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AMERICAN INDIAN TRIBAL SELF-GOVERNMENT IN THE FEDERAL SYSTEM: INHERENT RIGHT OR CONGRESSIONAL LICENSE?

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Who or what is a sovereignty? What is his or its sovereignty? On this subject, the errors and the mazes are endless and inexplicable. Chisolm v. Georgia, 1 U.S. (2 Dall.) 419, 456 (1793) (Wilson, J.).

I. Introduction

The United States is in the midst of a new civil war. Unlike the last civil war, it is not between the states and the Union; rather, it is a challenge by American Indian tribes against the states and the United States. Unlike the last one, this civil war has seen many of its battles occur in state and federal courts. Though the war began when the first white men settled on the North American continent, and has continued unabated to the present, the struggle has reached a new stage in which the Indian tribe rather than the settler is on the offensive.[1] This new offensive has been a fertile source of legal issues of which the most basic is the question of tribal sovereignty.

This article will examine the claim of tribal sovereignty[2] with a view towards both defining the issue and assessing its legitimacy. This examination is desirable

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1 The press provides us with evidence of this Indian revolution on a weekly basis. Following are some examples of these battles: (a) In 1974 a group of Iroquois Indians took over a portion of the Adirondack State Park in New York, claiming ownership to nine million acres in the states of New York and Vermont. New York filed an eviction action in federal court and the Indians were expected to file a motion to dismiss, contending the matter should be litigated in an international tribunal or settled through diplomatic negotiations between the United States and the tribe. TIME, Dec. 23, 1974, at 16. (b) In November, 1974, Indians alleging to be Wampanogas filed an action in the United States District Court for the District of Massachusetts against the town of Gay Head claiming ownership to 238 acres of land, alleging that the State of Massachusetts wrongfully deeded the land to the town in 1870 without the consent of the United States. Boston Globe, Jan. 19, 1975, at 42, col. 1. (c) The Penobscot and Passamaquoddy tribes have filed an action in the United States District Court for the District of Maine, against the State of Maine, seeking *inter alia,* to recover half the State of Maine alleging that their treaties with the states of Massachusetts and Maine were invalid. Boston Globe, Jan. 12, 1975, at 36. *See* O'TOOLE & TUREEN, *State Power and the Passamaquoddy Tribe,* 23 ME. L. REV. 1 (1971). (d) On January 1, 1975, in a nationally publicized incident involving the leaders of the militant American Indian Movement, an armed band of Menominee Indians invaded and occupied a privately owned monastery in Gresham, Wisconsin. Boston Globe, Jan. 9, 1975, at 14 (evening ed.). *See also* TIME, Feb. 17, 1975, at 8. (e) In 1973, members of the American Indian Movement occupied Wounded Knee on the Sioux's Pine Ridge Reservation in South Dakota and a shoot-out between the Indians and the F.B.I. left two persons dead. Boston Globe, Jan. 19, 1975, at A-4 (Focus). (f) The Fairchild Corporation operated an electronics plant on that portion of the Navajo Reservation in the State of New Mexico under a lease with the Navajo Tribe. After the corporation laid off 140 Navajo employees, twenty armed Navajos seized the plant, saying they would not leave even if the plant were closed. Boston Globe, Mar. 2, 1975, at 19.

2 Tribes, or groups of Indians purporting to be tribes, are asserting ambitious and bold claims, based upon a broad claim of tribal sovereignty. For example, Vine Deloria, a Sioux, and a former executive director of the National Congress of American Indians, would like the United States to return the American portion of the continent to Indians. Short of this, he argues for the restoration of total Indian independence from the United States. *See* V. DELORIA,

since federal, state and tribal courts can expect endless litigation involving tribal and individual Indian claims. The article will first briefly discuss the effect of conquest in international law. Thereafter follows an examination of federal constitutional provisions relating to Indians. Then, the notion of tribal sovereignty will be examined against the background of the congressional response to the presence of native Americans. Most of the major United States Supreme Court opinions which have dealt with Indian law problems will then be examined to see if some stable notion of the role of the tribe in the federal system has emerged. Because tribal sovereignty is examined in this way, many of the major developments in Indian law are exposed, and the article, therefore, provides a useful document for introduction to the problems of Indian law.

II. American Indian Tribes and the Effect of Discovery and Conquest in International Law

Citizens of European nations traveled to North America, discovered it (at least as far as Europeans were concerned), established settlements on it, claimed it for their respective sovereign nations, and made war with its native inhabitants, the American Indians. Within 400 years,[3] the conquest was complete.

No doubt, the American colonists represented the sovereignty of Great Britain; it is equally clear that the various Indian tribes were sovereign states.[4]

OF UTMOST GOOD FAITH (1971); and V. DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES (1974). For an autobiographical statement by Deloria, and his thoughts on the Indian movement, *see* A. JOSEPHY, RED POWER 247-59 (1971). Another author emerging from the Indian movement with a similar position says that, "The aim of Red, or Indian, Power—the right of Indians to be free of colonialist rule and to run their own affairs . . . is the major theme of contemporary Indian affairs. . . ." A. JOSEPHY, RED POWER 19 (1971). *See also* W. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW 240 (1971). While the recurring theme of the activist group within the Indian revolution is separation from the United States, it was not always this way. R. GESSNER, MASSACRE 406-07 (DeCapo Press ed. 1972). As recently as 1961, it appeared that the goal of American Indians was not separation, but rather full enjoyment of the bounty of America. Statement of the American Indian Conference held in Chicago in 1961, quoted in V. VOGEL, THIS COUNTRY WAS OURS 212 (1972). This view of helping the Indian to achieve a greater portion of the economic pie, but at the same time preserving Indian cultural identity, seems to be the current policy of the Congress acting through the Bureau of Indian Affairs of the Department of the Interior. T. TAYLOR, THE STATES AND THEIR INDIAN CITIZENS 168-72 (1972), published by the Bureau of Indian Affairs. The appendices of this volume contain as much raw data on Indian tribes as can be found in any single volume. Another moderate view stresses the desirability of the maintenance of Indian cultural identity, but within the federal system, and only to the extent federalism can accommodate special interests based upon race. *See* H. FEY & D. MCNICKLE, INDIANS AND OTHER AMERICANS (rev. ed. 1970) (hereinafter referred to as FEY & MCNICKLE). This book is available in paperback and is the most concise source of comprehensive information about the historical development of Indian issues. Other books, articles and tracts relating to Indian issues are plentiful, but their quality and objectivity vary enormously. *See, e.g.*, EASTERN MASSACHUSETTS REGIONAL LIBRARY SYSTEM, AMERICAN INDIAN: A SELECTED READING LIST (1973); T. TAYLOR, THE STATES AND THEIR INDIAN CITIZENS 283-86 (Selected Bibliography) (1972); U.S. Department of the Interior, ANSWERS TO YOUR QUESTIONS ABOUT AMERICAN INDIANS 31-41 (reading list) (1970). Some are new efforts to restate the historical development of Indian-American relationships. *See, e.g.*, V. VOGEL, THIS COUNTRY WAS OURS (1972); W. WASHBURN, THE AMERICAN INDIAN AND THE UNITED STATES. A DOCUMENTARY HISTORY (1973) (in four volumes). Others are position papers for the Indian movement. *See, e.g.*, V. DELORIA, OF UTMOST GOOD FAITH (1971).

3 Say, from Columbus' discovery in 1492, to the end of the nineteenth century.

4 *See, e.g.*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (1965), which defines "state" as follows: " 'state' . . . means an entity that has a defined territory and population under the control of a government and that engages in foreign relations."

At least before the Europeans arrived, the tribes exercised total self-government without outside influence over the lands they occupied. What effect, then, did this "discovery" and conquest have on the status of Indian tribes as sovereign states within the doctrine of traditional international law?

A state can acquire sovereignty over territory in various ways, two of which are conquest (or annexation) and cession.[5]

A state acquires sovereignty over the territory of another state by conquest under two sets of circumstances:

> (a) Where the territory annexed has been conquered or subjugated by the annexing state. (b) Where the territory annexed is in a position of virtual subordination to the annexing state at the time the latter's intention of annexation is declared. . . . Conquest of a territory as under (a) is not sufficient to constitute acquisition of title; there must be, in addition, a formally declared intention to annex. . . .[6]

On the other hand, a state acquires sovereignty over the territory of another state by cession, when the ceding state transfers its territory to the acquiring state.

> [Cession] rests on the principle that the right of transferring its territory is a fundamental attribute of the sovereignty of a State.
>
> The cession of a territory may be voluntary, or it may be made under compulsion as a result of a war conducted successfully by the State to which the territory is to be ceded. As a matter of fact, a cession of territory following defeat in war is more usual than annexation.[7]

Applying these general rules to the historical reality of British, and later, American claims to the United States, it is clear that the effect of conquest and cession leaves the Indian tribes with no internationally recognizable claim to sovereignty over any of the territory now part of the United States. The fact is that Indian tribes were conquered, subjugated, and cast into a position of virtual subordination. And the United States has, as will be demonstrated, expressly and impliedly declared an intent to annex the lands it now claims. Also, lands not taken by actual combat were voluntarily or involuntarily ceded to the United States by treaty and agreement.[8]

At least one international tribunal[9] is in accord. In the case of *Cayuga Indian Claims* (*Great Britain v. United States*),[10] Great Britain attempted to sue the United States on behalf of the Cayuga Indian Nation. The tribunal held that the claim could not be maintained on behalf of the Cayuga Nation, but only "on behalf of the Cayuga Indians in Canada," because the Cayuga Nation, "an

5 *See* W. FRIEDMAN, O. LISSITZEN & R. PUGH, CASES AND MATERIALS ON INTERNATIONAL LAW 465 (1969).

6 J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 180 (7th ed. 1972).

7 *Id.* at 181.

8 *See* notes 197-204 and accompanying text *infra* on the use of the treaty power and the power of the Congress, by unilateral action, to abrogate a treaty.

9 What the United States Supreme Court has said on this matter is discussed below.

10 20 AM. J. INT'L L. 574 (1926) (American and British Claims Arbitration Tribunal). One of the three arbitrators was Roscoe Pound.

Indian tribe [many of whose members were in the state of New York, not in Canada] . . . is not a legal unit of international law."[11] The tribunal explained its position as follows:

> From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the Power which by *discovery* or *conquest* or *cession* held the land which they occupied. . . . The Power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain. The rights in this respect acquired by discovery have been held exclusive. . . . So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it.[12]

III. The Tribe in the United States Constitution

Having concluded that an Indian tribe is not an internationally recognized sovereign, the status of the tribe under the United States Constitution should be examined. The Constitution does not, in fact, contemplate a role for the tribe in the federal system, *i.e.*, the existence of the tribe as a self-governing legal entity is not *constitutionally* guaranteed.

There is one provision of the Constitution relating to tribes,[13] and two less important provisions which refer to Indians.[14] Article I, § 8(3) provides that "[t]he Congress shall have the Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." And, as will be seen, Congress has exercised its commerce power over Indian tribes in a pervasive and pre-emptive way from the very beginning. Note that "foreign Nations," "States," and "Indian tribes" are separately delineated. Chief Justice Marshall used this delineation in *Cherokee Nation v. Georgia*,[15] as support for his conclusion that tribes were not foreign nations.

In addition to article I, § 8(3), and the two less important provisions mentioned previously, two other provisions of the Constitution warrant mention. Article II, § 2(2) gives the President and the Senate the power to make treaties. The use of this power with Indian tribes is discussed further in section IV.B. The other provision, the currently emasculated tenth amendment,[16] divides powers into three groups: the United States, the States, and the people. On its face, it does not provide for Indian tribes. And since no other provision of the Constitution can be read as a source of tribal power, it apparently forecloses the tribes' *constitutional* right to entity status.

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11 *Id.* at 577.
12 *Id.* (emphasis added).
13 U.S. CONST. art. I, § 8 (3).
14 U.S. CONST. art. I, § 2(3) and the fourteenth amendment. Both article I, § 2 (3), and the fourteenth amendment which amended it, simply exclude "Indians not taxed" in determining a state's representation in the House of Representatives. Article I, § 2(3) also excluded Indians not taxed from a state's apportionment of direct taxes.
15 30 U.S. (5 Pet.) 1, 18 (1831).
16 The tenth amendment provides as follows: "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."

This conclusion is supported by what little there is in *The Federalist* regarding Indians or Indian tribes. Alexander Hamilton saw the Indians as savages, the natural enemies of the United States and a justification for a standing army under the Constitution.[17] The Indian nations were a threat to the union.[18] John Jay was a bit more charitable. He also saw the Indians as a danger warranting a good national government, but blamed all Indian wars on the states as distinguished from the "feeble" federal government.[19] James Madison, commenting on the commerce power with Indian tribes, observed that article I, § 8(3), cured the defect in the Articles of Confederation which limited federal power to Indians not within a state.[20]

These few references are the only mention of Indians in this major document contemporaneous with the Constitution. Accordingly, the conclusion is valid that neither the Constitution nor its draftsmen foresaw or provided for the continuing existence of Indian tribes. Indeed, forty years after *The Federalist,* in 1828, James Kent was to predict the doom of all Indians:

> [Indians] have generally, and with some very limited exceptions, been unable to share in the enjoyments, or to exist in the presence of civilization; and judging from their past history, the Indians of this continent appear to be destined, at no very distant period of time, to disappear with those vast forests which once covered the country, and the existence of which seems essential to their own.[21]

IV. The Exercise of Congressional Power Over the Tribe

A. *General Comments*

The Congress of the United States, exercising its power to regulate commerce with Indian tribes under article I, § 8(3), and its power in conjunction with the President to make treaties with Indian tribes, under article II, § 2(2), has been the major architect of American Indian law and policy. Congress reflects the interests and values of American society; and, accordingly, the congressional treatment of Indians has fluctuated from total separation to total assimilation, including the complete termination of tribal status.

Many commentators have criticized Congress for this. The literature is replete with remarks such as "Congress has never taken up its responsibility of clearly defining the national goal regarding the status of the Indian,"[22] or, "federal policy has vacillated between attempted assimilation of the Indians into white society and protection of their cultural identity."[23] Little of this criticism

17 THE FEDERALIST No. 24, at 161 (Mentor ed. 1961) (A. Hamilton).
18 THE FEDERALIST No. 25, at 163 (Mentor ed. 1961) (A. Hamilton).
19 THE FEDERALIST No. 3, at 44 (Mentor ed. 1961) (J. Jay).
20 THE FEDERALIST No. 42, at 268-69 (Mentor ed. 1961) (J. Madison).
21 3 J. KENT, COMMENTARIES 318 (1st ed. 1828).
22 Comment, *The Indian Battle for Self-Determination,* 58 CALIF. L. REV. 445, 485 (1970).
23 Note, *The Indian: The Forgotten American,* 81 HARV. L. REV. 1818, 1821 (1968). *See* Bean, *The Limits of Indian Tribal Sovereignty: The Cornucopia of Inherent Powers,* 49 N.D.L. REV. 303 (1973). See also, Nixon, *Introduction,* 48 N.D.L. REV. 529 (1972), where the former President said, "I envisioned an approach which would carefully steer a course between excessive Federal control and termination [of the tribes]."

is warranted. The implication that Congress is somehow culpable for this vacillation is unfair. Congress reflects the policies of its time. The policies and the law change because the historical conditions change. The Americas of 1800, 1880, and 1950 were wholly different societies. This phenomenon can be clearly seen in the exercise of the treaty power and, more importantly, in the exercise of the commerce power.

B. *Treaties*

The original thirteen colonies, as agents of the British crown, entered into vast and elaborate treaties with Indian tribes.[24] The Indian wars in New England were numerous, but are now long forgotten.[25] Colonial reservations were the precursors of federal reservations. By 1700, most of the Indians in Massachusetts were placed on Massachusetts colonial reservations.[26] But the colonists expected the assimilation of the Indian into Massachusetts society, and, therefore, the reservation system was not meant to be permanent.[27] "By the time the United States inaugurated the federal reservation policy for the Indian tribes in 1786, the Massachusetts system of reservations had already served its purpose and virtually came to an end."[28]

Just as the colonies dealt with Indian tribes through treaties before separation from Great Britain, they continued to deal with Indian tribes through treaties during the Revolutionary War. The first federal treaty with a tribe occurred in 1778, with the Delaware Indians.[29] It was designed, if not to gain the loyalty of the Indians, to at least keep them from supporting the British in the war. The new country guaranteed to the Delawares whatever territory they were entitled to by former treaties.[30]

Since article II, § 2(2), of the Constitution required only Senate ratification, the House of Representatives was never involved with Indian treaties. The Senate picked up where the Continental Congress left off. Between 1778 and 1868, the last year in which the United States dealt with Indian tribes by treaty, the United States Senate ratified 370 Indian treaties.[31]

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24 *See* INDIAN TREATIES 1736-1762 (Historical Soc'y of Pa. ed. 1938). For treaties between the Penobscott Indians and Massachusetts, later assumed by Maine, *see* STATE OF MAINE, INDIAN TREATIES WITH THE STATE OF MAINE (1843).

25 *See* H. SYLVESTER, INDIAN WARS OF NEW ENGLAND (1910) (in 3 volumes).

26 Kawashima, *Legal Origins of the Indian Reservation in Colonial Massachusetts,* 13 AM. J. LEGAL HIST. 42 (1969).

27 *Id.* at 56.

28 *Id.*

29 Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13. Volume 7 of the *Statutes at Large* is entitled "Treaties Between the United States and the Indian Tribes," and is devoted entirely to Indian treaties.

30 *Id.*, art. 6 at 14.

31 HOUSE COMM. OF INTERIOR AND INSULAR AFFAIRS, 88th CONG., 2d SESS., LIST OF INDIAN TREATIES 1-6 (Comm. Print No. 33, 1964). All treaties appear in volumes 7 through 18 of *Statutes at Large.* Various compilations of Indian treaties exist. Two early compilations are U.S. DEP'T OF WAR, INDIAN TREATIES (1826) and COMMISSION OF INDIAN AFFAIRS, TREATIES BETWEEN THE UNITED STATES OF AMERICA AND THE SEVERAL INDIAN TRIBES (1837). The complete compilation is C. KAPPLER, LAWS AND TREATIES (Vols. 1 & 2, 1902) (Vol. 3, 1913) (Vol. 4, 1929). A recent compilation which includes, along with treaties, unratified treaties and agreements is INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW, INC., A CHRONOLOGICAL LIST OF TREATIES AND AGREEMENTS MADE BY INDIAN TRIBES WITH THE UNITED STATES (1973). This latter compilation appears to have been prepared for the Indian advocate.

The use of the treaty power in dealing with Indian tribes in the formative era of American territorial expansion was a natural phenomenon. Ever westward expansion was to be accomplished by voluntary relinquishment of the soil if possible, and if not, by war. Hence, "[i]t was decided very early that compacts entered into with Indian tribes required ratification by the Senate and had the same status, force, and dignity as agreements with sovereign nations."[32] Moreover, the use of treaties by the United States in its relations with Indian tribes merely continued the practice of Great Britain and the colonies.

But, as the power of the United States expanded, the use of the treaty power relative to Indian tribes raised serious questions. Treaties with Indian tribes suggested sovereignty in the tribe. What was perhaps natural, truly necessary, in the seventeenth and eighteenth centuries became an embarrassment by the nineteenth century.

> As early as 1817 [Andrew] Jackson had written to President Monroe that "I have long viewed treaties with the Indians an absurdity not to be reconciled to the principles of our government. The Indians are the subjects of the United States, inhabiting its territory and acknowledging its sovereignty, then is it not absurd for the sovereign to negotiate by treaty with the subject."[33]

While in the abstract the implication of tribal sovereignty arising from treaties with tribes appears viable, an examination of a typical treaty suggests the contrary. In the treaty between the United States and the Cherokees in 1835,[34] the Cherokees ceded all their land east of the Mississippi River to the United States for $5 million.[35] The United States ceded lands west of the Mississippi River to the Cherokee Tribe and agreed that the lands so ceded would never be included within the territorial limits of a state or territory without its consent.[36] The United States also promised that the tribe could make its own laws and be governed by them, "provided always that they shall not be inconsistent with the Constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they [Cherokee laws] shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission of the United States."[37]

Rather plainly, the tribe was subjected to the sovereignty of the United States. The tribe was granted powers of self-government, but subject to the Constitution and any law Congress might enact. Moreover, its governmental powers did not extend to non-Indians entering Indian territory lawfully. Thus,

32 THE NATIONAL ARCHIVES, LIST OF DOCUMENTS CONCERNING THE NEGOTIATION OF RATIFIED INDIAN TREATIES 1801-1869 1 (1949).

33 Higgins, *International Law Consideration of the American Indian Nations by the United States,* 3 ARIZ. L. REV. 74, 82 (1961), quoting from BASSET, CORRESPONDENCE OF ANDREW JACKSON 279-81 (1955).

34 Treaty with the Cherokees, Dec. 29, 1835, 7 Stat. 478 (1835).

35 *Id.,* art. 1 at 479.

36 *Id.,* art. 5 at 481. As will be shown below, this is the result of federal exhaustion of the field rather than an inherent tribal right to be free from state jurisdiction.

37 *Id.*

the very terms of the treaty deny the tribe the sovereignty which is supposed to arise by implication from the fact that a treaty was made.

It must also be remembered that many of the treaties with Indian tribes were peace treaties which came after the wars which implemented America's manifest destiny. Whatever may have been the status of Indian tribal sovereignty prior to treaty making, after a war was concluded and a treaty made, the tribe was in fact subjected to the power of the United States. And whether treating Indian tribes as nations was a mere pretense, as suggested by Professor Chill,[38] or a sincere effort based upon a belief in tribal independence matters little since the treaties were violated by both sides, and "Indian attacks and American punitive expeditions continued until the frontier was finally conquered and the Indians subdued."[39] It must be remembered, too, that the conquest of America and the subjugation of the Indian tribes were at the time seen to be justified by the Christian's duty to spread the word of the Gospel to heathens and the duty to civilize (Europeanize) what seemed to be a backward people.[40] What now seems an injustice seemed at the time, if not virtuous, at least justifiable.

Whatever inference was raised with respect to tribal sovereignty by the use of the treaty power by the United States is now a moot point. For by the Act of March 3, 1871,[41] the Congress of the United States proclaimed that:

> [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. . . .[42]

Thereafter, no treaty was made with an Indian tribe. It would be difficult to conceive of language evidencing an intent to extinguish tribal sovereignty vis-à-vis the United States clearer than this. As will be seen, existing treaties with Indian tribes have a status no greater than that of a statute, and therefore may be abrogated by the unilateral act of Congress.

C. *Statutes: An Historical Development*

The historical development of American policy toward the Indians is nowhere better revealed than in the major congressional legislation dealing with

38 E. CHILL, *Commentary,* in 1 MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967 664 (F. Israel ed. 1967).

39 *Id.* at 665. See P. EDWARDS, THE MEDICINE LODGE INDIAN PEACE TREATY (1961) for a human account of the events surrounding the making of a treaty.

40 A typical comment of the time, though made in reference to Canada's Indians, is the following: "Let us have Christianity and civilization to leaven the mass of heathenism and paganism among the Indian tribes; . . . ." A. MORRIS, THE TREATIES OF CANADA WITH THE INDIANS OF MANITOBA AND THE NORTH-WEST TERRITORIES 296 (1880). The author was the Lieutenant Governor of Manitoba and the Northwest Territory. His account of Canada's treaties with its Indian tribes reveals a sensitivity to the problem of displacement. For recent materials on Indian law problems in Canada, see *Symposium,* 38 SASK. L. REV. 1-249 (1974).

41 25 U.S.C. § 71 (1970) (originally enacted as Act of March 3, 1871, ch. 120, 16 Stat. 544).

42 *Id.* Congress provided a savings clause which provided that obligations arising under existing treaties would not be invalidated. *Id.*

Indian tribes. Since the existence of entity status for the tribe, the extent of tribal self-government, and the extent of tribal immunity from state interference are nowhere guaranteed by the United States Constitution,[43] these matters have historically been wholly within the legislative ambit of the Congress, usually under the commerce clause, article I, § 8(3). Accordingly, law and policy have waxed and waned with the tempo of the times. It is in this area that Congress has been subjected to the greatest criticism; yet this "oversimplified" criticism "obscure[s] the fact that Indian policy did not spring full-blown from some statesman's brow, but rather was a slow growth, developing under the press of circumstances and the pressures of diverse groups."[44]

1. The Formative Era, 1790-1834

In less than one year after the United States Constitution was ratified, the Congress enacted its first measure governing relations between citizens of the United States and Indian tribes.[45] It was the first of a series of so-called "non-intercourse" acts to be adopted during the next 44 years. As the label implies, the Act was designed to keep the Americans away from the Indians. For example, it required the issuance of federal licenses to trade with tribes,[46] and prohibited the alienation of Indian or tribal land to Americans or any of the states, in the absence of a federal treaty authorizing it.[47] It was Congress' first attempt to preempt all Indian-American relationships from individual or state action. The Act was to expire automatically at the end of the session next following two years after its passage.[48] Accordingly, similar new legislation was enacted in 1793,[49] but interestingly enough, it provided for federal court jurisdiction for any criminal violations of its provisions.[50] It too expired of its own force, and the third piece of legislation was enacted in 1796.[51] This third nonintercourse act was slightly more elaborate. It set boundaries between Indian country and the rest of the United States,[52] and provided the death penalty for the non-Indian's murder of an Indian on tribal land.[53] Expiring of its own force, it was replaced by a fourth act,[54] which expired on March 3, 1802, and which was not replaced until March 3, 1813.[55] Therefore, between 1802 and 1813, no federal legislation existed regulating affairs with Indians.

The objective of these nonintercourse acts was to ensure westward settle-

43 *See* Part III *supra,* and Part V *infra.*
44 F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS vii (1962).
45 Act of July 22, 1790, ch. 33, 1 Stat. 137.
46 *Id.*
47 *Id.* § 4 at 138.
48 *Id.* § 7 at 138.
49 Act of March 1, 1793, ch. 19, 1 Stat. 329.
50 *Id.* § 10 at 331.
51 Act of May 19, 1796, ch. 30, 1 Stat. 469.
52 *Id.*
53 *Id.* § 6 at 470.
54 Act of March 3, 1799, ch. 46, 1 Stat. 743.
55 Act of March 3, 1813, ch. 61, 2 Stat. 829. This Act allowed the President to retaliate against the British for injuries done Americans by Indians aligned with the British in the War of 1812.

ment, but at the same time minimize conflict between non-Indians and Indians.[56] The acts were not altogether successful at keeping the peace. A random sampling of the early *Statutes at Large* will show that Congress consistently appropriated funds to suppress Indian hostilities.[57]

The provisions in these early nonintercourse acts relating to federal jurisdiction over non-Indian crimes in Indian territory, requiring federal consent for Indian alienation of land, indeed, the very existence of the acts themselves, suggest that Congress was dealing with entities (the tribes) which in fact possessed attributes of something less than sovereignty. The policy was separation and nonintercourse, not so much for the benefit of the maintenance of tribal integrity as for the orderly advance of the frontier.[58]

2. The Intercourse Act of 1834[59]

After 44 years of experience with sporadic nonintercourse acts, the first major piece of federal Indian legislation emerged. The frontier was advancing at an ever faster rate, and the time had come to establish a more permanent mechanism by which non-Indian conflicts with Indians could be minimized. It provided licensing for trade with Indians,[60] prohibited non-Indians from bartering with Indians for hunting and cooking items,[61] prohibited non-Indians from hunting in Indian country,[62] prohibited non-Indians from grazing their animals in Indian country,[63] prohibited settlement on Indian land,[64] prohibited the conveyance of Indian land except by federal treaty,[65] prohibited speeches in or messages to Indian country designed to disturb the peace,[66] and extended federal criminal jurisdiction to all crimes committed in Indian country, except as "to crimes committed by one Indian against the person or property of another Indian."[67]

Rather clearly, the whole thrust of the act was to control the conduct of Indians and non-Indians in a detailed and preemptive way so that the natural expansion westward would be as orderly as possible. The policy was separation, but with the ultimate motive of either the future assimilation or annihilation of the tribes. The events of history were such that by 1871, Congress was to formally deny nation status to Indian tribes by the Act of March 3, 1871.[68]

56 See F. PRUCHA, *supra* note 44, at 1-3.
57 *See, e.g.*, 5 Stat. 1, 6, 8, 17, 33, and 65.
58 See F. PRUCHA, *supra* note 44, at 1-3.
59 Act of June 30, 1834, ch. 161, 4 Stat. 729 (codified in scattered sections of 25 U.S.C.).
60 *Id.* § 2.
61 *Id.* § 7.
62 *Id.* § 8.
63 *Id.* § 9.
64 *Id.* § 11.
65 *Id.* § 12.
66 *Id.* § 13.
67 *Id.* § 25 at 733.
68 25 U.S.C. § 71 (1970) (originally enacted as Act of March 3, 1871, ch. 120, 16 Stat. 544) (discussed in note 41 and accompanying text *supra*).

3. The General Allotment Act of 1887:[69] Indian Citizenship and Assimilation

A contributor to the second volume of the *Harvard Law Review* in 1888 divided the history of Indian law into four periods, culminating in the General Allotment Act.[70] The first period, from colonization to 1829, found the white man contending with the Indians for possession of the continent. When they were not in actual combat, the whites dealt with the Indians under international law, but always, through its courts, "asserted [their] title to the soil by right of discovery, and extended that claim, territorially, as fast as the progress of colonization and emigration carried the advancing line of white settlement westward."[71]

The presidency of Andrew Jackson began the second period, from 1829 to 1871, "which may be characterized as the period of compulsory emigration under the form of consent by voluntary treaty."[72]

With Congress in 1871 terminating the treatymaking process, the next 16 years were described as a "period of confinement on reservations under executive control."[73]

The fourth period was the future. "[T]he ultimate objective point to which all efforts for progress should be directed is to fix upon the Indian the same personal, legal, and political status which is common to all other inhabitants."[74] The Indian wars were nearly at an end, the tribes were subjugated, and westward expansion was complete. In the face of this new reality, what should be the status of the Indian tribe? The natural response was that it should end with Indians being assimilated into the now-dominant culture. Congress responded to this new reality accordingly with the passage of the General Allotment Act, whose main objective was to allot tribal lands to individual Indians, end the status of the tribe, and make a citizen out of the Indian. This Act was no irrational fluctuation in congressional policy. When the reality called for separation, the Intercourse Acts were appropriate. When there was nothing left to keep separate, assimilation seemed appropriate. The people of the period felt that civilization was not possible without individual ownership of land.[75] The continent had changed. The tribes could no longer lead the nomadic life of the hunter. If the Indians were to survive at all, they were to become independent farmers.

To this end, the Act provided that tribal land, whether held by treaty,[76] act of Congress, or Executive order could be allotted "in severalty to any Indian located thereon,"[77] in accordance with a prescribed formula. Consistent with the formula, an Indian could select whatever portion of tribal land he wanted, but

69 Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (amended and codified in scattered sections of 25 U.S.C.).
70 Abbot, *Indians and the Law*, 2 HARV. L. REV. 167 (1888).
71 *Id.* at 167-68.
72 *Id.* at 171.
73 *Id.* at 173.
74 *Id.* at 174.
75 D. Otis, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (1973). Otis provides a definitive history of the General Allotment Act.
76 For the power of Congress to unilaterally abrogate a treaty by subsequent statute, *see* notes 197-204 and accompanying text *infra*.
77 Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388.

if he failed to make an election within four years after the President directed allotment, the Secretary of the Interior would make his selection for him.[78] The United States would hold the allotted land in trust for 25 years and thereafter convey it in fee to the individual Indian, or if deceased, to "his heirs according to the laws of the State or territory where such land is located."[79] At the end of the trust period, the Indian allottee would become subject to the civil and criminal laws of the state or territory in which he resided.[80] The Act provided an equal protection clause against the territories in favor of the Indian,[81] and provided that both individual Indian allottees born in the United States and every other Indian not residing with a tribe who has "adopted the habits of civilized life" were henceforth declared to be American citizens.[82]

As to those reservation lands remaining after allotment, the United States would purchase them (with tribal consent), distribute them to settlers, and hold the proceeds in trust for Indians, from which Congress would appropriate educational funds.[83]

Whatever the wisdom of this assimilation plan, Congress clearly asserted the full sovereign power of the United States against the continued existence of the tribe. The assumption underlying such a plan is that the continuing existence of the tribe as a self-governing entity is a function of federal legislative grace.

Allotment and assimilation were the Indian law and policy of the United States between 1887 and 1934. Many Indians became United States citizens under the provisions of the Allotment Act. To fill whatever gaps may have been left, in 1924 Congress declared that "all non-citizen Indians born within the territorial limits of the United States" are citizens of the United States.[84] The statute's validity was tested somewhat later in *Ex Parte Green,*[85] a case in which an Indian was inducted into the United States Army. He filed a petition for habeas corpus, alleging that he was not a citizen of the United States within the meaning of the Selective Service law, that any attempt by Congress to make him a citizen under the 1924 Act violated treaty rights, that his tribe had never been conquered by the United States and was an independent nation by virtue of certain eighteenth-century treaties. The court denied his claim and held that even if his treaty argument were valid, where there is a conflict between a treaty and a subsequent statute, the statute prevails, citing the *Head Money Cases.*[86]

A high point in the aftermath of the General Allotment Act's assimilative policy came in 1929. As mentioned earlier, by treaty and the early Intercourse Acts, Congress had from the beginning assumed exclusive responsibility and

78 *Id.* § 2.
79 *Id.* § 5.
80 *Id.* § 6.
81 *Id.*
82 *Id.*
83 *Id.* § 5. Between 1887 and 1934 approximately 90 million acres of tribal land were distributed for settlement. Note, *The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit,* 25 HAST. L.J. 1451, 1464 (1974).
84 8 U.S.C. § 1401(a)(2) (1970) (originally enacted as Act of June 2, 1924, ch. 233, 43 Stat. 253). Though the act provided that citizenship would not affect an *Indian's* right to tribal property, it did not guarantee the *tribe's* right to tribal property.
85 123 F.2d 862 (2d Cir. 1941), *cert. denied,* 316 U.S. 668 (1942).
86 112 U.S. 580 (1884). Discussed *infra.*

authority in dealing with Indian tribes. It had continued to assert the sovereignty of the United States over the tribe. In doing so, it left little or no room for state action on the reservation or in Indian country, not because the Constitution prohibited it, but because Congress saw a need for a uniform national policy with respect to Indians. Consequently, it preempted the field. But the need for a national policy diminished as the tribes moved in history from sovereign nations to wards of the federal government. The whole purpose of allotment was to end the special status of the tribe, since the historical justification for its recognition no longer existed. The goal was to integrate Indian citizens into the federal system. To this end, in 1929, Congress enacted measures allowing the states to enter tribal lands to enforce health and sanitation standards and to enforce compulsory school attendance of Indian children as provided by state law.[87] And with it a new principle emerged: the states could exert their sovereignty over the tribe whenever permitted to do so by Congress. But along with a new economic doctrine the Depression brought a new Indian policy.

4. The Indian Reorganization Act of 1934:[88] The Attempt to Stem the Tide of Historical Inevitability

A recurring theme in materials relating to federal Indian law[89] is that one man, Felix S. Cohen, single-handedly slowed the forces of history. From the first colonial settlement until 1934, the consistent policy of the United States had been, at first, to seize and possess the continent, and then, to assimilate any Indians who might be left. But the New Deal brought men to Washington who, for the first time, were of the opinion that there might yet be a continuing role for the tribe in the federal system. Felix S. Cohen was such a man: he drafted[90] the Indian Reorganization Act of 1934,[91] and, while an employee of the Department of Interior in 1942, he published a book which became a *cause célèbre* in the world of federal Indian law.[92]

Though the Indian Reorganization Act was not the first major piece of Indian legislation to emerge from the New Deal,[93] it was the most significant. It was permissive in nature, and could be repudiated by any tribe.[94] Its major

87 25 U.S.C. § 231 (1970) (originally enacted as Act of Feb. 15, 1929, ch. 216, 45 Stat. 1185).

88 25 U.S.C. § 461 *et seq.* (1970) (originally enacted as Act of June 18, 1934, ch. 576, 48 Stat. 984).

89 *See, e.g.*, Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145 (1940); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1971) [hereinafter cited as HANDBOOK].

90 *See* the Foreword to the University of New Mexico's reprint of his book. HANDBOOK, *supra* note 89.

91 *See* comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. Rev. 955 (1972).

92 HANDBOOK, *supra* note 89. The subsequent history of this book appears in note 107 and accompanying text *infra*.

93 The Indian Reorganization Act was preceded by the Johnson-O'Malley Act. 25 U.S.C. § 452-54 (1970) (originally enacted as Act of April 16, 1934, ch. 147, 48 Stat. 596). Because the territorial isolation of tribal Indians did not insulate them from the hardships of the Depression, the Johnson-O'Malley Act authorized the Secretary of the Interior to contract with the states and territories [presumably Alaska] for the education, medical care, agricultural assistance and social welfare of Indians.

94 Act of June 18, 1934, ch. 576, § 18, 48 Stat. 984.

features were the termination of allotment,[95] and the provision of federal legislative authority for tribal self-government.[96] Trusts created under the General Allotment Act were extended indefinitely,[97] all unallotted lands were restored to tribal ownership,[98] and the Secretary of the Interior was authorized to acquire land for tribes[99] and create new reservations.[100] The goal of the Act was to allow tribes to elect existence as a separate people as an alternative to the mandatory assimilation of the General Allotment Act. And, the Act permitted those tribes who elected existence to adopt a constitution and bylaws for their self-government,[101] with certain enumerated powers in addition to any which might have existed under prior law. They were:

> [t]o employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments.[102]

The Act was a last-minute attempt to prevent the inexorable doom of all tribes predicted over one hundred years earlier by James Kent.[103] But, more important than the end of allotment were the Act's provisions for tribal self-government. While it is clearly a legislative grant of power, the Act does not go as far as Cohen's own view. Cohen's fundamental assumption was: "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has [*sic*] never been extinguished."[104] For this position Cohen relied on *Worcester v. Georgia*,[105] an opinion whose validity had been eroded by history and subsequent opinions.[106] And even if the case enjoyed full current vitality, Chief Justice Marshall was addressing himself to assertions of tribal sovereignty against the states, not the United States. Rather inconsistently, then, did Cohen concede that "[c]onquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe."[107]

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95 *Id.* § 1.
96 *Id.* § 16. Section 12, providing Indian employment preference in the Federal Indian Office, is discussed *infra.*
97 *Id.* § 2.
98 *Id.* § 3.
99 *Id.* § 5.
100 *Id.* § 7.
101 *Id.* § 16. Section 17 provided that a tribe could apply for a federal charter of incorporation, revocable by act of Congress.
102 *Id.* at 987.
103 *See* text acompanying note 21 *supra.*
104 HANDBOOK, *supra* note 89, at 122.
105 31 U.S. (6 Pet.) 515 (1832).
106 Discussed in notes 175-80 and accompanying text *infra.*
107 COHEN, *supra* note 104, at 123. But Cohen's *Handbook of Federal Indian Law*, published by the Bureau of Indian Affairs of the Department of the Interior in 1942, became the major treatise on federal Indian law. As noted, Cohen opined that Indian tribes possessed inherent powers of self-government quite independent of the United States Constitution. By the 1950's, however, congressional policy toward tribes returned once again to assimilation, *i.e.*, the termination of all tribes. Accordingly, the Department of the Interior authored and published in

The revitalization of the tribe by the Indian Reorganization Act of 1934 and Cohen's 1942 book were not to survive into the 1950's. By the mid-1940's Congress was showing its impatience with tribal matters. Ancient Indian claims were an ever-present pest. Because of the sovereign immunity of the United States, laches, and statutes of limitations, each Indian claim required special legislation. In an effort to fulfill its moral (and to a lesser extent, legal) obligations to Indian tribes and to put an end to tribal claims against the United States once and for all, the Act of August 13, 1946[108] created the Indian Claims Commission to hear all tribal claims against the United States whether arising out of contract, tort, treaty or otherwise.[109] The jurisdiction of the Commission was limited to claims which existed before August 13, 1946,[110] and all such claims had to be brought within five years (*i.e.*, by August 13, 1951) or be forever barred.[111] All tribal claims arising after August 13, 1946, were to be heard in the United States Court of Claims.[112] The Commission was directed to notify all tribes of the provisions of the Act and investigate claims.[113] All final determinations by the Commission were reviewable by appeal to the United States Court of Claims.[114]

Since pre-1946 claims could be brought only within the five-year period, the Act provided for the termination of the Commission within 10 years.[115] However, the Commission has been extended over the years to hear the original 370[116] claims filed before 1951. The original 370 claims were divided into 605 docketed claims, and by 1968 (after 22 years) 149 were dismissed, and final judgment was entered in 134.[117] Congress has extended the life of the Commission to 1977,[118] but it is doubtful if the remaining cases will have been settled in nine years.[119]

1958 a new book called FEDERAL INDIAN LAW, which reasserted the power of the United States over Indian tribes. U. S. DEPARTMENT OF INTERIOR, FEDERAL INDIAN LAW (1958). Finally a third book, published in 1971 by the University of New Mexico, reprints Cohen's original work, and castigates the 1958 volume as a bogus version of Cohen's book. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (Univ. of N.M. ed. 1971) at v-vi. The world is still waiting for a revised version from the Department of the Interior, as directed by Congress in 1968. Under the Act of April 11, 1968, P.L. 90-284, 82 Stat. 73, Congress directed the Secretary of the Interior to revise and republish its version of *Federal Indian Law.*

108 Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (amended and codified in 25 U.S.C. § 70 *et seq.* (1970)).

109 *Id.* § 2.

110 *Id.*

111 *Id.* § 12. The language of this section indicates the intent of Congress to terminate ancient claims with finality: "no claim existing before such date [August 13, 1946] but not presented within such period [five years] may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress." *Id.* This section should be a powerful tool for any United States Attorney defending the United States in actions brought by tribes based upon pre-1946 claims.

112 *Id.* § 24.

113 *Id.* § 13.

114 *Id.* § 20.

115 *Id.* § 23.

116 Vance, *The Congressional Mandate and the Indian Claims Commission,* 45 N.D.L. REV. 325, 329 (1969).

117 *Id.*

118 25 U.S.C.A. § 70 (Supp. 1975).

119 Apparently, the Commission has chosen to sit as a court and is, therefore, passive. It has not taken its investigatory role under the statute seriously. *See* Vance, *supra* note 116, at 335. *See also* Vance, *Indian Claims,* 38 Sask. L. REV. 1 (1974).

5. Termination of the Tribes: Congressional Grants of Civil and Criminal Jurisdiction over the Remaining Tribes to the States

After the 20-year lull in which the Indian Reorganization Act of 1934 and Cohen's book slowed the inexorable force of history, Congress, by 1953, returned to its former policy of assimilation. By now, it was unnecessary to subjugate tribes; their status as self-governing entities could be terminated by legislation. Congress expressed its intent by Concurrent Resolution;[120] the words were strikingly similar to those used in connection with the policy behind allotment in 1871.[121]

> [I]t is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; . . .[122]

Though this resolution has been severely criticized,[123] it should be noted that assimilation (in the sense of no racial classifications under the law) has always been regarded as a positive goal in the melting pot that is America. Though diversity and cultural identity have always been protected in a *private* context in a pluralistic society, it is questionable whether the protection of these values in a *public,* governmental way is consistent with the United States Constitution.[124]

In any event, Congress had no doubt that it could legislate away the existence of a tribal entity, and in the years that followed, many Indian tribes were so terminated.[125] The legislation provided for the closing of the tribal rolls,[126] the sale of tribal land[127] (proceeds to go to individual Indians), the termination of federal recognition of Indian identity vis-à-vis federal programs,[128] and the full application of the laws of the state in which the tribe was located to individual Indians and the tribe[129] (the tribe could elect to exist as a private corporate entity under the laws of a state). Whatever right to self-government granted by the provisions of the Indian Reorganization Act and incorporated in a tribal constitution was terminated.[130]

This kind of legislation, never successfully challenged, stands for the proposition that tribal self-government exists through the authority of Congress and is not guaranteed by the federal system as established in the United States Constitution.

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120 H. R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953).
121 *See* text accompanying note 74 *supra.*
122 H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953).
123 *See, e.g.,* Fey & McNickle, *supra* note 2, at 163-65.
124 *But see* Morton v. Mancari, 417 U.S. 535 (1974), discussed *infra.*
125 Termination legislation for various tribes is collected in 25 U.S.C. chapter 14 (1970).
126 *See, e.g.,* as to the Klamath tribe in Oregon, the Act of Aug. 13, 1954, ch. 732, § 3, 68 Stat. 718.
127 *Id.* § 6.
128 *Id.* § 18(a).
129 *Id.*
130 *Id.* § 19.

For those tribes not terminated, Congress implemented its intent to incorporate Indians into the mainstream of American federalism by yielding its exclusive jurisdiction over tribes, heretofore established by pre-emption under article I, § 8(3) of the Constitution, by granting its consent to any state which wanted to assert its civil and criminal jurisdiction over tribal Indians.[131] The consent of the tribe was not required.[132] But Congress continued to exempt tribal land from state taxation,[133] and as a result, many states were reluctant to expand jurisdiction without a proportional increase in the tax base.

Through statutory termination and grants of jurisdiction over tribes to the states, it can fairly be said that the 1950's were the contemporary high-water mark of congressional intent to integrate the tribal Indian into the federal system.[134] But the turbulent events of the 1960's caused a reassessment of Indian policy, and the congressional goal of assimilation and termination was again suspended.

6. The Indian Civil Rights Act of 1968[135]

Termination was suspended[136] because Indians who were members of terminated tribes were not equipped for assimilation. Many, having spent their proceeds rapidly, ended up as wards of the state in fact, if no longer in law.[137] But assimilation without termination is difficult if not impossible. The Indian Civil Rights Act of 1968 was one such nonterminating assimilative effort. The tribe could exist, but would be subject to almost all the restraints the Bill of Rights imposes on the federal and state governments.[138] This was necessary because much earlier when the United States Supreme Court held that the Bill of Rights was a limitation on the power of the federal government only and not

131 Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588, frequently referred to as Public Law 280. The Act itself granted the states of California, Minnesota, Nebraska, Oregon and Wisconsin civil and criminal jurisdiction over Indian reservations, with some excepted, including any action in which a tribal Indian is a party and over all offenses committed by or against an Indian in Indian country. §§ 2 and 4. For a discussion of whether this subjects tribal Indians to the laws of local governments as well as laws of statewide applicability, *see* Note, *The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit,* 25 HAST. L.J. 1451 (1974). Since Public Law 280 came 15 days after House Concurrent Resolution 108, *supra* note 120, one would assume that Congress intended tribal Indians to be subject to the laws of local governments.

132 Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588. This was amended to require tribal consent by 1968. See discussion in note 141 and accompanying text *infra.*

133 *See Id.* § 4.

134 It was in this period also that the Congress allowed tribes to lease their land, with the approval of the Secretary of the Interior, for commercial gain. 25 U.S.C. § 415 (1970) (originally enacted as Act of Aug. 9, 1955, ch. 615, 69 Stat. 539). Section 5 of this Act prohibited the Secretary of the Interior from approving any lease which would delay termination. Recent commentators have read the Secretarial approval requirment of this statute to be based upon a federal policy of preserving Indian culture. *See* Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands,* 26 STAN. L. REV. 1061, 1079-80 (1974). But § 5 on its face refutes that claim.

135 25 U.S.C. § 1301 *et seq.* For a remarkably readable legislative history of this act *see* Burnett, *An Historical Analysis of the 1968 Indian Civil Rights Act,* 9 HARV. J. LEGIS. 557 (1972). *See also* Reiblich, *Indian Rights Under the Civil Rights Act of 1968,* 10 ARIZ. L. REV. 617 (1968).

136 The *practice* was suspended. H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953) (remains unrepealed).

137 *See* Fey & McNickle, *supra* note 2, at 167-79.

138 Indian Civil Rights Act, 25 U.S.C. § 1302 (1970).

the states, it held that, for the same reason, the Bill of Rights was not applicable to an Indian tribe.[139] The Act also extended the writ of habeas corpus in federal court to test the legality of detention by an Indian tribe exercising powers of self-government.[140] This is important, not so much for tribal Indians who could at least be assumed to have subjected themselves to tribal government, but rather for non-Indians who may be held by a tribal government. Without this provision neither state nor federal court could help the non-Indian test the legality of his detention. Finally, the Act amended § 7 of Public Law 280 to require the consent of the tribe before a state could extend its civil and criminal jurisdiction over a reservation.[141]

On its face, this Act appears benign enough. There was no substantial Indian opposition to the Act. Indeed, perhaps because of the provisions requiring tribal consent before the exertion of state jurisdiction, an admittedly massive adjustment to Public Law 280, one commentator has suggested that the Act was intended to preserve tribal self-government.[142]

Yet, the application of most of the provisions of the Bill of Rights of the United States Constitution to tribal governments plainly stands in opposition to claims of tribal sovereignty. Moreover, it subjects the tribes, by and large, to the same limitations imposed on state and federal governments.[143] This will have a homogenizing effect on tribal governments. Cultural or historical practices contrary to the provisions of the statutory bill of rights must fall. It is a statement by Congress that certain rights are so fundamental that whatever interest a tribe might have contrary to such rights must fail.[144] A crucial question is whether the same standards of due process apply to tribes, or whether cultural differences may lawfully be considered.[145] One court, already facing this question, held that the equal protection clause in the Act[146] requires the application of the one-man one-vote standard of *Baker v. Carr*[147] to tribal elections.[148] Just as there was objection to the application of this principle to the states, already there is a suggestion that Indian tribal values should prevail over the values expressed by the equal protection clause.[149] The extent to which such a suggestion might prevail remains to be seen.

The Indian Civil Rights Act is nonterminating to the extent it requires tribal consent prior to a state's claim of jurisdiction over it. But it is assimilative

139 Talton v. Mayes 163 U.S. 376, 384 (1896), discussed in text accompanying notes 193-96 *infra*.

140 Indian Civil Rights Act, 25 U.S.C. § 1303 (1970).

141 25 U.S.C. § 1323 (b) (1970) repealed section 7 of the Act of Aug. 15, 1953, ch. 505, 67 Stat. 588. 25 U.S.C. §§ 1321 (a), 1332 (a) require the consent of the tribe before the exertion of state jurisdiction.

142 Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D.L. Rev. 337, 346-47 (1969).

143 A notable exception is an establishment clause. Whether an Indian tribe may impose a single religion on all its members is, theoretically at least, an unsettled question.

144 For an early prediction of this problem *see* Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343, 1353-73 (1969).

145 *Id.*

146 25 U.S.C. § 1302(8)(1970).

147 369 U.S. 186 (1962).

148 White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973).

149 *See* Comment, *Indian Law: The Application of the One-Man, One-Vote Standard of Baker v. Carr to Tribal Elections*, 58 Minn. L. Rev. 668 (1974).

to the extent it applies the Bill of Rights to tribal government. On balance, the Act appears to be a holding action; while tribes are allowed to exist, the umbrella provided by the Bill of Rights protects Indians and non-Indians from the activities of tribal governments. It is in this holding pattern that Congress continues to operate.[150]

7. Summary of the Congressional Response

The congressional response to native Americans has changed with the tides of history. In the early part of the nineteenth century, when Indian tribes were in fact nations possessed of limited sovereignty, Congress preempted the field in the early Intercourse Acts and dealt with the tribes by separation. As the nineteenth century reduced Indians in fact from nationhood to the vanquished, Congress encouraged the settlement of their land by non-Indians and the ultimate assimilation of the Indian. By the twentieth century the Indian was a citizen of the United States, and the tribe was a political subdivision of the Congress.[151] Depending upon the prevailing attitudes of the decade, Congress either allowed tribal self-government (the Indian Reorganization Act) or extinguished the existence of the tribe as an entity (the termination legislation). Clearly, Congress has absolute power over the existence of the tribe, and the states lack power over the reservations within their boundaries only because and to the extent Congress has not permitted it. In short, the use of the term "sovereignty" in connection with an Indian tribe is wholly inaccurate as against the United States. As against the states it is accurate only to the extent Congress preempts the field and permits tribal self-government to the exclusion of state jurisdiction. The extent to which the Supreme Court has been faithful to this principle is the next area of examination.

V. The Tribe in the United States Supreme Court

The effects of westward expansion and historical events are reflected in the opinions of the Supreme Court which relate to Indian tribes. Because the status of the tribe in the early nineteenth century was quite different *in fact* than its status by the end of the century, early formulations by the Court were rapidly eclipsed by reality, and later opinions reflect the shift.

A. *The Early Formulation of John Marshall*

Four cases written by Chief Justice John Marshall between 1810 and 1832 set the stage upon which Indian legal battles are now fought. These cases

150 For example, the most recent congressional legislation regarding the tribes is 25 U.S.C.A. § 450 *et seq.* (Supp. 1976) (Indian self-determination) and 25 U.S.C.A. § 1451 *et seq.* (Supp. 1976). In order to raise the standard of living of tribal Indians, the latter Act creates a loan and grant program to tribes and individual tribal Indians to assist in the establishment of Indian businesses.

151 "Whatever the tribes' theoretical status in the 1830's, they were in fact not sovereign by the end of the 19th century, as shown by Congressional legislative authority over them." Note, *supra* note 144, at 1347.

were significant not because of the limited principles for which they stood, but rather because of Marshall's expansive dicta. It must be recalled that these opinions were written during the period in which the United States policy toward Indian tribes was reflected in the Intercourse Acts: separation for eventual subjugation with minimal friction.

Fletcher v. Peck[152] was the first case to reach the Court in which the relationship between the states, the tribes and the United States was at issue. The buyer of real property within the boundaries of the state of Georgia sued his seller for breach of covenants of title, alleging that the property in question had been reserved by the British Crown for the use of Indians, and therefore the land was acquired by the United States by the Revolutionary War, and not by Georgia.[153] The Court rejected this contention, and held that "the reservation for the use of the Indians appears to be a temporary arrangement," and the land so reserved was "within the state of Georgia."[154] Accordingly, there was no breach of covenant in the deed. The Court then raised the question "whether a state can be seized in fee of lands, subject to the Indian title," and held that "the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."[155] The date of this case, 1810, may be crucial to understanding the result. Between 1802 and 1813 no federal legislation existed regulating affairs with Indians.[156] Accordingly, though the opinion does not so state, no federal preemption was involved and the states were free to hold the fee in lands reserved to tribal Indians. But this result is at odds with later formulations by Marshall. Thirteen years later he would have held title in the United States as a successor to the Crown's treaties. *Fletcher* was a slow start and would later prove embarrassing to Marshall.

In *Johnson v. M'Intosh*,[157] the Court was asked to decide if an Indian tribe could convey title to lands in America. Since the purported conveyances occurred in 1773 and 1775, the Intercourse Acts' prohibitions against tribal transfer of land without the consent of the United States[158] were inapplicable; therefore, the Court had to examine the nature of tribal sovereignty in the abstract. Chief Justice Marshall traced the legal impact of European settlement, and concluded that discovery gave title to the continent to the European nation which made the discovery.[159] "[T]he rights of the original inhabitants . . . to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will . . . was denied by the . . . principle that discovery gave exclusive title to those who made it."[160] Therefore, the United States holds title to the continent and has the "exclusive right to extinguish

152 10 U.S. (6 Cranch) 87 (1810).
153 *Id.* at 142.
154 *Id.*
155 *Id.* at 142-43.
156 Text accompanying note 55 *supra.*
157 21 U.S. (8 Wheat.) 543 (1823).
158 *See* text accompanying note 47 *supra.*
159 21 U.S. (8 Wheat.) at 573.
160 *Id.* at 574.

the Indian title of occupancy, either by purchase or by conquest."[161] Reflecting the reality of the day, the Court said "[t]he title by conquest is acquired and maintained by force" and "it is not for the Courts of this country to question [its] validity."[162]

The Court noted that usually the conquered are allowed to be incorporated into the conquering society, to "make one people,"[163] "[b]ut the tribes of Indians . . . were fierce savages,"[164] so a different result was unavoidable. Finally, the Court held that "Indian inhabitants are to be considered merely as occupants . . . to be deemed incapable of transferring the absolute title to others."[165] *Johnson* has since stood for the proposition that the United States is the sovereign against whom Indian tribes have no standing as sovereigns. Five years later, James Kent was to rely almost exclusively on *Johnson* in discussing Indian tribal title to land in his *Commentaries*.[166] "It [the rule of *Johnson*] is the law of the land, and no court of justice can permit the right [of the United States] to be disturbed by speculative reasoning on abstract rights."[167]

But *Johnson* appears to be wholly inconsistent with *Fletcher*. Somehow, between 1810 and 1823 Marshall concluded that the fee to Indian tribal lands was not in the states but, rather, in the United States.

In *Cherokee Nation v. Georgia*,[168] the Cherokee Tribe brought a bill in equity against the State of Georgia, seeking to restrain the state from executing its laws in Cherokee lands.[169] The tribe asserted a right to be free of state law arising out of a treaty between the United States and the Cherokees.

Chief Justice Marshall examined the jurisdiction of the Supreme Court under article III of the Constitution. Unless the Cherokees were a foreign state under article III, the Court had no jurisdiction and had to dismiss the bill. He examined the unique relationship between Indian tribes and the United States, and said that "[t]he Indian territory is . . . a part of the United States . . . considered within the jurisdictional limits of the United States. . . ."[170] Then follows his often-quoted and now-famous dicta:

> [I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[171]

161 *Id.* at 587.
162 *Id.* at 589.
163 *Id.*
164 *Id.* at 590.
165 *Id.* at 591.
166 3 J. KENT, COMMENTARIES 307-19 (1st ed. 1828).
167 *Id.* at 310-11.
168 30 U.S. (5 Pet.) 1 (1831).
169 *Id.* at 15.
170 *Id.* at 17.
171 *Id.*

The Court, therefore, held that an Indian tribe is not a foreign state under the Constitution,[172] and buttressed its conclusion by the separate treatment accorded foreign nations and Indian tribes in article I, § 8(3).[173] Accordingly, the Cherokees' bill was dismissed.[174]

Up to this point, Marshall had fashioned two principles out of the state of things: (1) Tribes could not convey their land of their own will, because the fee was in the United States (*Johnson*); and, (2) tribes were not foreign nations under the Constitution (*Cherokee Nation*). The question raised by the Cherokees in *Cherokee Nation,* the extent to which a state has jurisdiction over tribal lands within its boundaries, remained to be considered.

Worcester v. Georgia[175] presented this issue. A non-Indian citizen of Vermont, a missionary, was convicted of violating a Georgia statute which purported to regulate who could live in Indian country. "[P]ower, war, conquest," said Chief Justice Marshall, "give rights, which, after possession, are conceded by the world. . . ."[176] Hence, he proceeded on "the actual state of things."[177] The Court noted that treaties between the United States and the Cherokees guaranteed to the Cherokees the right of self-government.[178] It was within this context that the Court said: "The Cherokee nation, then, is a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force, . . ."[179] On this basis, the Court struck down Georgia's statute. State law did not extend to Indian tribal land, not because of inherent tribal sovereignty, but, rather, because the United States had by treaty guaranteed to the tribe the power to govern themselves. Indeed, after *Fletcher, Johnson,* and *Cherokee Nation,* there was little, if any, sovereignty left on which to base the decision. This point has often eluded commentators and courts, and *Worcester* has been inaccurately used to expand on notions of tribal self-government. Much of the responsibility lies with Marshall, whose expansive discourse produced something less than a tight opinion. But Marshall had good reasons for this. First, as a political matter it was important to assert the preeminence of the Union over the states.[180] Secondly, in 1832, the historical reality was that many tribes were distinct political communities. *Worcester* was an attempt to assert the authority of the Union against the states, not the sovereignty of the tribe against the states or the United States, and any effort to read therein the latter proposition should be dispelled by *Fletcher* (for the states) and *Johnson* and *Cherokee Nation* (for the United States), as well as subsequent formulations by the Court.

172 *Id.* at 20.
173 *Id.* at 18. See text accompanying note 14 *supra.*
174 The Court saying, "[i]f it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future." 30 U.S. (5 Pet.) at 20.
175 31 U.S. (6 Pet.) 515 (1832).
176 *Id.* at 543.
177 *Id.*
178 *Id.* at 556. *See, e.g.,* the 1835 treaty with the Cherokees discussed in the text accompanying note 37 *supra.*
179 31 U.S. (6 Pet.) at 561.
180 Indeed, after this decision President Jackson was reported to have said, "John Marshall has made his decision; let him enforce it." FEY & MCNICKLE, *supra* note 2 at 26.

B. *Subsequent Formulations of the Status of Indian Tribes in Relation to the United States: 1850-1901*

In this period, the Court used various stock formulations of the status of Indian tribes,[181] ranging from the imprecise,[182] to the insulting.[183] But three cases deserve separate treatment.

In *Ex Parte Crow Dog*[184] the Court noted that a federal statute had excluded from federal criminal jurisdiction the murder of an Indian by an Indian on a reservation. The case is frequently cited in support of tribal sovereignty. In reality, however, the case merely restates the familiar principle that the jurisdiction of federal courts can be limited by acts of Congress.

Congress moved quickly to fill the jurisdictional gap and in *United States v. Kagama*[185] the Court was faced with a challenge to the constitutionality of the statute. The Court said:

> 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 exist within the broad domain of sovereignty but these two.*[186]

This language clearly precludes the possibility that an Indian tribe has a right to self-government independent of a congressional grant. Not content to rest its decision upholding the statute on article I, § 8(3), the commerce power, the Court added that the statute was constitutional "because it [jurisdiction over a reservation] never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."[187] In 1886, the Court still suffered under a narrow view of the commerce power. No doubt such a statute would be upheld today under the commerce power, but *Kagama* reached the result by a *tour de force*. Its Constitutional premise was that sovereignty exists only in the United States and the states. Since the state had no jurisdiction, the United States had to have it. The Constitution permits no other scheme. The conclusion is that tribal self-government exists only to the extent the United States permits it to exist.

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181 Mackey v. Coxe, 59 U.S. (18 How.) 100, 103 (1855) ("Whether the Cherokee people should be considered . . . a foreign State. . . . The fact that they are under the constitution of the Union . . . is a sufficient answer to the suggestion."); Holden v. Joy, 84 U.S. (17 Wall.) 211, 242 (1872) ("Indian tribes are States in a certain sense, though not foreign States, or States of the United States. . . ."); Choctaw Nation v. United States, 119 U.S. 1, 27 (1886) ("[T]he Choctaw Nation falls within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States.").

182 Parks v. Ross, 52 U.S. (11 How.) 362, 374 (1850) ("The Cherokees are in many respects a foreign and independent nation.").

183 Montoya v. United States, 180 U.S. 261, 265 (1901) ("The North American Indians do not and never have constituted 'nations' . . . . In short, the word 'nation' as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment.").

184 109 U.S. 556 (1883).

185 118 U.S. 375 (1886).

186 *Id.* at 379 (emphasis added).

187 *Id.* at 384-85.

Kagama's vitality was recently confirmed in *United States v. Blackfeet Tribe*,[188] a case which dramatically demonstrates the contemporary status of claims to tribal sovereignty. A federal statute prohibited slot machines on the reservation.[189] The Blackfeet Tribe in Montana passed an ordinance permitting slot machines. After an F.B.I. agent seized some machines, the tribal court issued an order restraining all persons from removing the slot machines from the reservation. A United States Attorney violated the order and was ordered to show cause why he should not be held in contempt by the tribal court. The United States Attorney then filed an action in the United States District Court seeking to enjoin the tribe from proceeding with the contempt proceedings. In defense, the tribe asserted its "sovereignty." The court said: "The blunt fact, however, is that an Indian tribe is sovereign to the extent that the United States permits it to be sovereign—neither more nor less."[190] The court held that it was beyond the power of the tribal court to limit a federal officer in the performance of his duties. The court said it had sympathy for the judges of the tribal court because it understood the pressures "generated by political urgings for the exercise of tribal sovereignty."[191] After citing *Kagama*, the court said:

> Unfortunately the word "sovereignty" is politically used without regard to the fact that as applied to Indian tribes "sovereign" means no more than "within the will of congress."[192]

The third Supreme Court case in this period warranting separate treatment is *Talton v. Mayes*.[193] In it, a Cherokee Indian was indicted by a five-member grand jury of the Cherokee Tribe for the murder of another Cherokee within the reservation. He argued that the five-member grand jury violated the fifth amendment of the United States Constitution. The Court reasoned that since the Bill of Rights was not applicable to the states, the fifth amendment was similarly not applicable to tribes, because "its sole object [was] to control the powers conferred by the Constitution on the National Government."[194] With the subsequent application of most of the provisions of the Bill of Rights to the states, it is unlikely that the case has continuing validity. Furthermore, the enactment of the Indian Civil Rights Act of 1968[195] has largely mooted the issue. But what the Court had to say about the nature of the Cherokees' right to self-government is significant:

> By *treaties* and *statutes* of the United States the right of the Cherokee nation to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized.[196]

188 364 F. Supp. 192 (D. Mont. 1973), relitigated on a similar claim, 369 F.Supp. 562 (D. Mont. 1973).
189 15 U.S.C. § 1175 (1970).
190 364 F. Supp. at 194.
191 *Id.* at 195.
192 *Id.* In the later stage of the litigation, the court said that the United State has police power on the reservation which is "not dependent upon specific constitutional grant and is plenary," citing *Kagama*. 369 F. Supp. at 564-65.
193 163 U.S. 376 (1896), alluded to in text accompanying note 139 *supra*.
194 *Id.* at 384.
195 See text accompanying note 135 *supra*.
196 163 U.S. at 379-80 (emphasis added).

The Cherokees' right to self-government had its origin in federal treaties and statutes. But treaties, like statutes, can be repealed by the unilateral action of Congress.

C. *The Power of the Congress to Repeal a Treaty by Unilateral Action*

In *The Cherokee Tobacco*[197] the United States had, by treaty in 1866, exempted the Cherokee Tribe from federal taxes on the sale of farm products. In 1868, in conflict with the treaty, Congress enacted a statute which imposed a federal tax on, *inter alia,* tobacco. The Court recognized that the treaty and the statute were in conflict, but concluded that a subsequent act of Congress supersedes a prior treaty.[198] To the same effect is *Head Money Cases*[199] in which the Court held that a treaty is "subject to such acts as Congress may pass for its enforcement, modification, or repeal."[200]

In *Stephens v. Cherokee Nation*[201] a statute authorizing a commission to determine citizenship in certain tribes as part of the general allotment plan was attacked as violative of treaty provisions. The Court noted that the United States "allowed" Indian tribes self-government by treaty.[202] But it was clear that an act of Congress can "supersede a prior treaty and that any questions that may arise are beyond the sphere of judicial cognizance."[203] Accordingly, the Court upheld the statute.

At first glance, the power of Congress to abrogate a treaty by statute seems awesome. Upon reflection, however, the need for this doctrine becomes apparent. Surely the United States has the power to abrogate its obligations under international treaties. If it did not it would not be a sovereign. Moreover, there is no constitutional limit on the power of Congress to repeal a treaty.[204] Congress may be liable to pay damages under some provision of the Constitution such as the fifth amendment, but there can be no doubt about its power to repeal a treaty.

D. *The Sovereign Immunity of the Tribe*

One clue to the sovereignty of an entity is its power to exempt itself from suit. Indian tribes do not, by themselves, have this power; Congress may authorize suits against tribes. In *United States v. U.S. Fidelity Co.,*[205] the Supreme Court said:

> These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed

197 78 U.S. (11 Wall.) 616 (1870).
198 *Id.* at 621.
199 112 U.S. 580 (1884).
200 *Id.* at 599.
201 174 U.S. 445 (1899).
202 *Id.* at 483.
203 *Id.,* quoting from Thomas v. Gay, 169 U.S. 264,271 (1898). As to the status of Indian tribes as political questions *see* Baker v. Carr, 369 U.S. 186, 215-17 (1962).
204 For example, by its own terms, the contract clause is a limitation on the power of the states, not the federal government.
205 309 U.S. 506 (1940).

to the United States for their benefit, as their tribal properties did.[206]

The Congress has authorized suits against tribes. For example, most courts which have been presented with the issue have held that the Indian Civil Rights Act of 1968[207] is a congressional waiver of tribal immunity from suit.[208]

E. *The Status of Tribal Land*

1. The Early Formulation

At issue in *Lone Wolf v. Hitchcock*[209] was a treaty between the United States and the Kiowa and Comanche Tribes which provided for the allotment of tribal land to individual Indians with the guarantee that no subsequent cession of tribal land would affect the grant to the allottee unless approved by three-fourths of the adult, male tribal Indians. When Congress enacted a statute which affected the allotted land, the allottees claimed a taking in violation of the fifth amendment. The Court denied a compensable interest in the allottee, even though his interest arose out of a treaty.[210] The Court noted that while Congress might have a moral obligation to perform its treaty stipulations, "the legislative power might pass laws in conflict with treaties made with the Indians."[211]

2. The Current Formula

There is no doubt that the United States can take tribal land as it can take other land.[212] The real issue is whether compensation is due under the fifth amendment. The answer depends upon whether the tribal claim is based upon aboriginal possession[213] or Executive order, on the one hand, or congressional grant, such as by treaty, on the other.

In *Sioux Tribe of Indians v. United States*,[214] a tribe brought an action against the United States seeking compensation for the taking of land given them by Executive order. The Court said:

> Where lands have been reserved for the use and occupation of an Indian Tribe by the terms of a *treaty* or *statute*, the tribe must be compensated if the lands are subsequently taken from them.[215]

206 *Id.* at 512.
207 25 U.S.C. § 1301 *et seq.* (1970). *Compare* 25 U.S.C. § 450n (1).
208 Cases are collected in Seneca Constitutional Rights Organization v. George, 348 F. Supp. 48, 50 (W.D. N.Y. 1972).
209 187 U.S. 553 (1903).
210 *Id.* at 564-66.
211 *Id.* at 566.
212 Except insofar as it is limited in taking the land of a State of the Union. U.S. Const. art. IV, § 3(1).
213 "The power of Congress in [the extinguishment of Indian title based on aboriginal possession] is supreme. The manner, method and time of such extinguishment raise political, not justiciable issues. . . . And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." United States v. Santa Fe Pacific Ry., 314 U.S. 339, 347 (1941). (Douglas, J., wrote the opinion of the Court.)
214 316 U.S. 317 (1942).
215 *Id.* at 326 (emphasis added).

But, because article IV, § 3 of the United States Constitution confers upon Congress the exclusive power to dispose of property belonging to the United States, tribes are "not entitled to compensation upon the abolition of an executive order reservation."[216] The pattern begins to take shape. The United States owns all the land that Indian tribes claim based upon their prior possession. It is only when the Congress gives some land back to the tribe that compensation is due under the fifth amendment upon a subsequent taking. Therefore, no compensation is constitutionally due for the taking of tribal land held under claim of aboriginal possession or by Executive order. Only Congress can give a tribe a compensable interest in tribal land.

These principles were affirmed and defined with greater specificity in *Tee-Hit-Ton Indians v. United States,*[217] in which the Court said:

> Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking.[218]

The Court said no particular form of congressional recognition is required, "but there must be the definite intention by Congressional action or authority to accord legal rights, not merely permissive occupation."[219] The Court traced the conquest of tribes, noted that original Indian title was mere possession, not ownership, and that original Indian title or occupancy can be terminated without compensation.[220] The Court admitted that Indian tribal lands were taken by force, and that their cessions were not real sales, but Congress had no legal duty to compensate because "no other course would meet the problem of the growth of the United States."[221]

The Court noted that Congress established the Indian Claims Commission to hear grievances even though it had no legal duty to do so.[222] Finally, the Court specifically limited and distinguished *United States v. Tillamooks,*[223] in which recovery was allowed by *statute,* but in which the language was ambiguous and imprecise.[224]

Thus, an analogy between sovereignty and ownership of land is possible. Just as a tribe derives its powers of self-government from the United States, so too does it derive its claim to land. Prior powers of self-government and ownership of land have no bearing on their present rights.

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216 *Id.* at 330.
217 348 U.S. 272 (1955).
218 *Id.* at 277-78.
219 *Id.* at 278-79. And, the compensable interest is in the tribe, not the individual Indian. United States v. Jim, 409 U.S. 80 (1972).
220 348 U.S. at 279, 285. For a recent case discussing Indian title, *see* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).
221 348 U.S. at 290.
222 *Id.* at 281-82.
223 329 U.S. 40 (1946).
224 348 U.S. at 284-85.

F. *State Power Over the Reservations Within Its Boundaries*

The extent to which a state can extend its jurisdiction to tribal reservations located within its boundaries is the most common issue in contemporary Indian law litigation. While the problem has already been alluded to,[225] some general observations are necessary before discussing the Supreme Court's treatment of this state power. The Supreme Court has been as zealous to keep the states out of reservations as it has been in asserting the plenary authority of the United States over reservations. Some of this zeal is caused by the states' reluctance to accept total federal preemption of the field. Some of it is caused by uncritical reliance on dicta in *Worcester v. Georgia*[226] in rapidly changing times. But in its zeal to prevent state intervention, the Court has used language which holds out false hopes for advocates of tribal self-government. Perhaps more importantly, the quickness with which the Court has excluded states from asserting jurisdiction over activities involving tribal Indians on the reservation has produced a patchwork of jurisdictional anomalies resulting in there being whole areas of the United States in which *no forum* exists for bringing a claim.

1. Early Distinctions

From the very beginning *Worcester* was rejected. Whether a state could exert its jurisdiction over activities on a reservation depended upon whether the actors were Indian or non-Indian. In *The Kansas Indians*[227] the Court held that Kansas could not tax tribal land because (1) the United States guaranteed state tax exemption to the tribe by treaty, and (2) the tribe was to be governed exclusively by the Union.[228] The case, to be sure, could have been decided on the first ground alone. But the year was 1866, and the Civil War was on the minds of everyone. Accordingly, the Court buttressed its conclusion by quoting John Marshall and referred to the tribe as a "people distinct from others."[229]

Where the state sought to exert jurisdiction over non-Indians on the reservation, the Court was more congenial. In *Utah & Northern Ry v. Fisher*[230] the Court allowed the Territory of Idaho to assess a tax on non-Indian-owned railroad property which passed through a reservation because "[t]he authority of the territory may rightfully extend to all matters not interfering with" the protection afforded the tribe by treaty.[231] The Court said it would have permitted the tax even if the railroad did not have a right-of-way over the reservation.[232]

In *United States v. McBratney*,[233] the Court held that Colorado had jurisdiction over a non-Indian who killed a non-Indian on the reservation. Though

225 *See, e.g.*, Part IV (C) (5) *supra*, and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
226 31 U.S. (6 Pet.) 515 (1832) (discussed in text accompanying note 175 *supra*).
227 72 U.S. (5 Wall.) 737 (1866).
228 *Id.* at 755.
229 *Id.*
230 116 U.S. 28 (1885).
231 *Id.* at 31.
232 *Id.* at 33.
233 104 U.S. 621 (1881).

a treaty between the United States and the tribe called for federal jurisdiction, the act of Congress admitting Colorado to the Union contained no such provision, and under the rule of *The Cherokee Tobacco*,[234] the statute repealed the treaty. *McBratney* was followed in *Draper v. United States*,[235] and more recently in *New York ex rel. Ray v. Martin*,[236] where the Supreme Court said: "in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries."[237] A broad reading of *Martin* would suggest that a state could exert its jurisdiction over anyone or anything on a reservation except where prohibited by treaty or statute. A narrow reading would limit the rule to non-Indians and their property on the reservation. In any event, the broad exclusionary language of *Worcester* (which itself dealt with a non-Indian) had by this time yielded to the distinction between Indians and non-Indians. But this distinction does not fit any of the nice categories of *in personam* jurisdiction.

2. The Development of the Current Formula: A Study in Confusion

Williams v. Lee[238] begins the current development of a scheme by which one can determine whether a state may assert its jurisdiction over persons, property or events on a reservation. A non-Indian who operated a general store on a reservation sued an Indian and his wife in an Arizona state court to recover goods sold on credit on the reservation. The Court noted that time and history had modified the principle of *Worcester v. Georgia*[239] by allowing state law to extend to reservations where "essential tribal relations were not involved."[240] The Court attempted to capsulize the jurisdictional scheme:

> suits by Indians against outsiders in state courts have been sanctioned. And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation. But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive. . . .[241]

Then the Court fashioned a new rule, subsequently referred to as the "Infringement Test":

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.[242]

Since no Act of Congress gave Arizona jurisdiction over a tribal Indian for a claim arising on the reservation, *Worcester* applied and the state had no jurisdiction.

234 78 U.S. (11 Wall.) 616 (1870).
235 164 U.S. 240 (1896).
236 326 U.S. 496 (1946).
237 *Id.* at 499.
238 358 U.S. 217 (1959).
239 31 U.S. (6 Pet.) 515 (1832).
240 358 U.S. at 219.
241 *Id.* at 219-20 (citations omitted).
242 *Id.* at 220.

The reliance on *Worcester* was misplaced. In *Worcester,* a treaty preempted state jurisdiction. In *Williams* the Court did not even look for a treaty (though one existed). The result achieved was probably correct because of treaty guarantees, but the language of *Williams* would later prove embarrassing.

The erosion of *Worcester* in *Fisher,*[243] *McBratney*[244] and *Martin*[245] was to be acknowledged within four years. In *Kake Village v. Egan,*[246] the Court would rely on *Fisher* and *McBratney* to disavow the statement in *Worcester* that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate.[247] The Court, instead, enunciated a new test whereby,

> even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.[248]

This test applies the *Williams* infringement test to Indians, a result made possible by the imprecision of *Williams.* The Court would later retreat from this approach.

In *Warren Trading Post Co. v. Arizona Tax Commission,*[249] it appeared that the Court finally arrived at a principled doctrine upon which to solve these problems—the doctrine of preemption. The Court struck down an Arizona gross sales and income tax levied on a trading post doing business on that portion of the Navajo reservation in Arizona. Unfortunately, it is not clear in the opinion whether the trading post was Indian owned or not. The Court held that the state tax could not be imposed because "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."[250] The trading post had been licensed by the United States pursuant to a comprehensive federal regulatory scheme, which "left the State with no duties or responsibilities respecting the reservation Indians."[251] This principled approach to state tax exemption based upon federal preemption was to be short-lived. Indeed, the Court later surprisingly denied that *Warren Trading Post* was a preemption case.[252]

The next serious effort at meeting these problems came in 1973.[253] The distinctions between "on the reservation" and "off the reservation" and between Indian and non-Indian were finally incorporated into a new principled approach to the problems of state jurisdiction in two cases.

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243 Utah & N. Ry. v. Fisher, 116 U.S. 28 (1885).
244 United States v. McBratney, 104 U.S. 621 (1881).
245 New York *ex rel.* Ray v. Martin, 236 U.S. 496 (1946).
246 369 U.S. 60 (1962).
247 *Id.* at 72.
248 *Id.* at 75.
249 380 U.S. 685 (1965).
250 *Id.* at 690.
251 *Id.* at 691.
252 McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170 n.6 (1973), discussed in text accompanying notes 266-69 *infra.*
253 Meanwhile, the Court had held that Public Law 280, discussed *supra* in the text accompanying note 131, had the effect of excluding state jurisdiction over a reservation Indian for a claim arising on the reservation unless the state complied with the Act. Kennerly v. District Court of Mont., 400 U.S. 423 (1971). This approach was available to the Court in *Williams,* but went unnoticed.

In *Mescalero Apache Tribe v. Jones,*[254] the Supreme Court was confronted with the validity of a New Mexico gross receipts tax imposed on a tribal ski resort, located *off the reservation,* and a use tax imposed on personal property purchased by the tribe outside of New Mexico and used at the resort. Instead of blind reliance on *Worcester,* the Court finally realized that the proper approach is to be found by examining relevant federal treaties and statutes.

> [W]e reject . . . 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 "[w]hether the enterprise is located on or off tribal land." Generalizations on this subject have become particularly treacherous. The conceptual clarity of . . . Marshall's view in *Worcester v. Georgia,* . . . has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government.[255]

This methodology of rejecting generalizations in favor of reliance on treaties and statutes comes as a great relief after the confusing generalizations spawned by *Worcester.* Contrary to the blanket exclusion of state law over reservations in *Worcester* the Court said:

> even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.[256]

But even this is the kind of generalization the Court warned against. Clarity would have been better served had the Court simply said that state laws may apply unless prohibited by treaty or statute. Since the resort in the case before the Court was off the reservation, the comment was unnecessary to the decision, and the following rule applied: "Absent express federal law to the contrary, Indians going beyond reservation boundaries . . . [and] off-reservation activities are within the reach of state law."[257] The Court found that the Indian Reorganization Act, under which the resort was undertaken by the tribe, exempted from state taxation land acquired under the Act. Since the personal property was attached to the realty, the New Mexico use tax on it was invalid. But since no similar express federal statute exempted the resort from a state gross receipts tax, the New Mexico gross receipts tax was valid.[258]

While *Mescalero* concerned itself with off-reservation activities by tribal Indians, *McClanahan v. Arizona State Tax Commission*[259] involved a state's attempt to tax the income of a tribal Indian whose entire income came from reservation sources. First the Court pointed out that the case did not concern

254 411 U.S. 145 (1973).
255 *Id.* at 147-48.
256 *Id.* at 148.
257 *Id.* at 148-53.
258 *Id.* at 158.
259 411 U.S. 164 (1973).

a nonreservation Indian, or non-Indians on the reservation, or reservation Indians off the reservation (as in *Mescalero*).[260] The Court held the tax invalid because of relevant treaties and statutes, not tribal sovereignty.[261]

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.[262]

The Court noted that Indian sovereignty as a doctrine was relevant only as a backdrop against which treaties and statutes must be read.[263] Federal preemption of the field was such that the issue of residual Indian sovereignty was moot.[264]

Looking to the applicable treaties and statutes, the Court found that tax exemption was inferred[265] from both the Navajo treaty which set aside a reservation for Navajos only, and from Arizona's enabling Act which authorized it to tax land "outside of an Indian reservation."[266] The Court then attempted to clarify the confusion caused by *Kake* and *Williams* by limiting *Kake* to nonreservation Indians[267] and *Williams'* infringement test to non-Indians.[268]

The significance of *Mescalero* and *McClanahan* lies not only in their bringing some order to a confusing area, but also, and more importantly, in their creation of a realistic, principled approach to the various problems involving state assertions of jurisdiction over reservation and nonreservation activities involving both Indians and non-Indians. The result is that federal preemption, not tribal sovereignty, insulates tribal Indians from state jurisdiction.[269] The corollary, of course, is that nothing protects tribal self-government "from the will of Congress itself."[270]

3. Jurisdictional Nightmare

Because of federal preemption, those states which did not avail themselves of the consent of Congress to unilaterally assert their jurisdiction over Indian reservations,[271] while such consent lasted,[272] frequently find themselves without jurisdiction over reservation Indians for transactions arising on the reservation.

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260 *Id.* at 167-68.
261 *Id.* at 165.
262 *Id.* at 172.
263 *Id.*
264 *Id.* at 172 n.8.
265 The Court invoked the canon of construction that doubtful expressions are to be interpreted in favor of "the weak and defenseless people." *Id.* at 174. *See* Antoine v. Washington, 420 U.S. 194 (1975).
266 411 U.S. at 176.
267 *Id.* at n.15.
268 *Id.* at 179.
269 See Comment, 49 WASH. L. Rev. 191, 211-12 (1973); Note, *Indian Regulation of Non-Indian Hunting And Fishing*, 1974 WIS. L. REV. 499, 509-10.
270 Comment, 49 WASH. L. REV. 191, 212 (1973).
271 See text accompanying note 131 *supra.*
272 See text accompanying note 141 *supra.*

Yet, federal courts are of limited jurisdiction, and Congress has not relaxed federal jurisdictional requirements coextensively with federal preemption. Accordingly, there are occasions involving non-Indians where only tribal courts have civil jurisdiction.[273] Many tribes, however, have not implemented forums to the full extent of their jurisdiction. Other tribes, understandably, lack the capacity or resources to indulge in a first-rate judicial system. Accordingly, there are claims in the United States for which there are literally no forums and other claims for which there are practically no forums.

Schantz v. White Lightning[274] illustrates the problem. A non-Indian resident of North Dakota, while driving through a reservation,[275] was involved in an automobile collision with a car driven by a tribal Indian.[276] The North Dakota courts had no jurisdiction over the non-Indian's claim against the Indian because the tribe never granted its consent to the state to assert jurisdiction over the reservation under 25 U.S.C. § 1322 (1970). The tribal court, under the tribe's constitution, had no jurisdiction over actions brought by non-Indians for claims exceeding $300.00 The United States District Court had no jurisdiction because (1) there was no diversity—both were residents of North Dakota, and (2) there was no federal question—the tort of negligence does not arise under federal law. The United States District Court dismissed the complaint of the non-Indian expressing regret over the absence of any judicial forum to hear the case.[277]

Another anomaly created by federal preemption is that a court's jurisdiction may very well depend on who sues first.[278] For example, in the case above, if the Indian sued the non-Indian in the state court, the state court would have had jurisdiction. Hence, jurisdiction depends not on where the event occurred so much as on the ethnic origin of the defendant.

Finally, the lack of a forum in which to bring a claim inures to the detriment of the Indian as well. Sellers of goods and services are reluctant to extend credit to tribal Indians for lack of tribal remedies.[279] In any event, the jurisdictional void left by federal preemption is an area ripe for congressional remedy.

G. *The Supreme Court, 1974-1975*

One would have hoped that the Court would have maintained the methodology employed by *Mescalero* and *McClanahan* (*i.e.*, look to the treaties and statutes) on a consistent basis. By and large, it has. But on occasion it will fall back on the "separate entity" language of *Worcester*, where straightforward treaty or statutory analysis would have done as well.

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273 Between state and federal courts, criminal jurisdiction seems to be complete as to non-Indians. See Comment, *The "Right of Tribal Self-Government" and Jurisdiction of Indian Affairs*, 1970 UTAH L. REV. 291, 298. *But see*, Ortiz-Barrazza v. United States, 512 F.2d 1176 (9th Cir. 1975).

274 368 F.Supp. 1070 (D.N.D. 1973), *aff'd*, 502 F.2d 67 (8th Cir. 1974).

275 Driving through a reservation is a common daily event in many western states.

276 368 F.Supp. at 1070.

277 *Id.* at 1071.

278 See Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206.

279 Comment, *Indian Property and State Judgment Executions*, 52 ORE. L. REV. 313, 323 (1973).

In *Oneida Indian Nation v. County of Oneida*[280] the Court held, with good reason, that a tribal claim to possession of aboriginal land was sufficient to invoke the federal question jurisdiction of the federal courts. But in an effort to save the Indian hiring preference provision of the Indian Reorganization Act[281] the Court, in *Morton v. Mancari*,[282] relied on "sovereign" language to describe the preference granted to Indians. The Court referred to Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities."[283] Indeed, as to Indians as a group, the Court relied on article I, § 8(3) of the Constitution[284] to say that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[285] Probably article I, § 8(3) would have sufficed without resort to the "quasi-sovereign" language.

United States v. Mazurie[286] is an unfortunate, if herculean effort, to uphold a congressional delegation to a tribe of jurisdiction over non-Indian-owned land within the reservation boundaries. The Court, relying on *Worcester*, said "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."[287] It is unclear why the methodology and language of *McClanahan*[288] was not employed.

One inherent problem in this inconsistent approach to Indian law is the disturbing practice of overruling or distinguishing cases shortly after they are issued.[289] In *Mattz v. Arnett*,[290] the Court said that the language of allotment acts does not terminate the reservation status of the land settled by non-Indians.[291] Two years later, in *DeCoteau v. District County Court*,[292] *Mattz* was emasculated.

H. *Summary*

Fluctuations notwithstanding, the net effect of Supreme Court treatment of the role of the tribe in the federal system is that federal pre-emption, not tribal sovereignty, insulates the tribe from state law, and that as to its relationship to the United States, the tribe is a construct of Congress.

VI. Conclusion

> [T]he extent of sovereign power being, like the very existence of sovereignty, a pure matter of fact, depends entirely upon the extent of the obedience

280 414 U.S. 661 (1974).
281 See note 96 *supra*.
282 417 U.S. 535 (1974).
283 *Id.* at 554.
284 See text accompanying note 13 *supra*.
285 417 U.S. at 555. See *Gray v. United States*, 394 F.2d 96 (9th Cir. 1968), *noted in* 82 HARV. L. REV. 697 (1969), in which penalty provisions of federal statutes which varied as to whether the victim was an Indian or non-Indian were upheld.
286 419 U.S. 544 (1975).
287 *Id.* at 556.
288 Quoted in text accompanying note 262 *supra*.
289 *See* text accompanying note 224 *supra*.
290 412 U.S. 481 (1973).
291 *Id.* at 497.
292 420 U.S. 425 (1975). Similarly, *In re* Heff, 197 U.S. 488 (1905) was overruled in United States v. Nice, 241 U.S. 591 (1916).

actually rendered.[293]

Largely through his own effort, the tribal Indian is no longer the forgotten American.[294] But his effort has raised the question whether his sui generis role in the federal system can or should survive. It has been said that "to the extent [the tribal Indian] asserts an inherent right of tribal self-government, [he] has not truly manifested his consent to be governed wholly under the internal government set forth in the Constitution."[295] Many tribal Indians would heartily agree with this appraisal.[296] The Constitution was not designed with tribes in mind. Congress has been caught between changing tides of opinion running from full separation to total assimilation, but neither is immediately achievable. The reality is that the tribe cannot be separate, if only because historical forces and the Indian's already achieved partial integration are irreversible.[297] The effort, then, must be to find some imaginative accommodation of tribal interests in cultural identity consistent with the federal system and the near certain assimilation of the tribe in the future. Statehood as a solution has both constitutional,[298] and intrinsic problems. A state would have to open its borders to all Americans, not just members of a tribe.[299]

The problem posed by the tribe is largely a question of policy, a function of the legislative branch of government. But the failure of Congress to find a solution to the problem of the tribe results from the lack of any consensus within the Republic.[300] The solution must come, if at all, through the political process, and the tribe should play a major role in it.

The Supreme Court's role should be limited. It should forthrightly deny the existence of inherent tribal sovereignty (as it implicitly did in *McClanahan* and *Mescalero*) and decide Indian law problems within the framework of relevant treaties and statutes. A contrary conclusion would render the entire legislative scheme unconstitutional, a reckless result. Allotment, termination, and grants of jurisdiction could not pass muster if tribes had inherent rights to self-government, with origins other than the Congress. A lack of residual tribal sovereignty is already inherent in the Court's decisions. Whenever the Court has

293 Lowell, *The Limits of Sovereignty*, 2 HARV. L. REV. 70, 87 (1888). *See* Oliver, *The Legal Status of American Indian Tribes*, 38 OREG. L. REV. 193, 203 (1959).

294 Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818 (1968).

295 Note, *Sovereignty, Citizenship and the Indian*, 15 ARIZ. L. REV. 973, 1001-02 (1973).

296 *See, e.g.*, Henderson & Barsh, *Oyate kin hoye keyuga u pe*, HARV. L. SCHOOL BULL., April 1974 at 10, June 1974 at 10, Fall 1974 at 17.

297 *See* Note, *supra* note 294, at 1840.

298 Article IV, § 3(1) would prohibit the creation of a state out of the territory of an existing state without the consent of the legislature of the state concerned. The tenth amendment divides constitutional powers among the United States, the states and the people.

299 Recognized by Henderson & Barsh, *supra* note 296, at 19 (Fall 1974).

300 Consensus is difficult of achievement because of constant tension between conflicting values. On the one hand, the tribe is a remnant of a nearly lost heritage, an endangered specie. Once extinguished, it cannot be revived. Moreover, diversity within a pluralistic society is a positive value. On the other hand, the equal protection clause runs counter to the legal recognition of special status for one class of people. No other racial group has managed to achieve legal protection of cultural identity in the public sphere. Equal protection forbids it. Other groups have had to preserve cultural identity in the private sector. The Indians' claim to exemption from this result, based upon article I, § 8(3), does not evoke a sympathetic response. A fundamental policy choice must weigh these considerations.

resorted to pat phrases involving "sovereignty" it has always been within the context of the exclusion of state jurisdiction, a result readily obtainable under the doctrine of federal preemption.

Litigation involving tribes will proliferate as the tribe asserts its jurisdiction with greater confidence. Courts will not be misguided by the mystery which surrounds the tribe's claim to sovereignty only if they adhere to a methodology of looking to the relevant treaties and statutes.