Cherokees, and their right of self-government."[70] But regardless of whether the United States conferred the power or merely allowed it to be retained, the opinion does make it clear that this federal conferral or

62. *Id.* at 27-28 (Johnson, J., concurring); *id.* at 47-50 (Baldwin, J., concurring).
63. *Id.* at 27.
64. *Id.* at 16.
65. See text accompanying notes 5-22 *supra*.
66. 31 U.S. (6 Pet.) 515 (1832).
67. *Id.* at 559-61.
68. *Id.* at 557.
69. *Id.* at 559.
70. *Id.* at 556.

recognition prevents the states from exercising governmental power.[71] Marshall had rejected the view of Justice Thompson in *Cherokee Nation* that the tribes were foreign states outside the federal system whose sovereignty could have been directly exercised against the states. Instead, Marshall had held in *Cherokee Nation* that the tribes were dependent upon and protected by the federal government. In *Worcester*, it was this protection that was held to preempt state regulation of Indian affairs. Having found the tribes to be domestic, dependent nations instead of foreign states, Marshall now applied the constitutional division of powers between the states and the federal government to Indian affairs.[72]

The concurring opinion of Justice McLean in *Worcester* addressed the problem of federal preemption of Indian affairs in a manner that recognized the changing status of the tribes as their lands were enclosed by westward settlement, and the prevailing attitude that favored assimilation of tribal members into the general governmental structure. Justice McLean agreed with the majority as to the bases of federal jurisdiction,[73] but went on to state that the policy of the federal government was to extinguish gradually the independent sovereignty of the tribes.[74] He recognized that the federal government protected the tribal powers of self-government recognized in treaties and law,[75] but thought that when the tribe had ceased to exercise these powers the federal preemptive laws would no longer apply. In that event, state law would govern as to the former tribal members and lands.[76] Preemption involved both an empirical determination of the status of a tribe *vis-à-vis* the surrounding community, and an interpretation of applicable laws and treaties.

Justice McLean again applied this empirical approach in *United States v. Cisna*,[77] a circuit court case that held the Wyandotts' twelve-square-mile reserve in Ohio had become so integrated with the surrounding non-Indian community that the commerce clause no longer conferred any power upon Congress with respect to the tribe, so that

71. *Id.* at 556, 559.

72. See text accompanying notes 146-52 *infra*.

73. 31 U.S. (6 Pet.) at 578. McLean stated that the Cherokees were "placed by the federal authority, with but few exceptions, on the same footing as foreign nations." *Id.* at 581.

74. *Id.* at 593-94.

75. *Id.*

76. *Id.* This result might occur when the tribe was "so degraded or reduced in numbers, as to lose the power of self-government." *Id.* at 593.

77. 25 F. Cas. 422 (C.C.D. Ohio 1835) (No. 14,795).

the 1802 Intercourse Act no longer applied to them.[78] Although enunciated in theoretical terms by the court, the basis for this approach may also be found in the relevant statute. The 1802 Intercourse Act had provided that it would not apply to "Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states."[79] *Cisna* may be read as interpreting this provision.[80] As a general theory, the empirical test for preemption has had little acceptance beyond this early period. Thus, the Supreme Court recently applied the same rule to Montana's attempt to tax the relatively assimilated Salish and Kootenai Tribes.[81] Also, in cases presenting the question of whether a surplus land act disestablished a reservation or merely opened it to non-Indian settlement, the Supreme Court held that "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress."[82] In rare instances[83] when the Court appears to have engaged in an empirical examination, it has regarded the full original reservation as no longer being in existence because of either congressional action or the empirical facts of its subsequent history.[84]

The empirical test for preemption put forth by Justice McLean may be regarded primarily as an expression of the recurring federal

78. *Id.* at 425. A purely empirical approach to the question of criminal jurisdiction had been used before *Worcester* and *Cisna* by Chancellor Kent in Goodell v. Jackson, 6 N.Y. 1164, 20 Johns. 693 (1823). *Cisna* and *Goodell* were relied upon in State v. Foreman, 16 Tenn. (8 Yer.) 256 (1835), which upheld a Tennessee statute extending state criminal jurisdiction to crimes committed by Indians in Indian country.

79. Act of Mar. 30, 1802, ch. 13, § 19, 2 Stat. 139, 145.

80. The *Goodell* and *Foreman* cases were both state cases which upheld the application of state law on various grounds, including necessity. The *Foreman* case also held that, based on their empirical situation, the Indians were beyond the constitutional power of Congress to regulate commerce with Indian tribes.

81. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 476 (1976).

82. United States v. Celestine, 215 U.S. 278, 285 (1909). Congress need not, however, *expressly* disestablish a reservation. The intent to do so may be found in the legislative history and surrounding circumstances of an act of Congress, or may simply be implied from the passage of an act which is clearly inconsistent with the notion of a continuing reservation. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968) (Stewart, J., dissenting).

83. See Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165 (1977), where the Court held that the tribe did not have an exclusive right to conduct "on-reservation" fishing free of state regulation because the "subsequent history" indicated that the Indians had in fact alienated nearly all of the original reservation land and did not hold the fishing grounds for their exclusive use. *Id.* at 174. The Court did not pass on the continuing existence of the reservation itself.

84. *Id.* at 173 n.11. *See* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968) (Stewart, J., dissenting).

policy in favor of assimilation of the tribes, and possibly as a precursor of the policy of the Allotment Acts of the 1880's.[85] As a general theory of preemption the empirical test had little acceptance beyond this early period. The theory correctly perceived a gradual change in the status accorded the tribes. Subsequent cases, however, have adhered to an examination of the applicable treaties and laws without considering the extent to which the tribes are exercising particular powers or preserving their separateness.

The post-1871 cases

The Supreme Court's acknowledgement of the evolution of tribal status in relation to the federal government may be illustrated by two major cases, *Ex Parte Crow Dog*,[86] decided in 1883, and *United States v. Kagama*,[87] decided three years later. In *Crow Dog*, the Court examined the 1868 treaty[88] and the 1877 agreement[89] with the Sioux along with the Intercourse Act of 1834[90] to determine whether a federal court could exercise jurisdiction over an Indian who had committed a crime against another tribal member. The Intercourse Act of 1834 had applied federal enclave law to Indian country, except as to such crimes.[91] However, the 1868 treaty with the Sioux contained the frequently used[92] provision that the tribe would "deliver up" to the federal government for punishment any "bad men among the Indians" who had committed a crime.[93] In addition, the 1877 agreement provided: "Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life."[94] The government argued that these provisions repealed the exception contained in the 1834 Intercourse Act and placed crimes by Indians against Indians under federal jurisdiction as to the Sioux. The Supreme Court held that the "deliver up" provision did not apply to cases where both the criminal and the victim were of the same tribe.[95] Further, the Court interpreted the "orderly government"

85. See notes 24-32 & accompanying text *supra*.
86. 109 U.S. 556 (1883).
87. 118 U.S. 375 (1886).
88. Treaty with the Sioux, Apr. 29, 1868, 15 Stat. 635.
89. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254.
90. Intercourse Act of July 2, 1834, ch. 161, 4 Stat. 729.
91. 18 U.S.C. § 1152 (1976).
92. M. PRICE, LAW AND THE AMERICAN INDIAN 24 (1973).
93. Treaty with the Sioux, Apr. 29, 1868, 15 Stat. 635.
94. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254, 256.
95. The Court held it "clear from the context that this does not cover" a crime by one

provision to mean that the United States would allow tribal self-government, not that the United States would govern the tribe directly.[96] The opinion suggested that one of the bases for this interpretation was that the tribe was an entity "with whom the United States was contracting as a distinct political body."[97]

The Court's acknowledgement of a right of self-government in the Sioux is consistent both with the interpretation of the constitutional status of the tribes advanced above,[98] and with the statutory policy of the time regarding tribal sovereignty. The Court recognized that as long as the tribes were being dealt with under the commerce clause and the treaty-making powers, they retained a degree of autonomy relative to their position as distinct political entities. However, to the extent the tribe had come within the federal system, federal law would apply, in accordance with the provisions of the tenth amendment. The extent to which the tribal right to self-government should be recognized will be determined by looking to the relevant treaties and statutes.

In *Crow Dog*, examination of the treaty and consideration of the fact that the tribe had been dealt with by treaty at all, led to an interpretation of its provisions that favored tribal sovereignty.[99] So long as the treaty was in force and not superseded by a later inconsistent statute, the sovereignty recognized by the treaty provisions was retained. This holding illustrates the continuing validity of the treaties under the provisions of the 1871 act, which continued in effect any powers granted to or recognized as being retained by the tribes in treaties.[100] The Court also determined that the 1834 Intercourse Act similarly recognized the degree to which the tribes were still beyond the federal system, by quoting a previous holding that the act applied only to "those semi-independent tribes whom our government has always recognized as exempt from our laws."[101]

tribal member against another. 109 U.S. at 567. Presumably the context was the punishment of persons who had crossed a sort of jurisdictional line—either Indians and non-Indians committing crimes against each other, or intertribal criminal acts.

96. *Id.* at 568-69. "[T]he regulation by themselves of their own domestic affairs; the maintenance of order and peace among their own members by the administration of their own laws and customs." *Id.*

97. *Id.* at 568.

98. See text accompanying notes 5-22 *supra*.

99. 109 U.S. at 571-72.

100. See text accompanying notes 21-22 *supra*.

101. *Id.* at 572 (quoting United States v. Joseph, 94 U.S. 614, 617 (1876)). The holding of the *Joseph* case quoted by the Court regarding the Pueblo Indians was essentially overruled in United States v. Sandoval, 231 U.S. 28 (1913). The *Sandoval* decision stated that Congress, not the courts, should determine when an Indian tribe should be released from

A degree of empirical analysis is evident in *Crow Dog*, as the Court noted that the Sioux were in basically the same relationship to non-Indian communities at the time of the decision in 1883 as they had been at the time of the treaty in 1868. The result of the case was therefore appropriate to the facts. Although it is unclear from the discussion in *Crow Dog*[102] whether the treaty and statutory provisions would have controlled if the tribe had been less independent in 1883 than when the treaty was signed, the decision in *United States v. Kagama*[103] left no doubt that when a tribe enters the federal system any external sovereignty which the tribe might have possessed is extinguished.

In *Kagama*, the Supreme Court upheld the Major Crimes Act,[104] passed in response to the *Crow Dog* decision, and placed under federal jurisdiction certain serious offenses committed by one Indian against another. The Court held that the tribes could no longer claim any sovereignty external to the federal system: "[T]hese Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two."[105] Thus, the tribes were found to have come within the federal system without occupying a position of sovereignty therein.

In cases subsequent to *Kagama*, the Court upheld numerous federal acts on the basis of the broad federal power over Indian affairs. For example, in *Cherokee Nation v. Southern Kansas Railway*,[106] *Stephens v. Cherokee Nation*[107] and *Cherokee Nation v. Hitchcock*,[108] the Court upheld pervasive federal legislation affecting the Cherokees. The Court attempted to reconcile the exercise of federal power over the tribe with the language of tribal sovereignty in *Worcester*, an opinion written at a time when the Cherokees did in fact possess elements of sovereignty external to the federal system. By the time of *Stephens* in 1899, however, they were fully subject to regulation by Congress.[109]

federal protection. The Pueblos were found to be entitled to federal aid and protection on the basis of a uniform course of legislation and executive action, instead of on the basis of their separateness from the surrounding non-Indian population. *Id.* at 45-47.

102. 109 U.S. at 568-71.

103. 118 U.S. 375 (1886).

104. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. § 1153 (1976)).

105. 118 U.S. at 379.

106. 135 U.S. 641 (1890).

107. 174 U.S. 445 (1899).

108. 187 U.S. 294 (1902).

109. As stated in *Cherokee Nation v. Hitchcock*: "[T]he United States practically as-

The Court in *Stephens* noted the legal change in the tribe's status, but stressed the partial superiority of the federal government over them even at the time of the treaties. The Court held that at no time had the United States ever "constitute[d] them a separate, independent, sovereign people, with no superior within its limits."[110] The Court stated that the tribe's peculiar relation to the United States was illustrated by the fact that it had been capable of entering into treaties.[111] The tribe, however, was also said to be " 'subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the act of March 3, 1871.' "[112] That treaties were made indicates the special status that the tribes initially possessed, but the existence of the 1871 act indicates that they were denied the right to the continuation of that status.

Recent cases

After cases such as *Stephens* which established the full power of Congress in Indian affairs, little was said about the place occupied by the tribes in the federal system for many years. Among recent cases, the issue was first raised in *United States v. Mazurie*.[113] That case upheld Congressional delegation of power to a tribe to regulate the sale of alcoholic beverages on the reservation. The Court, in an opinion by Justice Rehnquist, stated that the delegation was not to a "private, voluntary organization" as the lower court had held, but to an entity with "a certain degree of independent authority over matters that affect the internal and social relations of tribal life," citing *Worcester* and *Kagama*.[114] The Court did not reach the question whether the tribe had the power in itself, without a congressional delegation, to impose the regulation in question, but did recognize that some attributes of sovereignty are retained by the tribes.

The source of "independent authority" was not stated, except to

sumed the full control over the Cherokees as well as the other nations constituting the five civilized tribes . . . .

. . . .

The holding that Congress had power to provide a method for determining membership in the five civilized tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe." *Id.* at 306-07.

110. 174 U.S. at 485.

111. *Id.*

112. 174 U.S. at 486 (quoting Choctaw Nation v. United States, 119 U.S. 1, 27 (1886)).

113. 419 U.S. 544 (1975).

114. *Id.* at 557.

the extent that reference was made to *Worcester* and *Kagama*.[115] In light of this reference, "independent authority" was presumably a term used to describe the sovereignty that the tribes have been allowed to retain since 1871. The authority may fairly be termed independent because certain powers may be retained by the tribe even without specific enumeration, and various "attributes of sovereignty"[116] may be exercised without an express delegation of power of the type involved in *Mazurie*. Although these powers are subject to congressional control or even congressional divestiture, they can be exercised without specific congressional approval if they are within the penumbra of sovereignty retained by treaty.[117] Thus a general treaty provision, such as one guaranteeing an orderly government, may give a tribe certain powers over "the internal and social relations of tribal life."[118]

In *McClanahan v. Arizona State Tax Commission*,[119] the Court recognized that the tribes had started from a position of sovereignty, independent of the federal system, and had been allowed to retain some "attributes of sovereignty."[120] The past sovereignty of the tribes was said to provide a "backdrop" for the interpretation of treaties and statutes.[121] This notion, that because the tribes were dealt with by treaty they must have been sovereign at the time, applied in cases as early as *Worcester v. Georgia*.[122] As noted above, the concept was also central to the *Crow Dog* case, decided approximately three decades after the practice of treating with the Indians ended.[123] In all three of these cases, the fact that the treaty-making power had been invoked was in itself relevant to the determination of the status of the tribes under the treaties still in force.[124]

115. *Id.*
116. *Id.* (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)).
117. But see notes 130-31, 135 & accompanying text *infra*.
118. 419 U.S. at 557.
119. 411 U.S. 164 (1973).
120. *Id.* at 173 (citing United States v. Kagama, 118 U.S. 375, 381-82 (1886)).
121. *Id.* at 172.
122. 31 U.S. (6 Pet.) 515, 559 (1832); see text accompanying note 71 *supra*.
123. *Ex parte* Crow Dog, 109 U.S. 556, 568 (1883); see text accompanying note 97 *supra*.
124. The historical counterpart of this legal development has been described as follows: "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. In spite of the fact that the independent-nation theory caused many complications, it became so firmly established in practice that it could not easily be shaken off." F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 142 (1962).

In other recent cases brief references suggest that tribal powers may be derived from inherent powers retained after entering the federal system or from a specific federal law. In *Williams v. Lee*,[125] the Court stated that Congress "recognized" the tribes' governmental authority in a treaty,[126] and in *Fisher v. District Court*,[127] the Court stated that powers of self-government were "conferred" upon the tribe.[128]

In two 1978 cases, the Court made more expansive efforts to define sovereignty in the context of tribal power. In *Oliphant v. Suquamish Indian Tribe*,[129] the Court held that the tribe did not have the power to prosecute non-Indians for criminal offenses committed on the reservation. The tribe claimed as the source of such power its "inherent sovereignty."[130] The decision acknowledged that there are powers retained from original sovereignty, but held that some of these powers may be lost even though not specifically divested by treaty or statute. They were said to be lost because when the tribes were incorporated into the federal system they necessarily gave up powers inconsistent with their new status.[131]

Shortly after *Oliphant*, the Court handed down its decision in *United States v. Wheeler*,[132] holding that the double-jeopardy clause did not bar the prosecution of an Indian in federal court under the Major Crimes Act[133] after he had been convicted in tribal court of a lesser included offense arising out of the same incident. The Court held the separate-sovereigns doctrine applicable, and found that the tribe's power to punish its members was not merely a form of federal power. Rather, it derived from a completely different source—the tribe's inherent sovereign power.[134]

The Court adopted the view that tribal powers not divested by treaty or statute are retained, but with a qualification that renders the rule much less significant than it might at first seem. This qualification was the one that had been stated in *Oliphant*; powers may be lost

125. 358 U.S. 217 (1959).
126. *Id.* at 223.
127. 424 U.S. 382 (1976).
128. *Id.* at 387.
129. 98 S. Ct. 1011 (1978).
130. See note 2 & accompanying text *supra*.
131. 98 S. Ct. at 1021.
132. 98 S. Ct. 1079 (1978).
133. 18 U.S.C. § 1153 (1970).
134. 98 S. Ct. at 1086. An interesting case which illustrates the application of different laws to tribal activity depending upon the source of the tribal power being exercised is Cheyenne River Sioux Tribe v. Andrus, 556 F.2d 1085 (8th Cir. 1977), holding that a tribal election authorized by federal regulations is governed by the twenty-sixth amendment.

"by implication as a necessary result of [the tribes'] dependent status."[135]

Together, *Oliphant* and *Wheeler* serve to clarify the nature of tribal sovereignty as it relates to tribal power. *Mazurie* had recognized and approved the delegation of federal power to the tribes, but it and other cases going as far back as *Worcester* had been less clear about the source of other tribal powers.[136] *Oliphant* and *Wheeler* both acknowledged the existence of inherent tribal powers retained from before the subjugation to the federal government. The holding of *Wheeler* complements that of *Mazurie*[137] by adding recognition of retained sovereign power to *Mazurie*'s recognition of federally delegated power. Each opinion engaged in a study of the relevant laws to determine whether there was a retention or a divestiture of the tribal power in question, either by expression or by implication.[138]

A problem remains, however, in the wake of *Oliphant* and *Wheeler* because of the Court's emphasis on the "inconsistent with their status" test. As a standard for determining whether a particular tribal power is divested or retained, this phrase fails to provide sufficient direction or clarity. The "status" of Indian tribes will ultimately depend upon what powers they have. In this sense, therefore, measuring powers by looking at status is essentially a circular approach.

Measuring powers by examining the tribe's status is not unlike the empirical approach which the Court has usually declined to employ in the past.[139] The difference is that the empirical test discussed above involved examining the status of a particular tribe, while the *Oliphant-Wheeler* test involves consideration of the status of the tribes in general.

This difference in perspective highlights the fallacy of regarding the language from *Oliphant* and *Wheeler* as setting forth a new test for tribal power: an individual tribe's situation may differ from that of tribes in general because of a specific treaty or statute. Thus, the "inconsistent with their status" language should not be mistaken for a new test that replaces the examination of relevant treaties and statutes.[140]

135. 98 S. Ct. at 1086; Oliphant v. Suquamish Indian Tribe, 98 S. Ct. at 1021.

136. See text accompanying notes 114-18 & 125-28 *supra*; see also text accompanying notes 68-71 *supra*.

137. See notes 113-14 & 132-34 & accompanying text *supra*.

138. United States v. Wheeler, 98 S. Ct. 1079, 1088-89 (1978); United States v. Mazurie, 419 U.S. 544, 553-56 (1975).

139. See text accompanying notes 76-84 & 102-03 *supra*.

140. This view is corroborated by the analysis of a host of relevant laws in each of the

The tribal status language is, however, a valid and helpful characterization if kept in perspective. Unlike earlier and more absolute formulations, it acknowledges and deals with the fact that the status of the tribes did change gradually as they came fully within the federal system.[141] Furthermore, the tribal status formulation highlights the importance to a tribal power analysis of whether the power is to be asserted over Indians or over non-Indians.[142]

Thus, the emphasis on tribal status in *Oliphant* and *Wheeler* should not be viewed as an all-encompassing, new test for determining whether a specific tribal power exists. The determination of tribal powers still must begin and end with a thorough analysis of treaties and statutes. The "inconsistent with their status" terminology more closely describes the results of the test for tribal powers than it defines the test itself. But because the tribal status language brings into consideration the realities of the historical federal-tribal relationship, and because this relationship is pertinent to the interpretation of the relevant laws, tribal status is best viewed as a part of the backdrop against which the treaties and statutes should be interpreted. As we have seen, the Court had earlier referred to the past sovereignty of the tribes as such a backdrop.[143] In *Oliphant* and *Wheeler*, it has reminded us, and perhaps itself, that the original prefederal sovereignty of the tribes is only part of the story. The full historical-legal picture also includes the tribes' coming within the federal system and acquiring a new status.

Summary

A judicial view of tribal sovereignty emerges from the *Cherokee Nation* cases to the present that is in harmony with the dictates of the Constitution and statutes so far as tribal power is concerned. *Worcester* indicates that during the treaty period the tribes possessed some independence from the federal system. This independence is the reason they were dealt with by treaty, and the treaties recognized varying degrees of sovereignty.

After 1871, the treaties were still in force unless abrogated by Congress. *Crow Dog* shows that the former, sovereign status of the tribes

two opinions. *See* United States v. Wheeler, 98 S. Ct. at 1088-89; Oliphant v. Suquamish Indian Tribe, 98 S. Ct. at 1017-20.

141. See notes 7, 13-14 & accompanying text *supra*. *Oliphant* and *Wheeler* acknowledge this development to a greater extent than any prior decisions. *See* Oliphant v. Suquamish Indian Tribe, 98 S. Ct. at 1020; United States v. Wheeler, 98 S. Ct. at 1086.

142. The lack of power over non-Indians in certain situations is, of course, the holding of *Oliphant*.

143. See note 121 & accompanying text *supra*.

is a relevant factor in determining the rights allowed to be retained by treaties. *Crow Dog* and *Kagama*, however, confirm that after 1871 the tribes were subject to federal regulation and were not in a position of sovereignty comparable to that of the states and the federal government.[144] Cases after *Crow Dog* and *Kagama* illustrate the broad power of the federal government to regulate Indian affairs.[145] The latest cases which examine the source of tribal power, *Oliphant* and *Wheeler*, confirm the existence of retained sovereign power in the tribes and underline the importance of examining the applicable treaties and statutes in order to determine a tribe's status.

Tribal Sovereignty and State Jurisdiction

The Basis for Limiting State Jurisdiction

The foregoing analysis contains the rationale underlying the proper relationship between the tribes and the states. The tribes possess powers of self-government that are: 1) inherent in their status and not specifically divested by treaty or congressional action; 2) retained as recognized by federal treaty; or 3) conferred by congressional enactment. The recognition of tribal power is a matter of federal law. If the exercise of tribal power, therefore, conflicts with the exercise of state power, the latter must yield because it has been preempted by federal authority.

Although there is no other equally sound rationale under which tribal power could preclude state power, the case law in this area has not been uniform in articulating the preemption analysis. Specifically, much confusion has prevailed since *Williams v. Lee* as to whether the limit of state jurisdiction is reached when it is preempted by federal law or when it "infringes" upon tribal jurisdiction. A careful examination of the relevant cases will show that from the seminal decision in *Worcester* to the most recent cases, the preemption analysis has been the only sound and consistent basis for decision, and that even *Williams* and those cases not expressly employing the preemption approach are not inconsistent with it.

Worcester v. Georgia,[146] discussed *supra*,[147] was the first case that squarely presented the question of whether tribal or state law applied

144. The particulars of the relationships between the federal government, the states and the tribes in terms of the division of governmental power are discussed in Part II, *infra*.

145. The federal legislative power, and the possibilities for state legislative action, are discussed in Part III, *infra*.

146. 31 U.S. (6 Pet.) 515 (1832).

147. See notes 66-77 & accompanying text *supra*.

to activity within Indian country. The issue was whether a non-Indian was subject to Georgia laws that purported to regulate conduct within the Cherokee Nation. The Supreme Court held that because treaties had recognized the sovereignty of the Cherokees and had allowed the tribe's exercise of sovereign powers to continue, the tribe was free to exercise extensive self-governmental powers within its territory. These treaties, along with subsequent legislation continuing the rights granted by the treaties, preempted the exercise of state authority.[148] The Court viewed the scheme established by preemptive federal power as allowing for complete self-government by the tribe of its members and territory, except in areas in which the federal government itself interfered.[149] Thus, there was no room left for the exercise of state governmental power. Although the Court described the politically distinct status of the tribes in strong terms to justify its holding that they possessed extensive self-governmental power,[150] the opinion made it clear that the Cherokees' right of self-government could be exercised because it had been recognized and allowed to continue in the relevant treaty: "This treaty, thus explicitly recognizing the national character of the Cherokees, and their right of self-government . . . has been frequently renewed, and is now in full force."[151] The Court did not hold that the exercise of tribal power in itself prevented the exercise of state power. It held that the exercise of state power was "repugnant to the constitution, laws and treaties of the United States."[152]

Worcester thus employed a preemption analysis. The fact that the tribe was dealt with by treaty was a factor which influenced interpretation of the treaties.[153] If a treaty recognizing tribal self-government was still in force, it preempted any state jurisdiction which was inconsistent with the treaty right of self-government.[154]

After *Worcester*, the ability of the tribes to exercise whatever powers of self-government they may have had arising from treaties became so impaired that no more cases presenting a direct clash between tribal and state jurisdiction arose until relatively recent times. The first modern case in which tribal and state entities competed for subject-matter jurisdiction was *Williams v. Lee*,[155] a decision which failed to articulate

148. 31 U.S. (6 Pet.) at 556-58, 559, 561.
149. *Id.* at 553-54.
150. *Id.* at 559.
151. *Id.* at 556.
152. *Id.* at 561.
153. *Id.* at 559.
154. *Id.* at 561.
155. 358 U.S. 217 (1959).

the preemption principle clearly and thereby led to considerable confusion in the area. In *Williams* a non-Indian retailer holding a federal trader's license operated a store on the Navajo Reservation. He brought an action in state court against two Indian customers for the cost of goods sold on credit. The Arizona Supreme Court applied the preemption test narrowly and held that the state courts had jurisdiction because no federal statute expressly barred such jurisdiction.[156] The United States Supreme Court in an opinion by Justice Black emphasized the right of tribal self-government in order to hold that, because self-government was a treaty right, all state jurisdiction which interfered with that right was preempted. The emphasis on tribal self-government was viewed by some as a departure from the preemption approach and as the elevation of the principle of tribal self-government to the status of an independent bar to state jurisdiction.[157] No explanation was given, however, either in *Williams* or comments on *Williams*, of how the exercise of power by an Indian tribe could of its own force prohibit a state from exercising jurisdiction over persons and territory within its borders.

A careful reading of *Williams* reveals that it actually employed the preemption test. First, the Court noted that in *Worcester*, Georgia statutes passed "despite federal treaties" were held invalid because state jurisdiction over Indian affairs was preempted by federal authority.[158] The Court acknowledged, however, that *Worcester* did not address state jurisdiction over cases "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized,"[159] or where Congress had conferred jurisdiction upon the states.[160] The Court then specifically examined the treaty rights of the Navajos:

> Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. Georgia, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. . . .
>
> . . . .
>
> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indi-

156. 83 Ariz. 241, 244, 319 P.2d 998, 1000 (1958).

157. Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445, 472-75, 478 (1970). " *Williams* for the first time recognized an independent Indian interest in self-government which stood as a barrier to state involvement in Indian affairs." *Id.* at 478.

158. 358 U.S. at 218-19.

159. *Id.* at 219-20.

160. *Id.* at 220-21.

> ans to govern themselves. . . . Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.[161]

State jurisdiction was barred, not by any inherent right of tribal self-government, but by federal preemption, because federal law recognized the tribal right. The emphasis upon broad tribal powers was appropriate to show that the attempted exercise of state jurisdiction conflicted with the scope of the preempting treaty and that the result of the case was in line with the historical and factual considerations present.

The implications of a *Williams* test were not lost on states seeking to exercise jurisdiction over Indian affairs. If state jurisdiction may be exercised wherever such jurisdiction does not infringe upon tribal rights, then a state arguably may exercise its power in any area in which the tribal government has not specifically acted, or in which the tribe has of its own accord ceded jurisdiction to the state, regardless of whether federal authorization would permit it to do so. On the other hand, if federal power is the preemptive force, state action may be precluded even in matters on which the tribal government has not spoken, on the theory that state jurisdiction would be inconsistent with a federal policy fostering Indian self-government. State courts succeeded in applying the test to allow state jurisdiction in many instances,[162] and a great deal of confusion arose as to whether such a test existed, and if so, in what circumstances it might be applied.

In *Kennerly v. District Court*,[163] the State of Montana relied on the notion that the infringement or noninfringement of sovereignty is an independent denial or grant of jurisdiction to the states. The state argued that it was free to exercise jurisdiction because there was no infringement of tribal sovereignty under the facts of that case; there was no infringement of sovereignty because the Blackfeet tribe had approved the concurrent exercise of state jurisdiction. Exercise of state jurisdiction was therefore consistent with the exercise of tribal self-government: the *Williams* test was satisfied.

The Supreme Court employed the preemption analysis to deny state jurisdiction,[164] though it did not specifically examine the preempt-

161. *Id.* at 221-23. This portion of *Williams*, containing the reference to the treaty terms, was quoted by the Supreme Court in its recent decision in United States v. Wheeler, 98 S. Ct. 1079, 1086 (1978).

162. *See* Organized Village of Kake v. Egan, 369 U.S. 60, 72-76 (1962).

163. 400 U.S. 423 (1971).

164. The Court has consistently applied the preemption test to measure the extent of state jurisdiction. In Organized Village of Kake v. Egan, 369 U.S. 60 (1962), the Court held state jurisdiction applicable to Indian fishing where such jurisdiction did not constitute a prohibited infringement.

ing treaties or statutes. Presumably the Court relied on *Williams* for the principle that the subject matter was within the scope of self-government and that federal law conferred a tribal right of self-government on the tribe in question.[165] The Court, therefore, proceeded to inquire whether there was a specific federal authorization for state jurisdiction over matters involving tribal members which arose on the reservation. The Court considered Public Law 280[166] as a possible authorization, but held that it did not apply because there had been no affirmative legislative action by the state.[167]

In 1973 the Court attempted to clarify the preemption standard in two cases involving state taxation. In *McClanahan v. Arizona State Tax Commission* a state income tax applied to a reservation Indian was invalidated on the ground that it "interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves."[168] The Court undertook a thorough review of the 1868 treaty with the Navajos, the act of Congress admitting Arizona to the union, and other statutes.[169] The opinion expressly noted that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."[170] In an accompanying footnote, the Court added that "the source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."[171] This reference indicates the Court now considers that the exercise of federal legislative power, rather than any inherent tribal right or power, limits state jurisdiction. The Court further stated that "in almost all cases federal trea-

165. This indicates that *Williams* is to be read as applying broadly to Indian tribes, putting the burden on a party opposing tribal jurisdiction to show that a particular tribe did not receive guarantees similar to those found in the treaty in *Williams*. *See* the discussion of Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976), at text accompanying note 182 *infra*.

166. See note 43 *supra*.

167. Indeed, the State of Montana had never purported to assume Public Law 280 jurisdiction and made no argument that it had such jurisdiction. The tribe had adopted a resolution granting concurrent civil jurisdiction to the state prior to passage of Public Law 280. The Supreme Court held such grant invalid in that no federal mechanism by which such a transfer could have been effected was in existence prior to Public Law 280, and the requirements of that statute and subsequent legislation were not met by the prior grant. 400 U.S. at 427-29.

168. 411 U.S. 164, 165 (1973).

169. *Id.* at 173-78.

170. *Id.* at 172.

171. *Id.* at 172 n.7.

ties and statutes define the boundaries of federal and state jurisdiction."[172] This statement leaves open the possibility that there may, in a rare case, be some federal preemption merely from the fact that a tribe exists, though there are no specific treaties or statutes to define the rights of the tribe. The likelihood of such a case is so remote that the theoretical questions of residual sovereignty and preemption in the absence of specific laws are largely moot.[173]

The decision then came close to expressly extinguishing the infringement of tribal sovereignty as an independent bar to state jurisdiction by saying that the sovereignty doctrine "is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read."[174] *Williams* was not, however, interpreted as a preemption case in *McClanahan*. Instead, there was said to be a *"Williams* test," but it was held applicable principally where non-Indians were involved.[175]

In *McClanahan*, as in *Kennerly*, the state argued that the *Williams* test could be used in its favor: where there is no infringement there is no bar to state jurisdiction.[176] *McClanahan* rejected the argument again, but did not put it permanently to rest because the opinion failed to state that there is no " *Williams* test" in the sense of a grant or denial of state jurisdiction independent of preemption considerations.

In the companion case, *Mescalero Apache Tribe v. Jones*,[177] the Court phrased the question as whether "paramount federal law permits these taxes to be levied."[178] The "conceptual clarity" of *Worcester* was found to have "given way to more individualized treatment of particular treaties and specific federal statutes."[179] The Court reviewed the act admitting New Mexico as a state and the 1934 Indian Reorganization Act, and found that the statutes did not preclude state taxation of the gross receipts of an off-reservation ski resort operated by the tribe.[180]

172. *Id.* at 172 n.8.
173. *Id.*
174. 411 U.S. 172; see text accompanying notes 122-24 *supra*.
175. *Id.* at 179.
176. In *McClanahan*, the state claimed that taxing individual Indians could not be considered an infringement of tribal sovereignty. *Id.* at 179. As in *Kennerly*, the asserted non-infringement was itself questionable, even if non-infringement were to be considered a grant of state jurisdiction. *Id.* at 177-79.
177. 411 U.S. 145 (1973).
178. *Id.* at 146.
179. *Id.* at 148.
180. A statement of the *Williams* holding was employed as an affirmation of the ability

The question of limits on state jurisdiction was next raised in another tax case, *Moe v. Confederated Salish and Kootenai Tribes*,[181] an action brought by the confederation and some of its members challenging cigarette sales taxes, personal property taxes and the state's vendor licensing statute as applied to reservation Indians. The Supreme Court considered *McClanahan* to be controlling,[182] and invalidated the taxes on the ground that they violated the supremacy clause, "not any automatic exemptions 'as a matter of constitutional law.' "[183]

With respect to the sales tax as applied to non-Indian purchasers of goods sold by reservation Indian merchants, the Court held that an Indian retailer could be required to collect and remit the tax. The tax was on the purchaser, and therefore a tax on non-Indians rather than Indians. For this reason, state taxation was not preempted as in *McClanahan* or as to the Indian purchasers in *Moe*. The requirement that an Indian retailer collect and remit the tax was called a "minimal burden,"[184] and was tangentially determined not to interfere with the tribal self-government ruling of *Williams*.[185] The case clearly applied a preemption analysis, and, therefore, this brief reference to *Williams* should not be regarded as a resurrection of a noninfringement test.

That the Court had no intention of using an infringement rationale is clear not only from the brevity of the reference to *Williams* but also from the fact that such reasoning would amount to a *grant* of state jurisdiction based on a finding of no infringement, in effect overruling *Kennerly* and *McClanahan*[186] which had expressly rejected the argument that the only limit on state jurisdiction was noninfringement of tribal self-government.

While the legacy of an independent " *Williams* test" was scarcely noticed in *Moe*, it caused more confusion in the most recent major case

of the State to exercise jurisdiction when federal authority was found not to have preempted the area. *Id.* at 148.

181. 425 U.S. 463 (1976). Between *Mescalero* and *Moe*, the Court decided Antoine v. Washington, 420 U.S. 194 (1975), in which the jurisdiction of the state to enforce its hunting laws against Indians in an area which a tribe had ceded to the United States was at issue. Antoine argued that the terms of the cession agreement exempted Indians from the operation of state law, and that its ratification invoked the supremacy clause. The Court held in his favor, relying entirely upon preemption as the ground for prohibiting state jurisdiction.

182. The state did not dispute that the treaty and statutes relied upon by the tribe were " 'essentially the same as those involved in *McClanahan*.' " 425 U.S. at 477. The Court thus found no need to retrace the analysis of the treaty and statutes that had appeared in *McClanahan*.

183. *Id.* at 481 n.17.

184. *Id.* at 483.

185. *Id.*

186. See notes 135, 147, & accompanying text *supra*.

on state jurisdiction, *Fisher v. District Court*.[187] *Fisher* presented the question of whether an Indian could invoke the jurisdiction of state courts to adopt an Indian minor. In its civil jurisdiction aspect, the case was similar to *Williams*. Because the parties in *Fisher* were all Indians and the subject of the action was adoption of a minor and hence an area of considerable tribal interest, the infringement considerations were even stronger than in *Williams*. It is understandable, then, that the per curiam opinion first mentioned *Williams*, noting that at least the *Williams* standard would have to be met in order for the state to exercise jurisdiction.[188] Immediately after its reference to *Williams*, however, the Court went on to find that the tribal right of self-government was "protected by federal statute,"[189] that it had been "conferred upon the Northern Cheyenne Tribe"[190] and that "[n]o federal statute sanctions this interference with tribal self-government."[191] Finally, the Court addressed the contention that tribal sovereignty in itself cannot preempt state law or divest state courts of jurisdiction.[192] The Court noted that the tribe's authority came by virtue of the 1934 Indian Reorganization Act and held:

> Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, even if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe, a question we do not decide, that jurisdiction has now been pre-empted.[193]

Thus *Fisher* clarified that *Williams* had obscured. Infringement of tribal self-government, or sovereignty, will preclude state jurisdiction if, and because, preempting federal statutes confer the power of self-government upon the tribe. If state law infringes upon tribal self-government, the state law is invalid under the supremacy clause.

State infringement of tribal self-government is not a legal doctrine which of its own force can prohibit state jurisdiction, but if there is

187. 424 U.S. 382 (1976).
188. *Id.* at 386.
189. *Id.*
190. *Id.* at 387.
191. *Id.* at 388.
192. *Id.* at 390.
193. *Id.* Some lower court decisions rely heavily on the fact that a tribe is actually exercising a particular right in order to find that state jurisdiction is preempted. Mescalero Apache Tribe v. State of New Mexico, 77395 (Dist. of N.M. Aug. 2, 1978); State of Arizona *ex rel.* Merrill v. Turtle 413 F.2d 683, 686 (9th Cir. 1969). The quoted portion of *Fischer* indicates that the court has left open the question of whether there is federal preemption even without any exercise of power by a tribe. However, the court found preemption of state taxes in *McClanahan* and *Moe* even though there were no competing tribal taxes.

infringement of a federally protected right of tribal self-government, this fact will indicate that the state activity involved must cease because it is preempted by federal law. It is because tribal self-government is a federally secured right that a state may not infringe upon it; not because tribal power displaces state power.

The Extent of Preemption

It is sometimes asserted that the federal government has entirely preempted the field of Indian affairs.[194] Arguably, this doctrine resulted from the "conceptual clarity" of the *Worcester* opinion which stated broadly that the Cherokees were a people upon whom the state's laws could have no effect.[195] Subsequent to *Worcester*, "total preemption" has "given way to more individualized treatment."[196] For instance, in *Puyallup Tribe v. Washington Game Department*,[197] the Supreme Court noted that the tribe based its claim that the state could not regulate on-reservation fishing by Indians upon "federal preemption of on-reservation Indian affairs,"[198] and then significantly cited a portion of *Mescalero Apache Tribe v. Jones*, which states that generalizations on the subject are difficult and that state law may be applied *unless* there is an infringement of self-government or impairment of "a right granted or reserved by federal law."[199]

In many cases the question of whether state law applies unless expressly preempted or does not apply unless expressly authorized is academic. Most state action which asserts governmental authority is likely to be preempted because Congress will normally have "granted or reserved" considerable governmental authority to the tribe. If state

194. An instructive recent view is that expressed in Lynaugh, *Developing Theories of State Jurisdiction over Indians: The Dominance of the Preemption Analysis*, 38 MONT. L. REV. 63, 75 (1977): "While the concept of federal preemption is applied in a restricted fashion in other areas of federal supremacy, such as in regulation of interstate commerce, federal preemption is given broader meaning in the context of federal Indian policy.

. . . [S]ince the traditional principle has been that States are without jurisdiction over Indian reservations unless expressly authorized, the Court is searching for a grant of state jurisdiction rather than a divestment of state jurisdiction."

This expression is circular in the sense that it states that there is broad preemption because there is total preemption, which is the case if a "grant of state jurisdiction" is needed. However, it is correct in the sense that past confusion about the possibility of total federal preemption of Indian affairs is a partial cause of the present view that most aspects of on-reservation Indian activity are preempted. See text accompanying notes 196-98 *infra*.

195. 31 U.S. (6 Pet.) 515, 561 (1832).

196. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

197. 433 U.S. 165 (1977).

198. *Id.* at 174 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147-48 (1973)).

199. 411 U.S. at 148.

jurisdiction infringes upon this authority, it is preempted. However, the question becomes important in cases where the treaties and federal statutes are relatively silent, givng little guidance either by expression or by inference.

It should be noted that the broad *Williams* sovereignty or noninfringement test is inconsistent with the idea that there is total federal preemption of Indian affairs. If the states are preempted except as they are given express authorization to act, considerations of noninfringement are superfluous. Indeed, state claims that noninfringement could work in reverse to authorize state jurisdiction were rejected in *McClanahan*[200] and *Kennerly v. District Court*.[201] The *Williams* test has meaning only if states are free to exercise jurisdiction *unless* preempted. Then infringement or sovereignty might be viewed as a second bar, coequal with preemption, or as a factor indicating when preemption has occurred.

The converse of total federal preemption may be called specific preemption. Under total preemption, there is no state jurisdiction over reservation activities unless an exception to the total preemption is specifically created by Congress. Under specific preemption, there is generally state jurisdiction except where it is preempted. As was noted above, *Worcester* has been cited as holding that the entire field of Indian affairs has been preempted by the federal government. *Williams* clearly implied the converse, that state jurisdiction applies unless preempted or barred by tribal sovereignty. In *Organized Village of Kake v. Egan*[202] the Court found that the *Worcester* rule had given way to specific preemption.[203] In *Mescalero*, the Court expressly rejected total preemption: "At the outset, we reject—as did the state court—the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise . . . ."[204]

Each assertion of state jurisdiction requires an examination of whether the federal government has preempted the subject. For example, *Williams* found that state civil jurisdiction over Indians for matters arising within the reservation was barred.[205] The same type of fact

200. 411 U.S. 164, 179 (1973).
201. 400 U.S. 423, 427 (1971).
202. 369 U.S. 60 (1962).
203. *Id.* at 72-75.
204. 411 U.S. at 147.
205. 358 U.S. 217, 223 (1958).

situation was presented in *Kennerly v. District Court*,[206] but it was unclear from *Williams* whether states were prohibited from exercising jurisdiction by a preempting federal law or by tribal sovereignty itself.[207] The Court treated the subject of civil jurisdiction as having been preempted, presumably on the basis of the *Williams* holding, and consequently looked to see if there was a specific authorization for state jurisdiction.[208] This analysis does not mean that the entire field of Indian affairs has been preempted. Express authority is not needed for every exercise of state jurisdiction, but it is needed for state civil jurisdiction over reservation Indians because Congress has preempted that area.

Cases which analyze the impact of state taxation on reservation Indians illustrate the specific preemption approach. *Warren Trading Post v. Arizona State Tax Commission*[209] held that Congress had preempted the taxation of licensed traders on the reservation. *McClanahan* held that Congress had preempted the taxation of reservation Indians.[210] Accordingly, *Mescalero* held that while in general there is no total preemption of Indian affairs and state law applies unless prohibited, "in the special area of state taxation" of reservation Indians the converse was true. Because of federal preemption, express authorization for the application of state tax law to reservation Indians is needed.[211] Thus, in *Bryan v. Itasca County*,[212] where state taxation was again the question, the Court found it imperative to determine whether there was an express authorization for state jurisdiction.[213]

In *Moe v. Confederated Salish and Kootenai Tribes*,[214] the Court again started from the *McClanahan* holding that state taxation of reservation Indians is preempted. It rejected the argument that the United States had preempted state taxation as to the Navajos in *McClanahan* but not as to the confederation in *Moe*.[215] Next it rejected the argument that there was an express authorization of state jurisdiction,

206. 400 U.S. 423 (1971).

207. *See* Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 480-81 & n.17; text accompanying note 183 *supra*.

208. See notes 163-67 & accompanying text *supra*.

209. 380 U.S. 685 (1965).

210. 411 U.S. 164 (1973).

211. 411 U.S. 145, 148 (1973).

212. 426 U.S. 373 (1976).

213. *Id.* at 377.

214. 425 U.S. 463 (1976).

215. *Id.* at 476. This argument was premised upon the assertion that the Indians in *Moe* were integrated into the surrounding community. See also text accompanying note 81 *supra*.

which is required if the specific field is preempted.[216] Finally the Court held that an Indian retailer can be required to collect a state sales tax from non-Indian customers on the reservation and remit it to the state.[217] Express authority was not needed for this exercise of state jurisdiction because the subject was not preempted. The state action was not a matter of taxing reservation Indians, which had been held preempted in *McClanahan*.[218] Nor was it taxation of a federally licensed retailer, held to be preempted in *Warren Trading Post*.[219] It was a state administrative regulation, which is enforceable unless preempted, because there is no total preemption of Indian affairs. The Court reiterated the *Mescalero* rejection of the total-preemption concept.[220]

Although these recent cases present a patchwork of what areas have and have not been preempted, a close examination of these cases shows a basic consistency in the Court's mode of analysis. Congress has not totally preempted the field of Indian affairs, so state jurisdiction may be exercised unless it infringes on an area specifically preempted by federal law or a superseding regulatory scheme. In areas found to be preempted, a state must show a specific federal grant of jurisdiction.

Tribal Sovereignty and Equal Protection

Sovereignty and Federal Legislation

Introduction

As demonstrated above, tribal sovereignty, as it relates to limiting state jurisdiction, is not a constitutional principle that operates by itself to divest states of jurisdiction normally exercised, but it is a factor which may warrant a finding that a particular exercise of state power is preempted by federal supremacy. In the context of equal protection challenges to federal Indian legislation, the cases are ambiguous as to whether sovereignty is regarded as a preeminent principle, or merely as a legal fact. In either case, a finding of sovereignty invariably defeats a challenge based upon equal protection arguments. Although it may initially seem anomalous that tribal sovereignty immunizes federal In-

216. 425 U.S. at 477-78. The asserted authorization was § 6 of the General Allotment Act. See note 24 *supra*.

217. 425 U.S. at 481-83.

218. 411 U.S. 164 (1973).

219. 380 U.S. 685 (1965).

220. 425 U.S. at 483. See note 204 & accompanying text *supra*.

dian legislation from equal protection challenges, the anomaly is removed when the historical context is understood.

Kagama—The early formulation

United States v. Kagama[221] presented an early challenge to a statute which classified Indians separately from non-Indians. In *Ex parte Crow Dog*,[222] decided three years before *Kagama*, the Supreme Court had held that the Sioux Tribe retained the power to punish one of its own members for a crime committed against another member. Because a murder went unpunished as a result, Congress passed the Major Crimes Act,[223] which extended federal jurisdiction to serious offenses between Indians. This legislation was challenged in *Kagama*.

The Court upheld the Act on the ground that Indians were dependent upon the federal government for protection, and were, therefore, subject to federal power. The Court addressed what was, in essence, an equal protection claim, though it was cast in terms of a challenge to congressional power. It noted that if the defendant had been a non-Indian he would have been tried in state court, and stated: "The distinction is claimed to be that the offense under the statute is committed by an Indian . . . ."[224] The Court held that Congress could make this distinction because of the dependent condition of the Indians "so largely due to the course of dealing of the federal government with them, and the treaties in which . . . [the congressional duty of protection] has been promised."[225] Thus the practice of distinguishing between Indians and non-Indians in federal legislation was sanctioned by the Court, on the basis of the tribes' unique relationship to the federal government.

Mancari—The modern formulation

The first modern challenge to an Indian/non-Indian legislative classification came in *Morton v. Mancari*[226] in 1974. The issue was whether a provision of the 1934 Indian Reorganization Act[227] creating a preference for qualified Indians in Bureau of Indian Affairs employment constituted an invidious racial classification in violation of the

221. 118 U.S. 375 (1886).
222. 109 U.S. 556 (1883).
223. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. § 1153 (1976)).
224. 118 U.S. at 383.
225. *Id.* at 384.
226. 417 U.S. 535 (1974).
227. 25 U.S.C. § 472 (1976).

fifth amendment. To resolve the issue, the Court immediately turned to consideration of the "unique legal status of Indian tribes under federal law and . . . the plenary power of Congress."[228] This power was again said to emanate from the commerce clause and the treaty power.[229] The Court then noted that the exercise of this plenary power had been so frequent as to result in an entire Title of the United States Code, all of which it considered to be subject to the same challenge as the statute in question.[230]

The employment preference was held not to be racially discriminatory because it "is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."[231] Thus the preference was "reasonably and directly related to a legitimate, nonracially based goal."[232] The standard for Indian legislation was a requirement that it be "reasonable and rationally designed to further Indian self-government."[233]

Antelope—The Kagama situation revisited

The most compelling expression to date of the sovereignty concept as an insulator against equal protection arguments is *United States v. Antelope*.[234] As in *Kagama*, the statute in question was the Major Crimes Act.[235] The equal protection question was squarely raised because, although the crime was committed on an Indian reservation, the victim was a non-Indian. This meant that had the defendants been non-Indians, they would have been tried in state court.[236] They argued, therefore, that they were being tried in federal court and subjected to the felony-murder rule solely because of their race.[237] In *Kagama*, the defendant had focused his challenge on the power of Congress to classify Indians and treat them differently from non-Indians. With the development of the equal protection concept and its incorporation into the fifth amendment, the Indian defendant in *Antelope* did not challenge the congressional power, but challenged the

228. 417 U.S. at 551.
229. *Id.* at 551-52; see also note 11 *supra*.
230. *Id.* at 552.
231. *Id.* at 554.
232. *Id.*
233. *Id.* at 555.
234. 430 U.S. 641 (1977).
235. 18 U.S.C. § 1153 (1976).
236. 430 U.S. at 644, n.4.
237. *Id.* at 644.

congressional classification made by the legislation. The Court justified this classification the same way it had justified the "distinction" in *Kagama* — on the basis of the special status of Indian tribes. The Court stated that

> the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' group consisting of 'Indians' . . . ."[238]

This statement suggests that federal legislation making the Indian/non-Indian legislative distinction is completely immune from any claim that it is racially discriminatory. Because a claim of discrimination based entirely on constitutional grounds requires proof of the intent to discriminate,[239] the statement that federal Indian legislation is not motivated by racial considerations but by the special political status of the tribes will operate to preclude virtually all equal protection challenges to federal Indian legislation made on the basis of race discrimination.

Legislation that has an extremely disproportionate racial impact may support an inference of racially discriminatory purpose.[240] In that case, the special political status of the tribes may lead to a determination that the classification is not purely racial, and that the inference may therefore not be drawn. When the federal legislation expressly names tribal members or reservation Indians, rather than all Indians, it may be determined not to be a racial classification. The hiring preference in *Mancari*, for example, was characterized as "political rather than racial in nature" because it applied only to tribal members.[241] In both *Mancari* and *Antelope*, the Court noted that Indians who were not tribal members or not acting in Indian country were classified with non-Indians; therefore, the classifications was not purely racial.[242]

238. *Id.* at 646 (citing Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974)).

239. Washington v. Davis, 426 U.S. 229 (1976).

240. *Id.* at 242-44.

241. 417 U.S. 535, 553 n.24 (1974).

242. *Id.*; United States v. Antelope, 430 U.S. 641, 646-47 & n.7 (1977). This rationale is very similar to that of Geduldig v. Aiello, 417 U.S. 484 (1974), decided the same day as *Mancari*, in which the Court held that exempting pregnancy from disability insurance coverage was not sex discrimination because it created classes consisting of pregnant persons and non-pregnant persons. *Id.* at 496 & n.20. *Aiello* has been frequently criticized for this approach by the commentators, one of whom noted the similarity to *Mancari*. Comment, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1556 (1974).

Even if the legislation is determined to discriminate racially, a finding of disproportionate impact, a finding easily made in the case of federal Indian legislation, may not be held to imply a purposeful discrimination. In *Mancari*, the finding of disparate impact was outweighed by the act's political purpose, which was said to relate to the "constituency of tribal Indians living on or near reservations."[243] In *Antelope*, the Court noted that the criminal statute in question was not directly related to tribal self-government, but simply to regulation of conduct "implicating Indian interests."[244] The Court held, nevertheless, that the statute was "governance of once-sovereign political communities," rather than legislation on the basis of race.[245]

Sovereignty and State Legislation

The possibility of state action

It is not clear at this point whether the *Mancari* and *Antelope* rationale[246] applies with equal force when the Indian/non-Indian distinction results from state action rather than federal action. If a state classification between Indians and others need only be supported by a rational basis, the states will have great latitude in Indian matters. States may wish to respond to the Indian immunities from state taxation and jurisdiction[247] by delivering corresponding state services only to off-reservation Indians and other citizens who do not share the special status of reservation Indians.[248] The States' position would find support in the converse rationale of *Warren Trading Post* in which the Supreme Court held that because the state was relieved of the burden of providing services to Indians it should not be able to tax the proceeds of a federally licensed Indian trader.[249] Actually, states often provide numerous services to Indians, which they might be expected to seek to avoid because of their inability to secure revenues in the normal manner from reservation activities.

In addition to lost revenue, the jurisdictional status of reservation Indians may be a catalyst for special treatment of reservation Indians

243. 417 U.S. 535, 552 (1974).
244. 430 U.S. 641, 646 (1977).
245. *Id.*
246. See text accompanying notes 226-45 *supra.*
247. See text accompanying notes 163-81 *supra.*
248. The precise line drawn for most federal legislative purposes is that Indians in "Indian country" are treated specially. DeCoteau v. District County Court, 420 U.S. 425, 427 & n.2 (1975).
249. Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691-92 (1965).

by states. For instance, following *Fisher v. District Court*[250] a state might wish to formalize a "hands-off" policy toward reservation Indians on the part of certain of its social-welfare agencies, because the state courts are not available for the final stage of child-welfare proceedings. Likewise, a state may not wish to give full faith and credit to tribal court orders.[251] In such cases, the state would be taking legislative or administrative action that classifies reservation Indians separately from other persons. Often, such action has the effect of disadvantaging reservation Indians, just as the Court's holding in *Fisher*, meant to further the goal of tribal sovereignty, obviously disadvantaged the Indian plaintiffs therein.

That reservation Indians might be disadvantaged as the result of limitation of state jurisdiction was acknowledged in *Antelope*, which held that the rationale of *Mancari* applied to the denial, as well as the conferral, of a privilege or benefit.[252] The question which must be considered is whether the sovereignty rationale of *Mancari* and *Antelope* that upholds a federal law with this result will also sanction state action of a similar nature. The limits of permissible state action will be examined.

Restrictions on State Action—Preemption

The threshold issue in examining any state action in the area of Indian affairs is federal preemption. As demonstrated by the analysis of the state-jurisdiction cases *supra*,[253] neither tribal sovereignty nor federal preemption completely excludes state and local governmental activity. Instead, state jurisdiction may be exercised except where it is in conflict with federal law. Because federal treaties and laws are read against the backdrop of the original sovereign status of the tribes,[254] they are often found to include implicitly a broad grant of tribal self-government.[255] This reading of the treaties and statutes is inconsistent

250. 424 U.S. 382 (1976).

251. *Compare* Jim v. CIT Financial Servs. Corp., 87 N.M. 362, 533 P.2d 751 (1975) *with* Lohnes v. Cloud, 254 N.W.2d 430 (N.D. 1977) (discussed in text accompanying notes 298-300 *infra*).

252. 430 U.S. 641, 646 (1976). It should also be noted that there exists a separate but related group of cases in which a benefit or service is held to be properly denied because the state cannot confer the benefit without exercising jurisdiction it is not allowed to exercise because of the preemption considerations discussed in Part II, *supra*. *See* White v. Califano, 437 F. Supp. 543 (D.S.D. 1977); Wauneka v. Campbell, 22 Ariz. App. 287, 526 P.2d 1085 (1974); Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1974).

253. See text accompanying notes 146-93 *supra*.

254. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973).

255. See text accompanying notes 22 & 159-61 *supra*.

with a finding that they also contain a right of access to state agencies, facilities and courts. Both Congress[256] and the Supreme Court[257] recognize that there is a mutually dependent relationship between the benefits and burdens of state law. Thus, state legislation that is consistent with specific exemptions from state jurisdiction accorded by federal law, or that is in harmony with the notion of broad tribal powers of self-government, should normally be held consistent with, rather than preempted by, federal law.

Restrictions on state action—fourteenth amendment

The sovereignty rationale of *Mancari* and *Antelope* which denies that the federal regulation of Indian affairs is based on impermissible classifications[258] under the fifth amendment is equally forceful when applied against equal-protection challenges to state legislation under the fourteenth amendment. If the principles that immunize federal legislation are applied to state action, it may be concluded that legislation which makes a purely racial classification with no nexus to tribal interests will be judged under the compelling-interest standard applied to invidious classifications. On the other hand, legislation that classifies according to tribal membership and reservation residence, when these criteria are relevant to the status of an individual with respect to the subject matter of the legislation, will only need to meet a rational-basis test, assuming that the legislation does not deny a fundamental right.

Restrictions on state action—pretextual discrimination

If state legislation, although ostensibly based upon the special "quasi-sovereign" status of Indian tribes, is actually a pretext for discrimination on the basis of race, it must be struck down under the fourteenth amendment.[259] Before Indian persons became citizens[260] eligible to participate in state and local government, the non-Indians

256. *See* General Allotment Act of 1887, ch. 119, § 6, 24 Stat. 388, 390 (current version at 25 U.S.C. § 349 (1976)), which provided that allottees would "have the benefit of an be subject to the laws, both civil and criminal, of the State or Territory in which they may reside."

257. Fisher v. District Court, 424 U.S. 382 (1976); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965).

258. See notes 238-45 & accompanying text *supra*.

259. Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974).

260. Many Indians who had received allotments under the General Allotment Act of 1887, ch. 119, 24 Stat. 388, became citizens by virtue of a provision in § 6 of that act. In 1924, Congress accorded citizenship to all Indians. Act of June 2, 1924, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401 (1976)).

surrounding them were termed "their deadliest enemies"[261] by the Supreme Court. Real and perceived hostilities on both sides have continued, and the courts today are likely to be justifiably alert to the possibility of a discriminatory motive in legislative or administrative action by state and local government concerning Indians.

However, the courts are reluctant to undertake this mode of inquiry unless a clear pattern of discriminatory intent can be discerned.[262] Where state action responds narrowly and directly to specific situations and problems that result from the special status of reservation Indians and tribes, it is not likely to be considered unconstitutionally motivated, even though its enactment may not be entirely free of improper purpose on the part of some participants.[263]

Restrictions on state action—(lack of state power)

The due-process guarantee of the fifth amendment will have the "same significance" as the equal protection clause of the fourteenth when a federal law applies to a limited territory and there is no national interest involved.[264] Where there is nationwide application and a special, national interest, however, the two standards may not be identical. In that event, the possibility is raised that a special, national interest may validate federal Indian legislation, while similar legislation at the state level is constitutionally unacceptable.

The area most closely analogous to Indian affairs in this respect is that of laws pertaining to aliens. For instance, a rule declaring aliens ineligible for public employment has been struck down at the state level,[265] but would probably be upheld at the federal level if enacted pursuant to proper procedures.[266] The difference in treatment results because the federal government has broad power and a peculiar, vital interest in the regulation of aliens, while the states have no particular interest and only that power which the federal government authorizes them to exercise.[267]

261. United States v. Kagama, 118 U.S. 375, 384 (1886).

262. In Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948), the majority refused to consider evidence of a discriminatory motive, even where the concurrence found such a motive and where a predecessor statute had been expressly discriminatory on its face. *Id.* at 418, 422 (Murphy, J.).

263. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

264. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).

265. Sugarman v. Dougall, 413 U.S. 634 (1973). *But see* Foley v. Connelie, 98 S. Ct. 1067 (1978) (New York statute barring aliens from the state police force upheld).

266. Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976).

267. Mathews v. Diaz, 426 U.S. 67, 85 (1976).

At the federal level, the subject of Indian affairs occupies a position similar to that of alien affairs. In both areas, federal activity is likely to be a "routine and normally legitimate part of [the federal government's] business."[268] In both areas, the federal government has broad, plenary power, such that an act of Congress is subject to minimal judicial review because of the federal interest involved.[269]

The considerations present at the national level in the area of alien affairs, however, present a somewhat greater federal interest than in Indian affairs. Involved in the former are "the conduct of foreign relations, the war power and the maintenance of a republican form of government."[270] The significance of these factors is that they were pertinent considerations in the field of Indian affairs in the past but have ceased to be relevant to that subject. When the tribes were formidable external forces, the federal government's dealings with them were governed by considerations of national security, the war and treaty powers, the government of the territories and the management of vast amounts of land that the government was held to control.[271] As the tribes were subjugated and brought completely within the federal system, these important national considerations disappeared.[272] However, Indian affairs continued to be directed and managed at the federal level because the important national concerns present in the early years left as a legacy a "unique legal status of Indian tribes under federal law and . . . the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status."[273] Thus the special, national interest in Indian affairs is not necessarily a continuing one, as it is in alien affairs. Rather, Indian affairs is a national interest that exists mostly as a vestige of the past.[274]

268. *Id.*

269. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977); Morton v. Mancari, 417 U.S. 535 (1974); Hampton v. Mow Sun Wong, 426 U.S. 88, 118 (1976) (Rehnquist, J., dissenting).

270. Harisiades v. Shaughnessy, 342 U.S. 580 (1952), *quoted in* Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976).

271. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

272. See notes 7-144 & accompanying text *supra.*

273. Morton v. Mancari, 417 U.S. 535, 551 (1974).

274. Only the regulation of commerce with Indian tribes is committed to the federal government by the Constitution; there is no constitutional guarantee that tribes will continue to exist. See text accompanying notes 42-46 *supra.* Other Indian matters are of federal interest only so long as Congress voluntarily continues its guardian-ward relationship with Indian people and its sanctioning of the quasi-sovereign status of Indian tribes. Thus the federal interest in Indian affairs is, for the most part, simply the result of federal preemption, and, arguably, should not inhibit otherwise valid state legislation unless such legislation is preempted.

At the state level, there is even less similarity in the positions of Indian and alien affairs. Federal regulation of immigration and citizenship requires little response on the part of the states, and leaves the states with virtually no need to specifically legislate regarding aliens.[275] Indeed, the federal government's conferral of citizenship upon Indians has not, of itself, generated controversy or caused problems for the states. As is illustrated by the variety and number of state jurisdiction cases,[276] federal regulation of Indian affairs has a much broader impact upon state concerns than does federal regulation of aliens. Often the states have not realized the full impact of the federal government's maintenance of quasi-sovereign units located inside their boundaries. By federal law, tribal governments displace state power to a large extent, often over a large portion of a state. The states have sometimes tried to ignore this fact, or have acted on the assumption that the special status of the tribes would soon disappear.[277] This attitude has impeded full recognition of the effect on state interests that results from the unique status of the tribes.

Although the continuation of tribal sovereignty is made possible by federal law, and although it was a product of a vital federal interest in the formative years of the nation, it is not a constitutionally required principle.[278] Tribal sovereignty is an issue that affects vital state interests as well as federal interests. The political-question doctrine, operating at the federal level, may require that there be some difference between fifth-amendment and fourteenth-amendment standards of judicial review, but in Indian affairs, unlike the regulation of aliens, the states are not without valid legislative interests of their own.

Summary and Application

Based upon the preceding discussion of possible restrictions on state and local action, it might be hypothesized that such action will be upheld if it first meets the threshold test of consistency with federal laws which promote tribal sovereignty and establish individual Indian rights. If the action is found to conflict with federal regulation, the

275. Mathews v. Diaz, 426 U.S. 67, 85 (1976); Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 420 (1948).

276. See notes 146-220 & accompanying text *supra*.

277. Of course, congressional policies such as allotment and termination have at times fueled such expectations. The judiciary often responded during periods of such congressional attitudes with decisions reflecting an assimilationist approach, sometimes with express reliance upon trends in federal legislation. *See, e.g.*, Acosta v. County of San Diego, 126 Cal. App. 2d 455, 272 P.2d 92 (1954).

278. See notes 5-54 & accompanying text *supra*.

court will not reach the equal-protection issue. If the state law is found to be consistent with federal legislation, it must meet the equal protection standards delineated above: the action will be upheld if it is (1) not a pretext for racial discrimination, (2) not a denial of a fundamental right, (3) narrowly drawn to apply only to persons who come within the unique federal legal status, such as members of tribes on reservations, and (4) rationally related to legitimate state interests. There exists a small but representative sampling of recent lower court case law against which this standard may be evaluated.

The first test, federal preemption of state action, was held dispositive by the Eighth Circuit in *Chase v. McMasters*.[279] The lower court in that case had held that a city's policy of not connecting municipal sewer and water systems to a tract acquired and held in trust for individual Indians under the 1934 Indian Reorganization Act was not unconstitutional.[280] The court found no intent to discriminate by pretextual use of the trust-land distinction. In line with *Mancari* and *Antelope*, the court next found that the trust-land classification was not a racial classification, thus addressing the second and third factors above. Finally, the court found the distinction to be rationally related to the governmental purpose of providing municipal water and sewer systems, because the trust land was exempt from normal real-property taxation.

On appeal, the Eighth Circuit reversed, not on the ground that the district court was incorrect as to any of the factors it applied, but on the ground that it had overlooked the threshold issue of federal preemption. The court held that the city's policy was void under the supremacy clause because it interfered with a federally guaranteed right of individual Indians to enjoy the beneficial use of trust property without paying taxes.[281]

The supremacy of conflicting federal law also was controlling in *White v. Califano*,[282] which upheld a state's policy of refusing admission to its mental hospital to reservation Indians. The court observed that for the state to exercise mental-commitment jurisdiction over reservation Indians would infringe upon tribal self-government. Thus, its concommitant denial of services also had to be upheld, and the court did not reach the remaining factors listed above relating to equal pro-

279. 573 F.2d 1011 (8th Cir. 1978).
280. 405 F. Supp. 1297 (D.N.D. 1975).
281. 573 F.2d at 1018. *But see* City of Tacoma v. Andrus, Civ. No. 77-1423 (D.D.C., Jan. 20, 1978) (opposite conclusion).
282. 437 F. Supp. 543 (D.S.D. 1977).

tection considerations.[283]

Pretextual discrimination was considered by the district court in *Chase*, as noted above, and by the court of appeals.[284] It was also considered in *Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*,[285] where the court found that the state legislation "was not adopted to mask racial discrimination."[286]

In *Chase, Yakima Nation* and the North Dakota Supreme Court case of *Lohnes v. Cloud*,[287] various state and local classifications were held not be invidious or to affect a fundamental right, the third factor listed above. The fourth factor, which requires that the category of state interest be narrowly drawn, has not received attention because it appears that no state or local government has classified simply on the basis of Indian versus non-Indian. In the recently reported cases, the legislative classifications in question have been reservation Indians,[288] occupants of trust land[289] or holders of tribal-court judgments.[290]

The fifth factor, the rational-basis test, arose in *Yakima Nation*[291] and the lower court decision in *Chase*.[292] In *Chase*, the district court found a rational relationship between the trust-land/fee-land distinction and the provision of municipal sewer and water services,[293] but the court of appeals indicated that it would probably not have found a rational basis, had it reached the question.[294]

The distinction between trust land and fee land was also at issue in *Yakima Nation*.[295] There state legislation extended Public Law 280 criminal jurisdiction[296] to fee land in Indian country but not to trust land. The court found that there was no rational relationship between the trust-land/fee-land distinction and the legislative purpose of pro-

283. *Id.* at 548-51.
284. 573 F.2d 1011, 1019 n.8 (8th Cir. 1978).
285. 552 F.2d 1332 (9th Cir.), *prob. juris. noted*, 434 U.S. 811 (1977).
286. *Id.* at 1334.
287. 254 N.W.2d 430 (N.D. 1977).
288. White v. Califano, 437 F. Supp. 543 (D.S.D. 1977).
289. Chase v. McMasters, 573 F.2d 1011 (8th Cir. 1978); Confederated Bands and Tribes of the Yakima Indian Nation v. Washington, 552 F.2d 1332 (9th Cir.), *prob. juris. noted*, 434 U.S. 811 (1977).
290. White v. Califano, 437 F. Supp. 543, 550-51 (D.S.D. 1977); Lohnes v. Cloud, 254 N.W.2d 430 (N.D. 1977).
291. 552 F.2d at 1335-36.
292. 405 F. Supp. at 1301-02.
293. *Id.*
294. 573 F.2d 1011, 1018 n.7 (8th Cir. 1978).
295. 552 F.2d 1332 (9th Cir.), *prob. juris. noted*, 434 U.S. 811 (1977).
296. See note 43 *supra*.

viding adequate law enforcement.[297]

In *Lohnes v. Cloud*[298] the North Dakota Supreme Court interpreted a state statute allowing for collection of an automobile-accident judgment from a state Unsatisfied Judgment Fund to exclude claims made by plaintiffs who had obtained judgments in tribal courts rather than in state court. Relying on *Antelope*, the court correctly found that the classification was not based upon race.[299] But the court did not actually follow through by then applying the rational-basis test, though it did list policy considerations that supported its holding. Because Indians were not exempted from contributing to the fund,[300] there was, arguably, no rational basis for excluding the tribal court judgment holders from the benefits of the fund.

Finally, a rational basis was found for benign state legislation in the field of Indian affairs in *Forge v. Minnesota*.[301] The Minnesota Supreme Court upheld a state law that imposed a license fee on non-Indian fishermen on the ground that it was a rational compromise between Indian treaty rights and legitimate state interests in regulating fishing.[302]

In all three of these cases, the courts did not apply the compelling-state-interest test, and in two of them the courts rigorously applied the rational-basis test. Consideration of all cases cited in this section indicates that the courts, for the most part, apply the analysis delineated above for state classifications in Indian affairs.

Conclusion

In each of the three lines of cases examined, specific conclusions about the proper role of sovereignty can be pulled together to form a unified view of sovereignty in the field of Indian law. Sovereignty is, in essence, a legal status held in varying degrees by Indian tribes in American Indian law. The tribes do not have a constitutional right to maintain this status, nor do they have a constitutional right to exercise any powers or other attributes of sovereignty. Sovereignty is not a direct source of tribal powers; except for certain implied powers not specifi-

297. 552 F.2d at 1335.
298. 254 N.W.2d 430 (N.D. 1977).
299. *Id.* at 434; see text accompanying note 238 *supra*.
300. Contributions were made by paying an additional fee to obtain a driver's license; thus Indians contributed to the same extent as non-Indians. *Id.* at 437.
301. 262 N.W.2d 341 (Minn. 1977).
302. *Id.* at 347-48.

cally withdrawn by the federal government, there must be a facilitating federal treaty or statute for each tribal power.

Federal law may foster, regulate, limit or completely terminate tribal sovereignty. Federal legislation regulating tribes and their members is not racially discriminatory and must only be supported by a rational basis.

Such federal laws may be a direct result of the original sovereign status of the tribes, and may be simply a recognition or a consent to the continuance of original tribal powers. Moreover, the retention of sovereign powers will frequently be inferred from treaties and statutes which do not expressly confer particular powers. The prefederal external sovereignty of the tribes provides a backdrop for interpretation, a backdrop that favors a finding of implied tribal power. The diminished status of the tribes within the federal system provides a countervailing historical backdrop, especially restrictive of tribal power when exercised over non-Indians.

Where there is an express or implied conferral or recognition of tribal sovereignty in federal law, that sovereignty preempts inconsistent state authority. Under the prevailing interpretations of federal law, states will frequently be preempted with respect to matters involving reservation Indians. State and local governments are, however, able to respond to this situation with reasonable legislative and administrative action to accommodate their needs and carry out their responsibilities under federal law. States are on more solid legal ground if they accept as permanent the preemptive federal policies which favor tribal self-government and adjust to them with legislation that minimizes the resulting economic and jurisdictional burdens.