Constitution, Court, Indian Tribes

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"The last footnote was written several weeks before Robert Cover died. I had talked to him about some of the issues raised in this essay, and he had advanced my understanding of them—an experience I had grown to rely upon. Let the publication of this essay stand as a small sign of my thanks for his good life."

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We claim that the "constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." But we also claim to recognize the sovereignty of Native American nations, the original occupants of the land. These claims—one to jurisdictional monopoly, the other to jurisdictional multiplicity—are irreconcilable. Two hundred years have produced no resolution of the contradiction except at the expense of the tribes and the loss to non-Indians of the Indians' gift of their difference. This article explores the bearing of American constitutional law upon Native American tribes.

INTRODUCTION

The reduction of the Native American population caused by the coming of Europeans has been more gradual than a nuclear holocaust but proportionately equivalent to one,[1] as what happened in Georgia illustrates. The land presently enclosed by the state's borders once supported several Indian nations with a combined population in the hundreds of thousands. The census currently registers the presence of a few thousand individual Indians scattered around the state. The nations are gone. The last of them, the Cherokee, were forced out in the 1830s along the Trail of Tears. Left, spread over Georgia, are shadows of nations: mounds, a great rock eagle, a blanket of names (Chattahoochee, Okefenokee, Dahlonega, Oconee, Ellijay, Tallulah). They represent what once was.

They also represent what is. Native Americans are not a relic. Indian nations no longer exist in Georgia, but they endure and are renewed else-

1. See Erdrich, Where I Ought to Be: A Writer's Sense of Place, N.Y. Times Book Rev., July 28, 1985, at 1, 23:

> Many Native American cultures were annihilated more thoroughly than even a nuclear disaster might destroy ours, and others live on with the fallout of that destruction, effects as persistent as radiation—poverty, fetal alcohol syndrome, chronic despair.
>
> Through diseases such as measles and small pox, and through a systematic policy of cultural extermination, the population of Native North Americans shrank from an estimated 15 million in the mid-15th century to just over 200,000 by 1910. That is proportionately as if the population of the United States were to decrease from its present level to the population of Cleveland. Entire pre-Columbian cities wree wiped out, whole linguistic and ethnic groups decimated. Since these Old World diseases penetrated to the very heart of the continent even faster than the earliest foreign observers, the full magnificence and variety of Native American cultures were never chronicled, perceived, or known by Europeans.

where on the continent. And the long drawn-out campaign against them continues.

The story is not a simple one.

A. Rhetoric

Non-Indians have typically been stirred more by feelings of benevolence toward Indians than by hate, fear, or greed. But though our good intentions keep turning out badly for the tribes, we persist in "doing something for them." The Great Father cannot resist playing the Good Samaritan as aggressive and overbearing. In one of its great surges, our benevolent paternalism became "an ethnocentrism of frightening intensity."[2]

Complexity and paradox (like good intention with grievous outcome) are qualities of the Indian/non-Indian story as a whole and of its legal chapter in particular. Law has been one of the few sources of protection for Indians. During the early decades, Congress and the Supreme Court defended the tribes and vindicated their sovereignty against predatory states like Georgia. For a century after the Civil War and with the acquiesence of the Court, however, federal statutes inflicted enormous losses upon the tribes. During the last two decades, the scene of action shifted from the legislative to the judicial branch. The Supreme Court, historically one of the great protectors of the tribes, has also become their chief antagonist. In the pages that follow, I shall focus upon opinions of the Court.

Since the beginning, pronouncement has been the non-Indians' medium of choice for their approach to Indians. In 1682 La Salle, standing at the mouth of the Mississippi, proclaimed the entire midsection of the continent, from the Alleghenies to the Rockies, to be the possession of Louis XIV.[3] La Salle's was less a performative than a preposterous utterance. It had little immediate effect upon the tribes. For devastating the Indians, European hyperbole could not match European diseases, arms, and economic systems.

But non-Indians have never stopped making proclamations upon the tribes and their lands. La Salle's role was to be assumed in turn by agents of the United States—at first, Christian missionaries paid by the federal government; then the cavalry; and finally Congress.

When late in the 19th century Congress unilaterally determined to rule the tribes by statute, words became a principal, immediate means of aggression. Congressional enactments liquidated the great bulk of remaining Indian country and terminated tribes.

The tribes who endured have learned to defend themselves in the lobbying wars, and Congress has not passed legislation over tribal opposition since 1968. Now it is the Supreme Court whose pronouncements upon the

2. F. Prucha, The Great Father 610 (1984).

3. Francis Parkman's rich account of La Salle's proclamation is found in J. B. White, The Legal Imagination 14 (rev. ed. 1985).

tribes—howsoever well intentioned and Good-Samaritan-like—do injury, with far greater real effects than the pretensions of La Salle. Official rhetoric has taken a hard edge.

B. Mystery

The complexity of the story is matched by the complexity of responses to it.

In a Saul Bellow novel, the protagonist Albert Corde has been done out of a fortune by a lawyer, Max Detillon. "Max had cost Corde tens of thousands. Even that might have been forgiven if only you had been able to talk openly and reasonably to the man. But the more harm he did you, the more harm he claimed you had done to him. He grabbed everything for himself, even the injury. And then you were up against it—no rational judgment, you see, a kind of mystery in itself."[4]

Talk about Indians is up against similar, if larger scale, irrationality and mystery. The story of non-Indians' relationship to Indians tends to evoke guilt feelings and no action or action that further victimizes the victims. Non-Indians grab even the Indian injury for themselves.

For instance, a reason given for establishing the Indian Claims Commission was to relieve Congress from the siege of Indian claims. The embattled legislators had been "harassed constantly by various individual pieces of legislation."[5] On other fronts, recent attention to Indian property and fishing rights has evoked assertions that *non*-Indians are "relegated . . . to second-class citizenship" and that a "preference" for Indians has resulted in gradually "giving the country back to [them]."[6] And then, in a dissent to one of the 1985 term's Indian cases, Supreme Court Justice John Paul Stevens maintained that vindication of Indian claims "upsets long-settled expectations in the ownership of real property,"[7] property which has been "converted from wilderness" by non-Indians and upon which non-Indians have "erected costly improvements."[8]

There is a kind of mystery in these claims of Indian harassment of Congress, Indian harm to the majority's rights, and Indian threat to property ownership and civilized improvements. Any telling of the United States-Indian nation story may run up against guilt-inspired irrationality or evoke remorse that turns upon the victim.

C. Losing

We may hope for change, for the good of non-Indians as well as Indians. For Indians the consequence of no change will be further loss. The coming of Europeans, the founding and growth of the colonies, and the westward

4. S. Bellow, The Dean's December 67–68 (1982).
5. U.S. Rep. Henry Jackson, *quoted in* United States v. Dann, 470 U.S. 39, 40 (1985).
6. B. Lowman, Author's Preface, 220 Million Custers (1978) (unpaginated).
7. County of Oneida v. Oneida Indian Nation, 420 U.S. 226, 268 (Stevens, J., dissenting).
8. *Id.* at 266.

expansion exacted a huge toll in native cultures, lives, and lands. More land was taken between 1887 and 1934, when the allotment and leasing ordered by Congress cost the tribes another 90 million acres.[9] Recent Court decisions have taken further cuts out of their land and self-government. In 1991 the shares of stock created by the Alaska Native Claims Settlement Act are to become negotiable; additional resources will fall vulnerable to removal from the hands of native peoples.[10]

Non-Indians, too, will be losers, victimized by their own aggression. The 19th-century settler John Beeson, like others who have appeared periodically throughout American history, hoped to persuade the nation that, unless it recognized and redressed the treatment of the original inhabitants of the land, it would be condemned to repeat it in progressively more destructive forms. President Lincoln apparently accepted the validity of Beeson's argument that the Civil War was an "extension of the unneighborly, un-Christian, and destructive practice which for generations had been operating against the Aborigines."[11] In modern times, the theory has been advanced that the Vietnam war was an unconscious replay of the murder of the Indians.[12]

Absent change, non-Indians will lose the Indian gift. The Indian way is fundamentally different—different, not less developed: 806 different languages, a different spirituality, different aesthetics, different ways of living on and with the earth, different ways than capitalism and Marxism for putting people to work. To acknowledge and accept the different Indian reality rather than to continue denying it would enrich experience and widen the horizons of non-Indians.

For example, tribal systems predate American forms of government. As one Indian law scholar has noted, "the nation can learn more from the success or failure of Indian tribal institutions than from the limited political experiments of the various states."[13] (The lessons are to be learned from Indians employing Indian traditions and not from non-Indian tinkering with tribes like removal, allotment, and termination.)[14]

9. Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the Comm. on Indian Affairs, 73d Cong., 2d Sess 15 (1934) (memorandum of Comm'r Collier dated Feb. 19, 1934), *quoted in* F. Cohen, Handbook of Federal Indian Law 216 (1942) (Cohen I)(I have throughout employed the University of New Mexico's 1971 reprint of the original 1942 volume). On Cohen, see notes 54–55 *infra* and text thereto.

10. 43 U.S.C. §§ 1601–1628. *See, e.g.*, Note, Settling the Alaska Native Claims Settlement Act, 38 Stan L. Rev. 227 (1985).

11. F. Prucha, The Great Father 468 (1984).

12. R. Slotkin, The Fatal Environment 16–18 (1985); C. Bly, Letters from the Country 4 (1981).

13. Clinton, Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government, 33 Stan. L. Rev. 979, 1063 (1981) ("Clinton, Isolated in Their Own Country").

14. A prior American Bar Foundation study notes that tribal courts are an imposed, non-Indian "improvement." S. Brakel, American Indian Tribal Courts (1978). Most of this study is devoted to a description of tribal courts. But it does turn to a nondescriptive assessment and prescription. ("In addition to being professionally inadeqate, the tribal judges are politically and socially insecure." *Id.* at 95.) And it advocates doing away with tribal courts: "In my view, official authority would be best utilized and personal power on the reservations would be best checked within the normal integrated

The very basic differentness of Indians is itself a source of instruction, a particularly important one for a powerful nation like the United States that finds itself needing to learn survival in a world composed of many nations whose unlikenesses are more and greater than their likenesses.[15] Non-Indians have much to receive from Indians across the distance of their difference.

That is why, great as the loss to Indians will be in the absence of change, non-Indians stand to lose more. An account of American law that bears upon tribes must proceed with care, for while change is needed, irrationality may prevail.

D. "Civilizing"

In addition to the complexity of the story and of possible responses to it, there is difficulty in attempting to place the story in a broader narrative context. The received apparatus of Western stories of origin will not work.

Hannah Arendt observed how, in the legends, the founding of a society entails aboriginal violence: "In the beginning was a crime."[16] Cain slew Abel, and Romulus slew Remus. In myth, the fratricide of the beginning gives birth to fraternity; the primordial crime gives way to civilization. The original violence is justified by the subsequent stability embodied in law.

So did Aeneas cross the Tuscan sea, in Virgil's account, "[t]ransporting Illium with her household gods . . . to Italy" where he made war upon the native inhabitants.[17] This aggression by which Rome was founded issued in brotherhood, so the story goes, for Aeneas vowed, before battle was joined, that he would "not make Italians underlings to Trojans." Instead "both nations, both unconquered, both [s]ubject to equal laws" would unite in a treaty of eternal union, a new Troy.[18]

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setting of, and with the mechanisms available under, state and county jurisdiction," *id.* at 100. Tribal courts "are imitations of white institutions," *id.* at 102. It is a well-meant but terminationist position and is illustrative of the frustrations tribes face in their encounters with the dominant society.

15. It is important to record the difference between American Indians and other Americans, and I shall return to it in the conclusion. Vine Deloria calls attention to the point:

> The geographical proximity of Indians to the rest of America suggests a homogeneity that does not exist, and the avowed equality that American institutions espouse gives further testament to the belief that people are not only created equal but share the same viewpoints and values. Since there are so few places where tribal cultures dominate social relations, and since three quarters of the Indians today live away from the reservation, it hardly seems possible that a wide chasm of beliefs separates Indians from other Americans.
>
> . . . [The] fundamental differences are primarily those of perspective, of attitude and orientation, and of the manner in which peoples tend to view the physical world and the human institutions in that world. These differences produce ceremonial and intellectual behavior which distinguishes groups from each other and creates the diversity that we see in human cultures.
>
> Indians have learned from their experience with the ecological movement that unless they outline differences clearly and distinctly, communication with non-Indians is blurred by the eagerness with which non-Indians want to identify with the Indian traditions.

Deloria, Indians and Other Americans: The Cultural Chasm, Church & Society, Jan./Feb. 1985, at 10, 10–11.

16. H. Arendt, On Revolution 11 (1965).

17. Virgil, The Aeneid, bk. 1, line 68, p. 5 (R. Fitzgerald trans. 1983).

18. *Id.* at bk. 12, lines 188–89. I am dependent on Arendt's insights and interpretation. See H. Arendt, On Revolution 210–11.

The *Aeneid* gave the Romans a language in which to express themselves as a community. The myth of a compact originating in violence done by intruder upon native informed Rome's understanding of her law and politics. Romans could think of themselves as spreading around the world a network of alliances—relationships confirmed in law—repeating, enlarging upon, being justified by the method of the original, legendary treaty between Trojans and Italians.[19]

It might appear that such Western stories of origin would provide a language and structure for understanding the American treatment of Native Americans, allowing us to say that the American beginning, like that of Rome, was accomplished by a repetition of the primordial crime. The coming of Europeans and the founding of the United States were attended by violence practiced upon the native people. (To speak in these terms does not require impugning motives. Indeed, the coming of Europeans to the New World was characterized by missionary impulses, and the devastation wrought upon Indians by European diseases was wholly unintentional.)[20]

The violence of the founding could then be said to have brought forth a justifying political reality in the tradition of Rome.[21] The American beginning could then be seen as determinative of the national vision. The violence required to subdue savages and wilderness would be justified as a necessary antecedent to the spreading of a new, regenerative way of life. Furthermore, having succeeded in our endeavor with the Indians and their wilderness, we might then conceive ourselves possessed of a vocation to overcome other forms of political as well as natural darkness, striving to extend enlightened civilization.[22]

The New World had presented a variation on the earlier mythic examples of cultural transplantation. As John Marshall recounted, the natives "were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence."[23] They would not yield. There

19. H. Arendt, On Revolution 187–89, 210–12.

20. Among other notable missionaries to the Indians, Jonathan Edwards certainly thought he was doing them good and actually did try to protect Indians from some of his predatory countrymen. See S. Dwight, The Life of President Edwards 449–563 (1830). See also J. Edwards, Memoirs of the Rev. David Brainerd; Missionary to the Indians (S. Dwight ed. 1822).

21. More's *Utopia* employed terms strikingly similar to those of the ideology and literature of conquest justification of the Europeans who settled America. See T. More, Utopia, 36 Harvard Classics 143, at 194–95 (bk. 2, ch. 5.) For one account of European ideology, see W. Cronon, Changes in the Land: Indians, Colonists, and the Ecology of New England (983) ("Cronon, Changes in the Land"). See also W. Washburn, Red Man's Land/White Man's Law 3–46 (1971) (especially 39–40 (More); 40–41 (Raleigh); 41 (Williams)).

Hannah Arendt did not raise the destruction and displacement of Indians as primordial crime. She did talk about the enslavement of blacks in this way. Perhaps the republic may be said to rest upon more than one primordial crime. The law now makes room for blacks in a way that it does not for tribes.

22. For a recent, thorough treatment of the search by whites for regeneration through conquest of the wilderness and of savages, see Richard Slotkin's The Fatal Environment (1985). See also R. Nash, Wilderness and the American Mind (3d ed. 1982).

23. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 590 (1823). (I employ this spelling rather than M'Intosh.)

was no Aeneas to win first the battle and then the hearts of the vanquished. In consequence, the "Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society."[24] The Europeans elected to stay and to adapt principles.[25] The resulting rule could not be an alliance like that between Trojans and Italians, but neither could it be said to constitute a radical departure. Some resemblance was still possible.

Natives who could not be partners could nonetheless be objects of benevolence. The rule as adopted to the new circumstance called for treaties by which Indian nations were to be maintained in separate territory as "domestic, dependent nations"[26] where the "humane designs of civilizing" them could be effected by "converting them from hunters into agriculturists."[27] For the meantime, natives would be "in a state of pupilage; their relation to the United States resembl[ing] that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father."[28]

Given the necessity for adaptation of the legends (alliance delayed), the American story in its basic outline—as provisionally adapted from Chief Justice Marshall—might seem to fit the pattern of such Western stories of founding as the *Aeneid*, where aboriginal crime in the event becomes the fountainhead of civilization confirmed in law.

We might conclude that the aggressive intrusion with which America began was not unique in the Western tradition. If so, it could be viewed as a repetition of the ancient cycle and justified with a received interpretive apparatus.

But there is something wrong here. Custer is no analog to Aeneas. The adapted version of the American story suffers gaps and omissions.

Quite apart from its validity as applied to prior instances,[29] in the case of America, the ancient, mythic formula is inadequate to the needs of explana-

24. *Id.* at 588.

25. "That law which regulates and ought to regulate in general, the relations between the conqueror and the conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable." *Id.* at 590.

26. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

27. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556–57 (1832). "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states" *Id.* at 557.

28. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

29. Of course, one may question the legitimacy of Western stories of origin as a literature of justification. If the *Aeneid* provided an ennobling interpretation for the Roman empire, it may have done so with validity only for the Romans. Who besides Romans looked upon Rome as a liberating, resurgent Troy? Was the crime acknowledged to lie at its core ever worked out of the Roman system? Was the Roman empire a series of treaty alliances among friends or, as Augustine thought, a great robbery dependent upon subjugation? For that matter, when has revolution in the West ever escaped the vicious cycle by which it finally fails, consuming itself and eventually producing the need for another revolution? When has there not been in the end as in the beginning a crime in the politics of the world?

tion and interpretation. Although they are surrounded by much myth and propaganda, the American founding events were not concocted; the history is accessible. Real Europeans did come to a real land that was already occupied by real people. Real violence was undertaken against the occupants, and it has never come to an end. Its objects—Indian nations in separate territory—still suffer its force.

The facts do not permit the rhetoric of a fratricide concluded in the past and giving way to fraternity confirmed by law. The secular Western tales of origin are ultimately inapposite, and attempted adaptations of them founder upon contrary American realities.[30] Not the least of the realities is the role of law which, so far from constituting a means for transcending the primordial crime has, in certain respects, become its instrument.

E. Silence

The season of the Constitution's bicentennial should prompt us to reflect on the story of American law and Native Americans. Little is said about the subject in the standard legal texts. This is a puzzle. Indian cases are among the most frequently argued before the Supreme Court and are among the most instructive for students of American law. But you will have a hard time finding the word "Indian" in the volumes on property or constitutional law, where material on the tribes would be fit and enlightening—necessary, really. There are pages on slavery and the subsequent legal struggle for the freedom of blacks but not on the continuing war against Native Americans. The Indian cases are typically missing from the casebooks and treatises.[31] We ought to wonder about the larger meaning of this pregnant silence.

Any account of the cases I offer here can only be a prolegomenon to development of an adequate language for addressing these things and acting upon them. Also, the way I elect to tell the story is not the only one possible. Charles Wilkinson's *American Indians, Time and The Law* (1986) finely demonstrates there is another way to read the cases and events and to draw them to a very different, optimistic conclusion.

I have come late to Indian law and am no expert. This may be an advantage, for the subject belongs to all of us and not to experts only. Perhaps my fledgling efforts will induce others to correct and improve upon my attempt.

30. For a trenchant theological analysis of the failure of and need for revolutions, see Paul Lehmann's The Transfiguration of Politics (1975).

31. This point has also been raised by Charles Wilkinson in The Place of Indian Law in Constitutional Law and History (1985). For example, Gerald Gunther's casebook no more than mentions Indians, although Professor Gunther is aware of the importance and potential of developments in the Indian cases. See Gunther, 8 Buffalo L. Rev. 1 (1958); Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 Stan. L. Rev. 500, 500 n. * (1969).

Indians make up less than half of 1 percent of the population. Their significance—like that of the little Semitic tribe that made an exodus from ancient Egypt—may be far greater to America than their number reveals.

I. The Indian Law Landscape

The Constitution empowers Congress to regulate commerce with the Indian tribes.[32] For Indians, the tribe is the dominant political-religious-social-aesthetic reality.[33]

I shall use the words "tribe" and "nation" interchangeably, as did John Marshall. Both terms designate the collective Indian reality. As Marshall noted, "nation" is a non-Indian term and comes with particular legislative and diplomatic meaning attached. Marshall said the word as applied to Indians means the same thing as applied to any nation: "A people distinct from others."[34] "Nation" appears to be acceptable to Indians as an alternative for "tribe."[35]

My subject is the law's relation to tribes rather than to individual Indians.[36] Individal Indians were naturalized by the Citizenship Act of 1924.[37] Many Indians had already been made citizens by particular treaties or statutes.[38] As citizens they are presumably accorded the same constitutional treatment as any other citizens. The citizenship of individual Indians, however, is surrounded with questions and complications all its own.[39] For example, some Indians who are members of tribes that affirm their sovereignty do not accept that they can be made citizens of the United States. I shall not address such issues here. My present concern is with the prior, tribal question.

Supreme Court law respecting tribes may be conveniently summarized by saying that Congress has power over Indian nations and that the Court supplies various jurisprudential grounds for its exercise. The Court has either refused to scrutinize the action of Congress in Indian affairs, invoking the political question doctrine, or summoned up constitutional bases for it, or devised what it deemed acceptable extraconstitutional support when

32. Art. 1, sec. 8 provides that Congress shall have power "to regulate commerce . . . with the Indian tribes." Both art. 1, sec. 2, and Amendment 14, sec. 2, provide for apportionment of representatives "excluding Indians not taxed."

33. See, e.g., Black Elk Speaks (J. Neihardt ed. 1979); R. Barsh & J. Henderson, The Road (1980); J. Lame Deer & R. Erdoes, Lame Deer: Seeker of Visions (1972). A narrow definition of "tribe" may be a white imposition. See Prucha, The Great Father at 943, 1010 (1984). The band or village may be an equally appropriate way to think of the tribe. See, e.g., H. Driver, Indians of North America 268–308 (2d ed. 1969). The standard is properly qualitative, not quantitative.

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

35. See National Lawyers Guild, Rethinking Indian Law iv (1982) ("Rethinking Indian Law").

36. The tribe is the focus of Indian law. See Clinton, Isolated in Their Own Country 979, 984–91 (cited in note 13).

37. 43 Stat. 253, 8 U.S.C. § 1401.

38. See generally Strickland et al., Felix S. Cohen's Handbook of Federal Indian Law 639–72 (1982 ed.) (Cohen III).

39. "Indians had to be made citizens so that the great experiment in coercive civilization could continue without possible legal impediments. Citizenship was conferred to benefit the government, not the tribes." R. Barsh & J. Henderson, The Road 96 (1980).

none could be found in the Constitution. The Court has never held a congressional exercise of power over Indian tribes to be illegal, and there is no reason to think it ever will.

In addition to this legally unlimited will of Congress, sometimes referred to as Congress's plenary power over Indians, there are two other newer features taking on major importance: the presence of the states in Indian country, and the deeper independent involvement of the Supreme Court in Indian affairs. I shall be calling your attention particularly to the latter phenomenon.

Congress, the states and the Court have expanded their powers over Indians at the expense of the tribes; but the tribes have wrested some significant victories from the law. That fact and an uncanny tribal capacity for survival have provided Indian nations with a contemporary residual vitality notwithstanding the general compacting suffered by their legal prospects.

These general features and others are exhibited in the Supreme Court's Indian opinions of the 1985 term. I shall begin with a summary review of these cases because they provide as good an entry as any into present Indian law.

County of Oneida v. Oneida Indian Nation,[40] is an example of the fact that tribes can still score major legal triumphs.[41] The Oneida Nation won vindication of its rights to New York lands which the state had illegally acquired from the Indians in 1795. The Indians had "aboriginal title" to the land.[42] A federal statute, the Trade and Intercourse Act, codified the principle that such title could only be extinguished by the sovereign. The necessary federal action had never taken place so that the county was in wrongful possession of the land, and the Oneida Nation was held to have a federal common law remedy for the violation of its aboriginal rights.[43]

The *Oneida* case also illustrates other aspects of contemporary Indian law. The 1985 term produced seven Indian law opinions, a figure illustrative of a steadily increasing volume; since 1959 Indian affairs have become one of the Court's most familiar subjects.[44] This growing number of cases is a relatively recent phenomenon, but the cases themselves typically take us back to American beginnings, as *Oneida* demonstrates. The Oneidas' claim, Justice Stevens observed, "arose when George Washington was Pres-

40. 470 U.S. 226 (1985).

41. On the subject of the eastern land claims see P. Brodeur, Restitution (1985); Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 23–29 (1979).

42. 470 U.S. at 233–24 & n.3, 238 & nn.16–18. See also United States v. Dann, 470 U.S. at 41 n.3; Strickland et al., Felix S. Cohen's Handbook of Federal Indian Law 486-93 (1982 ed) (Cohen III); Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947).

43. The county contested the right of a tribe to bring suit. On this subject see 470 U.S. at 234 & n.5; 239 n.1; 235 n.12; 236.

44. Before 1959 few tribal power cases were brought by tribes. There were 10 Indian law decisions in the 1960s, 33 in the 1970s, 16 in the first five terms of the 1980s. The Supreme Court has become more active in this field than in, e.g., antitrust, securities, environmental, and international law. See generally C. Wilkinson, American Indians, Time, and the Law (1987).

ident of the United States."[45] Another of the term's cases dealt with a claim based upon aboriginal title predating the formation of the union,[46] and five of the opinions[47] made some reference to early Indian law opinions of John Marshall: *Johnson v. McIntosh*,[48] *Cherokee Nation v. Georgia*,[49] and *Worcester v. Georgia*.[50]

Such recurrence to beginnings as that in *Oneida* reminds us of the contemporary significance of the early U.S. history, and it invites us to reflect upon age-old fundamentals. But it also bears unfortunate negative potential. By referring present decisions to the past, Indian nations and wrongs done them are made to appear anachronistic. That both the tribes and the offenses have present vitality and importance is lost to view, and we may be thought confronted only by what an *Oneida* dissent called "forefathers' misdeeds" which are to be balanced against innocent present "expectations in the ownership of real property."[51] The conclusion can then follow: "ancient claims are best left in repose."[52]

Another facet of current Indian law highlighted by *Oneida* is the influence of the *Handbook of Federal Indian Law*. *Oneida*, along with opinions in three of the other cases, cites F. Cohen, *Handbook of Federal Indian Law* (1982).[53] The federal government published Felix Cohen's *Handbook* in 1942 (Cohen I) while Cohen was Assistant Solicitor in the Department of the Interior. It was written primarily for governmental administrators but had an impact beyond its immediate purpose and became a kind of reference authority for the Court.[54] The Bureau of Indian Affairs put out a recast version in 1958 (Cohen II). The *Handbook* was redone yet once more under the direction of a board of editors and published as a third version in 1982 (Cohen III). Cohen III appears likely to exert as much influence as Cohen I, which was the only Cohen authored by Cohen.[55]

45. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 256 (1985) (Stevens, J., dissenting).

46. United States v. Dann, 470 U.S. 39 (1985).

47. All three Marshall cases are to be found in National Farmers Union Insurance Cos. v. Crow Tribe, 53 U.S.L.W. 4649, 4651 (1985), and County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234, 235 (1985). *Johnson* and *Cherokee Nation* are cited in United States v. Dann, 470 U.S. 39, 41 (1985), and Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 256 n.2 (1985) (Brennan, J., dissenting). Montana v. Blackfeet Tribe, 53 U.S.L.W. 4625, 4677 (1985), cites *Worcester*.

48. 21 U.S. (8 Wheat.) 543 (1823).

49. 30 U.S. (5 Pet.) 1 (1831).

50. 31 U.S. (6 Pet.) 515 (1832).

51. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 273 (1985) (Stevens, J., dissenting).

52. *Id.* As I shall point out, the Court makes a regular habit of attributing to the past its own present injurious practices. When "forefathers' misdeeds" rather than contemporary wrongs are said to be in issue, then the Court can follow the adage, "ancient claims are best left in repose."

53. Mountain States Telephone & Telegraph v. Pueblo of Santa Ana, 472 U.S. 237, 256 n.2 (Brennan, J., dissenting); National Farmers Union Insurance Cos. v. Crow Tribe, 53 U.S.L.W. 4649, 4651 n.16; County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234, 247; United States v. Dann, 470 U.S. 39, 41.

54. As I shall have occasion to discuss later, it had both positive and negative impact.

55. There is confusion in the way Cohen I, II, and II are cited. The 1942 Cohen, Cohen I, is the volume authored by Felix Cohen. The 1958 volume (Cohen II)—*Federal Indian Law*—purports to be a revision of Cohen's original and is sometimes cited as Cohen, although it deliberately changes the sub-

Oneida rested upon federal common law and treaty as well as statutory construction. Like all the term's other opinions and most modern ones, it was not a constitutional decision in the narrow sense. But *Oneida* is constitutional in a fundamental sense, and I shall be talking about Indian law in this as well as in the technical sense.

One other fact about the *Oneida* controversy is generally characteristic of Indian cases: land was the subject. Directly or indirectly, land was implicated in all the term's cases. Tribal identity and religion are tied to the land, and land is, more than anything else, the immediate reason for conflict between Indians and non-Indians.[56]

Claims to land did not fare so well in *United States v. Dann*[57] as they did in *Oneida*, although in many ways *Dann* presented a likelier case for upholding Indian title. The federal government claimed western grazing lands to which two Shoshone members asserted aboriginal title. The land was undeveloped, there were no conflicting expectations in private property, and there was none of the potential disruption that concerned the Court in *Oneida*. The Court held against the Indians nonetheless.

The United States had brought a trespass action against the Danns for grazing cattle on federal land. The Danns raised aboriginal title in defense. The Court found that payment for the land had been effected by congressional appropriation of funds to satisfy an Indian Claims Commission judgment in favor of the Shoshone. The Court held that payment had been made, although no money had been distributed to the Indians.[58]

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stance and tenor of Cohen I, and Felix Cohen did not author it. The 1982 volume (Cohen III)—*Felix S. Cohen's Handbook of Federal Indian Law*—holds itself out to be "Felix S. Cohen's" but is in fact the product of various authors and editors (none of whom was Felix Cohen) and is very different from Cohen I and II. The Court cites the three as though Cohen were the author of them all with only the dates changed (1942, 1958, and 1982). See, e.g., text at notes 372–77 and note 524 *infra*.

The board of authors and editors of Cohen III should be compared to the list of participants in law review symposia on Indian law and the compilers of casebooks on the subject. A very small number of people—a limited establishment—are shaping Indian law.

56. Land was directly involved in *County of Oneida v. Oneida Indian Nation*, in *United States v. Dann*, and in *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana. Kerr-McGee Corp. v. Navajo Tribe* and *Montana v. Blackfeet Tribe* dealt with taxes on mineral extraction from Indian lands. The *National Farmers Union* case decided the issue of jurisdiction over civil action arising on land within reservation boundaries but owned by the state. Land and erroneous surveys of land were at the base of the controversy about hunting and fishing rights in *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*.

On the subject of land as a principal issue see Lyons, When You Talk About Client Relationships, You Are Talking About the Future of Nations, *in* Rethinking Indian Law iv (cited in note 35). See generally, e.g., Cronon, Changes in the Land (cited in note 21); A. Josephy, Now That the Buffalo's Gone 127–50 (1982); Prucha, The Great Father 11–18 (cited in note 2); Washburn, Red Man's Land/White Man's Law (1971).

57. 470 U.S. 39 (1985).

58. The Court fixed its attention on whether a payment had been effected. No money had been distributed to the Shoshone. The Court found that payment had occurred when the government as debtor had appropriated funds and deposited them in a trust account for the government as trustee for the Shoshone. The opinion is consumed with concern for the technical question of whether payment had occurred, notwithstanding that it had never come into the hands of the Shoshone. The import of the opinion is that payment has extinguished aboriginal title, but the matter is certainly not free of confusion.

The Indian Claims Commission was created by Congress in 1946.[59] It expired in 1978. The Commission was supposed to provide final settlement of Indian claims against the United States. It failed in many respects.

The Commission held that the Shoshone aboriginal title was extinguished in the latter part of the 19th century and awarded compensation on this basis.[60] However, according to a subsequent district court opinion, aboriginal title had not been extinguished until the Commission's judgment in 1962.[61] On appeal the Ninth Circuit held that the extinguishment question had never been litigated or decided.[62] On remand, the district court found that extinguishment had occurred when the Commission award was certified for payment in 1979.[63] The Ninth Circuit then found that payment had not been made. The Supreme Court reversed, holding that certification of the award and congressional appropriation of funds for it constituted payment.

One thing is clear: the tribe's aboriginal title cannot now serve as a defense against a trespass action. Other than that, much remains uncertain. Although it may have little present legal significance, aboriginal title may still be held by the tribe. The Commission based its monetary award on the theory of a 19th-century extinguishment and actual land prices in effect at the time. But the district court held that title had not been extinguished until 1962 and then held that it had not been extinguished until 1979. The Ninth Circuit said the Commission could not extinguish title[64] absent Indian consent, which had not been given. In *Dann* the Supreme Court held only that certification and appropriation constituted payment of the award. If extinguishment occurred in 1979, then the Commission award based on 19th-century extinguishment and land values at the time would be off by a century, and the Shoshone would still not have satisfaction for federal denial to them of use of the land to which they held aboriginal title until 1979. Confusion is further compounded by the fact that the Supreme Court reserved the question of possible individual claims to aboriginal title.

Dann is also indicative of the frustration that litigation and lawyers pose to tribes. As the history of *Dann* is recounted by the Ninth Circuit,[65] lawyers for the Temoak Band of the Western Shoshone originally brought the claim. The Danns and other Shoshones attempted to intervene and withdraw the claim in order to preserve their right to the land. The Indian Claims Commission rejected the attempt as an "intratribal dispute" over litigation strategy. In 1976 the Temoak Band also sought to withdraw the claim. There is a question here about the relation of non-Indian attorneys

59. Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (codified as amended at 25 U.S.C. §§ 70 to 70v-3).
60. 470 U.S. 41–42.
61. *Id.* at 42.
62. *Id.*
63. *Id.*
64. 706 F.2d 919, 922 & n.1, 928 (1983).
65. 706 F.2d 919, 921–23, 925–27.

to their Indian clients. Tribal contracts for representation must be submitted for approval to the Secretary of Interior. In a memorandum opposing the award of attorney fees, certain of the Shoshone explained:

> Because of their remoteness, the Western Shoshones have always been less assimilated and educated than most other tribes. During the first two decades of the litigation . . . , there were virtually no attorneys in the country who purported to have expertise in Indian affairs law, except that small group of veterans who constituted the "Indian Claims bar." It seems to have been assumed at the time that all Indian titles outside of reservation boundaries were somehow extinguished. . . . The only lawyers available to represent the Shoshones were doing so under a self-financing system which they themselves invented and which created a powerful incentive to prove the extinguishment of Indian title to as much land as possible. . . . [T]here was always a great deal of confusion about the nature of the claim. . . , and no one knew enough about white culture and courts to know what the alternatives might be. . . . It was a closed system where the BIA, notorious for its colonial and paternalistic relationship with Indians, and the only available attorneys, endlessly told the Western Shoshones, who were dead right in their instincts, that they were dead wrong.[66]

The court found that the attorneys were entitled to be paid the customary 10% of the Indians' $26 million award, although the government has never in fact paid the Indians.[67]

The relationship of Indians to non-Indian attorneys and a non-Indian legal system is to be borne in mind in any analysis of the cases. There are an increasing number of Indian attorneys, and the attorney-client relationship is in process of change.

Dann was a defeat for the Indians. So was *Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*.[68] *Mountain States* illustrates a characteristic of Indian law that is not very evident in either *Oneida* or *Dann*—radical shifts in policy. Federal Indian policy is completely reversed periodically. Present policy calls for tribal "self-determination" for Indians.[69] It is the recurrence of a type of policy first fashioned in the 18th century and then attempted again in the first half of the 19th.[70] In between, however, there have been more and less radical policies forcing the dissolu-

66. Western Shoshone Identifiable Group, Represented by the Temoak Bands of Western Shoshone Indians, Nevada v. United States: Excerpts from the Memorandum of the Duckwater Shoshone Tribe, the Battle Mountain Indian Community, and the Western Shoshone Sacred Lands Association in Opposition to the Motion and Petition for Attorney's Fees and Expenses, July 15, 1980, *in* Rethinking Indian Law at 63, 63 n.5 (cited in note 35).

67. See also Tullberg & Coulter, The Failure of Indian Rights Advocacy: Are Lawyers to Blame?, in *id.* at 51; Price, Lawyers on the Reservation: Some Implications for the Legal Profession, 1969 Law & Soc. Ord. 161.

68. 472 U.S. 237 (1985).

69. See, e.g., Statement on Indian Policy, Jan. 24, 1983, 1 Public Papers of the President of the United States: Ronald Reagan, 1983, p. 96.

70. The Trade and Intercourse Acts and even the removal policy were viewed by some as measures that would allow Indians to be separate and, to a degree, self-governing.

tion of the tribes and the assimilation of Indians.[71] The cases reveal and suffer from the accretion of policies, all of which have present effects notwithstanding their mutual contradiction.

One of the term's opinions cites and gives play to the current policy of protecting tribal integrity by supporting self-determination.[72] But *Mountain States* revives a different, much older approach which the Court found under layers of intervening conflicting policies.

The Pueblo of Santa Ana sought to recover damages for use of its land for a telephone line.[73] Its argument was predicated upon the Trade and Intercourse Act which the Oneida successfully employed against Oneida County in New York. With no sense of irony, the Court found that the Pueblos are not an Indian tribe qualifying for protection.[74]

The Court has decided that a Pueblo is a tribe and is not a tribe.[75] From the Indian perspective, as I have noted, the tribe is the heart of Indian identity;[76] tribal membership was not based on racial criteria but was a religious-political matter. A tribe might be said to have been composed of those who abided by the tribal way.[77] The United States has imposed upon Indians its own, alien, definitions of "tribe," and it has made race a dominant factor in determining tribal membership.[78] However, federal statutory identification of what constitutes a tribe is marked by inconsistency.[79] Definitions have varied with time as well as subject matter. The effects of changing definitions have been cumulative as attempts have been made alternatively to force assimilation of the tribes by allotment, to reorganize

71. See text at notes 412–14.

72. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 199.

73. The tribe had agreed to an easement. The circuit court found that the Nonintercourse Act applied to the transaction.

74. Mountain State Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985).

75. The *Mountain States* opinion recounts the legislative and Court history of the Pueblo Indians. In fulfillment of its treaty obligations and to discourage the exploitation of Indians (because it produced frontier conflict), Congress passed the first trade and intercourse law in 1790. See Strickland et al., Felix S. Cohen's Handbook of Federal Indian Law 110 (1982 ed.) (Cohen III). It was several times elaborated and amended. The last and current version was enacted in 1834. See *id.*; 472 U.S. 237, at 241 n.9. Its purported intent is to provide protected separation for the tribes. In 1877 and in accord with the policy of the day the Court held that the Pueblos were not an Indian tribe so their lands could be sold notwithstanding the Nonintercourse Act and applicable treaties. United States v. Joseph, 94 U.S. 614 (1877). In 1913 in accord with a different policy, the Court held that Pueblos were an Indian tribe so that they could be denied liquor. United States v. Sandoval, 231 U.S. 28 (1913). In 1926 the Court held that Pueblos were tribes and that the Nonintercourse Act included them. United States v. Candelaria, 271 U.S. 432 (1926). Non-Indian claims to Pueblo lands were thereby cast in doubt. Congress eventually responded to the land title confusion with a confusing statute, the Pueblo Lands Act of 1924, § 17, called "awkward and obscure," "opaque," a "muddle," and a "statutory bog" in a dissent to *Mountain States* by Justice Brennan. 472 U.S. at 255–56. The statute was in issue in *Mountain States*. In that case, the Tenth Circuit Court of Appeals had held that the Nonintercourse Act applied to Pueblos. The Supreme Court reversed and held that Pueblo land sales do not require congressional ratification. It once again found the Pueblos are not an Indian tribe for statutory purposes.

76. See note 33.

77. Barsh & Henderson, The Road, at 244–45 (1980).

78. *Id.*

79. See generally Canby, American Indian Law in an Nutshell 3–6 (1981); Strickland et al., Felix S. Cohen's Handbook of Federal Indian Law 3–26 (1982 ed.) (Cohen III).

them, to terminate them, and most recently to make them self-governing.[80] By determining that Pueblos are not a tribe, the Court implemented older, discarded policy.

Mountain States illustrates a related phenomenon: Court disregard of its own canons of construction. In the face of Congress's shifts—and of its own—the Court has sought continuity in special canons of construction for Indian treaties and statutes.[81] The canons purportedly serve a liberal construction favoring Indians. The canons were rehearsed in *Oneida*[82] and followed in two other cases.[83] But they were forgotten in *Dann*.[84] And in *Mountain States*, as a dissent noted, they were violated.[85]

Both the canons of construction and the current policy of self-determination were followed in *Kerr-McGee Corp. v. Navajo Tribe of Indians*.[86] Tax was the issue. The question was whether the Navajos could legitimately tax business activities on tribal land. The Court has fallen into the habit of saying that Congress can place conditions upon tribal taxing power, including federal approval. No conditions were found to have been imposed in this instance.[87] Moreover there were no potentially conflicting federal or state interests in issue. The tribe simply sought to levy a tax upon a private business's activity. The tribal government had not been constituted under the Indian Reorganization Act, but so far as the Court was concerned, it was a sovereign tribal entity unlike the Pueblo of Santa Ana. The Navajos' self-government warranted protection.[88] Because the Court finds a close correlation between self-government and self-help, the tax was upheld—tribal governments can gain "independence from the Federal Government only by financing their own police force, schools and social programs."[89]

Taxes were again at issue in *Montana v. Blackfeet Tribe*,[90] but here the tribe wished to ward off a state tax, not impose one of its own. The state

80. See, e.g., Prucha, The Great Father (1984); Getches, Rosenfeld, & Wilkinson, Federal Indian Law 69–106 (1982); Strickland et al., Felix S. Cohen's Handbook of Federal Indian Law 127–80 (1982 ed.) (Cohen III); Price & Clinton, Law and the American Indian 77–86 (1983). A good summary and analysis of termination is provided by Note, Terminating the Indian Termination Policy, 35 Stan. L. Rev. 1181 (1983).

81. See Strickland et al., Felix S. Cohen's Handbook of Federal Indian Law 221–25 (1982 ed) (Cohen III); Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows upon the Earth"—How Long a Time Is That? 63 Calif. L. Rev. 601 (1975).

82. County of Oneida v. Oneida Indian Nation, 470 U.S. at 247.

83. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. at 200; Montana v. Blackfeet Tribe, 53 U.S.L.W. at 4627.

84. United States v. Dann, 470 U.S. 39 (1985).

85. Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 255, 256–57 (1985) (Brennan, J., dissenting).

86. 471 U.S. 195 (1985).

87. On the question of tax generally see the thorough and interesting analysis of Barsh, Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique, 54 Wash L. Rev. 531 (1979).

88. It is not insignificant that the government, with its freely elected governing body, appeared to the Court to resemble that of the United States. There was one exception: among tribal members the voter turnout was 69%.

89. 471 U.S. 201. The distinction between business partner and sovereign is collapsed.

90. 53 U.S.L.W. 4625 (1985).

had tried to tax tribal royalties from oil and gas leases.[91] So extensive is Congress's "plenary" power over Indians that, the Court averred, Congress could authorize the states to tax tribes. There had been no such authorization in this case.[92] The tax was invalid. There is abundant state-Indian as well as state-Indian-federal potential for conflict, and the power to tax is a critical locus for the conflict.

Another locus for state-tribe conflict is the regulation of hunting and fishing as was illustrated by *Oregon Dep't of Fish & Wildlife v. Klamath Tribe*.[93] Many tribes of the Northwest reserved off-reservation hunting and fishing rights when they ceded their lands to the United States. In *Klamath*, however, the Court refused to uphold such rights. In an 1864 treaty, the tribe had ceded all but some 2 million of its 22 million acres of aboriginal lands. Erroneous surveys of the retained land wrongly excluded well over 600,000 acres, almost one-third of the reservation.

The United States sought to rectify the error in a 1901 agreement by paying the Klamath for the excluded acreage. The question was whether the tribe held hunting and fishing rights in the area that was originally to have formed part of their reservation but that had been left out by the faulty survey. The 1901 agreement was silent on the subject of hunting and fishing rights. But the lands in question are set aside for national forests and parks, Indians have hunted and fished in the area continuously from time immemorial, and they were agreed to depend upon the significance of these activities. The Court construed the 1901 agreement as cutting off any reserved hunting and fishing rights when compensation was paid for the wrongly excluded land. Although the Court has sometimes protected tribal hunting and fishing, it has also qualified that very protection and allowed state control, as it did in *Klamath*.

National Farmers Union Insurance Cos. v. Crow Tribe,[94] is the remaining opinion from the 1985 term. Like the others, it sounds themes familiar in Indian law. The theme clearly revealed here is the jurisdictional confusion that the law has created in Indian country.[95]

An Indian child was injured in a school parking lot. The parking lot lay within reservation boundaries but on land owned by the state. The child's guardian brought an action for damages in the tribal court and won a default judgment. The defendants, the school board and its insurer, National Farmers Union, sought federal equitable relief from this judgment.

The Supreme Court determined the defendants had first to exhaust their tribal court remedies. Several years before, the Court held a tribal court did not have jurisdiction to try non-Indians who had allegedly committed crime

91. On the question of allotment and the leasing of Indian land, see text at notes 342–46.
92. 53 U.S.L.W. 4627.
93. 105 S. Ct. Rep. 3420 (1985).
94. 105 S. Ct. 2447 (1985).
95. See, e.g., Clinton, Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503 (1976).

in Indian country.[96] *National Farmers Union* said there was a distinction between criminal and civil jurisdiction and held the tribal court had the opportunity to determine its own civil jurisdiction in the first instance.

The case is evidence of the jurisdictional confusion imposed upon Indian country. Non-Indians are frequently to be found within Indian reservations. Partly as a consequence of this non-Indian presence, reservation jurisdiction is a maze of federal, state, and tribal authority. The *National Farmers Union* certification of a distinction between criminal and civil jurisdiction compounds the complexity but at least preserves the civil jurisdictional integrity of tribal courts.

There is far more federal Indian law than was at issue in the 1985 term, but the seven opinions do provide an introduction to the field and an illustrative view of its contemporary development: The tribes are before the Court with increasing frequency, and victories are still possible for them, but the Court makes selective use of contradictory policies, definitions, and canons of interpretation that frustrate tribal rights usually related to land. Jurisdictional complexity adds to the frustration as does non-Indian representation in an alien legal system. Although the Court prefers to decide cases on the basis of statutory, treaty, or common law, the antiquity of Indian claims and their affective power raise fundamental issues that are essentially constitutional. In the pages that follow, I shall be preoccupied with questions about the foundations of federal Indian law at the beginning and now.

II. The Origin of Indian Loss

Careful attention must be paid to the foundations, both professed and real, of federal Indian law, and this means turning from the most recent to the earliest Supreme Court cases. The founding cases figure frequently in contemporary law and warrant careful examination both because of their own inherent interest and because of what modern interpretation has made of them.

The Court has offered a variety of accounts of its Indian decisions and of the existing American governmental relationship to Indian nations. One of them appeared in the 1985 term in *National Farmers Union*, the case dealing with the civil jurisdiction of tribal courts. Justice Stevens proposed: "At one time [Indian tribes] exercised virtually unlimited power over their own members as well as those who are permitted to join their communities. Today, however, the power of the Federal Government over the Indian tribes is plenary."[97] The first challenge is to identify when and how the tribes lost the plenary power over their members that is now exercised by the government of the United States.

96. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
97. 105 S. Ct. 2451.

If an Indian nation is a nation, then its governmental powers cannot simply evanesce and reappear in the hands of another nation's government. Justice Stevens said the tribes once exercised virtually unlimited power over their members. The story of Native Americans and American law requires that we know at what point and by what means a plenary power afterward passed from Indian nations to the United States. The story told by Virgil depended upon Aeneas' vow of a compact by which the Italian natives would consent to unite with the newcomers and so constitute Rome as the new Troy. In the reality of America's past, is there any factual analog to the transaction between Italy and Illium?

Justice Stevens's statement in *National Farmers Union* is offered as a capsule history ("At one time. . . Today. . ."). There is a gap between those two sentences, an interstice when unlimited power in the government of their own affairs was lost by the tribes to be gained by the federal government. The Court evidently wants us to think such a transaction occurred and hangs much upon belief in one.

National Farmers Union does not answer the question about a transfer or seizure of power. Instead, it says that curtailment of Indian power is a question "that must be answered by reference to federal law," and it offers us a quotation from *United States v. Wheeler*,[98] which informs us that loss of Indian sovereignty took place "by treaty or statute, or by implication as a necessary result of [the tribes'] dependent status."

The loss of power by treaty is straightforward and verifiable. There are many grave doubts about the validity of some treaties with Indian nations both because of the manner in which Indians were forced or misled into signing them and because of the failure of the United States to keep the promises made in those treaties. But as an explanation for the Indian loss of power, the proposition is unexceptionable. A nation may voluntarily surrender its power through a treaty. Of course, the fact that the United States would enter treaties with Indian tribes is itself a way of acknowledging tribal sovereignty and power. In this way, treaties will always be an affirmation of the tribes' political integrity at the same time that they may be a vehicle by which tribes surrender certain powers. Which powers have been lost by a given tribe, and when, will then be a simple matter of reference to treaty.[99]

Although there is considerable variance between the treaties, typically the Indians relinquished little of their sovereignty. Among the more common declarations by Indians are the acknowledgement that they are "under the protection of the United States of America" and the promise that they

98. 435 U.S. 313, 322–26 (1978).

99. On the appropriateness of treaty-specific legal representation see Clinton, Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law, 8 Hamline L. Rev. 543 (1985).

will deliver up criminals.[100] Very little tribal loss of sovereign power can be accounted for by treaties.

Statutes are the second possible explanation for loss of tribal power listed by *Wheeler*. Statutes, however, account for no more legitimate diminishment of tribal power than do the treaties upon which they depend. A tribe could not legitimately suffer loss by statute unless the statute implemented a treaty provision. The inherent sovereignty of another nation cannot be reduced nonconsensually by means of United States legislation. One sovereign may not establish for itself jurisdiction over another by enacting statutes that purport to govern the foreign sovereign.

The third basis listed by *Wheeler* is "implicit divestiture," which it attributes to Indian tribes' "incorporation within the territory of the United States."[101] Incorporation may be what transpired between the "one time" when tribes governed their own affairs and the "today" when the federal government has that power. It certainly has drastic effects, and increases in favor with the Court. So the attempt must be made to discover what incorporation is, why it legitimates divestiture of sovereignty by implication, and how, as well as when, it occurred. This will not be easy.

The period of unlimited Indian power to which Justice Stevens refers may be identified with confidence as the time before the advent of settlers from Europe. The difficulty lies in ascertaining when afterwards "Indian sovereignty (became) subject to defeasance."[102] *Wheeler* refers to incorporation as incorporation within the United States and so must mean that incorporation took place at or after the founding of the American government.

We know that it had not taken place by the end of John Marshall's tenure as Chief Justice. In fact, Chief Justice Marshall specifically addressed the subject of incorporation of Indians and expressly rejected it as a possibility. Moreover, he did not believe that legitimate grounds existed for limitation of Indian sovereignty. (Or to state the matter more fully and accurately, he purportedly envisioned one limitation of Indian sovereignty, acknowledged both its necessity and illegitimacy, and indicated that no further nonconsensual losses of governmental power were to be inflicted upon the tribes.) A close look at Marshall's opinions on the subject is called for. They cast light on Indian law at the beginning. And their subsequent history in the Court casts light on the nature of the Court.

100. See, e.g., Treaty with the Wyandot, 1785, art. II, in Kappler, 2 Indian Affairs: Laws and Treaties 6, 7 (1904).
101. 105 S. Ct. 2452 n.4.
102. *Id.* at 2451 n.10.

A. The Marshall Court Cases

1. Fletcher v. Peck

Fletcher v. Peck[103] is known primarily because it was the first case to strike down a state action. It did so on the basis of the contract clause. It was likely collusive, and it frustrated the attempt by Georgians to undo their corrupt legislature's great Yazoo land fraud.[104] *Fletcher v. Peck* was also the first case in which Indian interests were an issue.

Georgia claimed ownership of the state's western territory, and the legislature sold it. The territory embraced Indian country. Justice Johnson entered an opinion in the case in which he dissented on the point of Georgia's title. He concluded that Georgia held nothing more than a mere possibility of right to title, inasmuch as the tribes west of Georgia were an independent people with absolute proprietorship of their soil.[105] He thought the state held "nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell."[106]

Marshall did not adopt this uncomplicated approach. He reserved the question of Indian title for the last two sentences of the opinion and then maintained that "the nature of Indian title, which is certainly to be respected by all courts, until it be legitimately extingished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."[107] Indian title was not directly in issue. Marshall may have thought to protect both Indians and white settlers who had relied upon state-sanctioned conveyances. In any event, his formula is doubletalk (Indians have title, judicially enforceable but not repugnant to state seisin in fee).

2. New Jersey v. Wilson

In *New Jersey v. Wilson*,[108] the second case discussing Indians, the contract clause was again invoked, this time to void New Jersey's repeal of tax exemption for a tribe's reserved territory. Non-Indian purchasers of the land were held to be in the same position as that of the Indian sellers. Since the exemption was in the nature of a contract, it could not be impaired. Again, Indians were not directly involved.

3. Johnson v. McIntosh

Indians were still not directly involved in the third opinion, *Johnson v. McIntosh*.[109] In this dispute between non-Indians, one white party claimed title under an Indian conveyance; the other claimed under a subsequent cession by the Indians to the United States followed by a conveyance from

103. 10 U.S. (6 Cranch) 87 (1810).
104. See C. Magrath, Yazoo (1966).
105. 10 U.S. 143, 146–47 (Johnson, J., dissenting).
106. *Id.* at 147.
107. 10 U.S. at 142–43.
108. 11 U.S. (7 Cranch) 164 (1812).
109. 21 U.S. (8 Wheat.) 543 (1823).

the United States. Marshall had to address the nature of the Indian conveyance. Having failed to adopt the simple answer to the question of Indian title put forward by Justice Johnson in *Fletcher v. Peck*, Marshall was compelled in this case to elaborate his own equivocal solution. Marshall's opinion is of particular moment because it is the one which specifically addresses incorporation.

He proposed a theory that seems to limit tribal power but that actually poses little or no restriction on the tribes. It has the look and feel of property law esoterica and has the function of settling a certain class of non-Indian title conflicts. The theory also gives Marshall the opportunity to salvage his statements in *Fletcher v. Peck*. (His citation to *Fletcher v. Peck* on page 592 is one of the rare Marshall cites to precedent.)

The theory sets out two different relationships: one among European claimants to the New World, the other between each of the European claimants and the Indian inhabitants. As among the Europeans, the doctrine of discovery obtained.[110] As between European and Indian nations, each relationship was to be separately regulated.

The Europeans, in order to avoid conflict among themselves, found it necessary to adopt the principle of discovery, which "gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."[111]

Each of the European "discoverers" had come to terms with the Indian inhabitants of their "discovered" territory. The "different nations of Europe respected the right of the natives, as occupants" of the soil "with a legal as well as just claim to retain possession of it, and to use it according to their discretion."[112]

In Marshall's statement of it, the doctrine of discovery by which the Europeans sought to avoid conflict among themselves seemed to have had one spillover effect upon the Indians. The discoverer acquired the exclusive right to purchase from the Indian inhabitants those lands within the discovered area. In this sense the tribes' "rights to complete sovereignty, as independent nations, were necessarily diminished." After the Revolution, the exclusive right to purchase held by the discoverer passed to the states and

110. Professor Robert Williams, in a fine study of the early European origins of thought about the status of Indians, employs the word "incorporation" in the context of the papally inspired and royally implemented Spanish *encomienda*, whereby groups of Indian villages were "commended" to colonists. Williams, The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought, 57 S. Cal. L. Rev. 1, 47, 36–48 (1983). Another article by Williams—The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence, 1986 Wis. L. Rev. 219—came into my hands too late for me to take it into account in this study. It includes analysis of U.S. constitutional law and jurisprudence and a reflection upon the possibilities of Native American legal thought as embodied in the Two Row Wampum. It is one of the most creative and illuminating pieces in the field of Indian law.

111. 21 U.S. at 573.

112. *Id.* at 574.

United States.[113] With respect to the land in issue in *Johnson*, the right passed to Virginia, which ceded it to the United States.[114]

A close look at the opinion reveals that Marshall's version of the doctrine of discovery has small consequence for the tribes. The Indian property interest is described as a "title of occupancy."[115] It is recognized and protected. And it can be conveyed to non-Indians. It has all the indicia of fee simple except this: unless a non-Indian purchaser is licensed by the discovering sovereign or that sovereign's successor, the non-Indian purchaser takes only the Indian's interest. That is, the unlicensed purchaser takes everything except what Marshall describes variously as "absolute title,"[116] "absolute ultimate title,"[117] or "complete ultimate title."[118]

"Absolute title" is an abstract tautology. It is the right of the discovering sovereign to prevent other foreign sovereigns from having absolute title. If absolute title ever had meaning, then it was the meaning of a commodity created by the creation of an exclusive market. It had value and circulation only within that monopoly. But no such market ever existed. (Marshall's labors to make sense of his proposition produced such sentences as this one: "The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring."[119])

Indian title of occupancy was a fully recognized and fully protected possessory right. The absolute title had bearing only upon past—fictional—transactions between discoverers. The discoverer's "sole right of acquiring the soil from the natives" supposedly meant that nondiscoverers could not purchase absolute title from the Indians. The Indians could sell their land and possessory right to others. Unlicensed purchasers acquired a title that included everything but absolute title. Within the framework of Marshall's theory, such purchasers lost nothing by failing to acquire absolute title, which was only the discoverer's right to prevent nondiscovering sovereigns from having absolute title. As I say, it was an abstract tautology.

The meaning of absolute title—or its lack of operative meaning—did not long occupy Marshall. Discovery was of no moment to the case.

The case has been read, among other things, as authority for the proposition that Indian title cannot be acquired without federal consent. The opinion says something quite different.

The primary ground upon which Marshall denied the plaintiffs' claim was the validity of Indian title and of Indian actions concerning that title. This ground is generally overlooked by commentators and subsequent opin-

113. *Id.* at 584–85.
114. *Id.*
115. *Id.* at 590.
116. *Id.* at 591.
117. *Id.* at 592.
118. *Id.* at 603.
119. *Id.* at 590.

ions. The plaintiffs' claim to the land was defeated principally because the Indians themselves had extinguished plaintiffs' interest. Marshall notes that a non-Indian might purchase the Indian title, however described.[120] The purchaser would take only such title as the Indian seller held, but he could purchase that title.

Purchased Indian title would be held under the law of the tribe. "Admitting [the tribes'] power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. . . . If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty."[121] The tracts in issue had been within the territory of Indian nations at war with the United States. The non-Indians who claimed title under a conveyance from these Indians were American citizens. The Indians "had an unquestionable right to annul any grant they had made to" citizens of the nation with which they were at war. The Indians had presumably exercised this right and extinguished the aliens' title since, when they subsequently ceded their lands to the United States, they did not reserve the title of the plaintiffs.

There was a secondary ground for rejecting plaintiffs' claim. It was conceivable that the sovereign had either authorized such purchases of land from Indians or subsequently ratified them. Neither was true here. The king had specifically forbidden British subjects to purchase land from the Indians.[122] His proclamation was valid. It also constituted recognition of the power and status of tribes and the endorsement of their property interest:

> The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects, as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for the preservation of peace; and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites.[123]

In the process of delivering his double blow to plaintiffs' claim, Marshall twice discussed incorporation. Locke had argued that ownership of land under the protection of a government constituted the implicit acceptance of

120. *Id.* at 593.

121. *Id.*

122. *Id.* at 594.

123. *Id.* at 596–97. Nor had unlicensed purchases been cured by ratification. *Id.* at 603–4. Nor were colonial prohibitions to be taken as evidence that prior purchases were valid. *Id.* at 604.

its authority.[124] As Barsh and Henderson note, by "purchasing land lying within tribal territory, individual Europeans therefore consented to tribal political authority—according to European political principles. To avoid the implications of operational consent, first the Crown, and later Congress, forbade the purchase of tribal land without license."[125] In one of his references to incorporation, Marshall averred that the "person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws."[126] Marshall viewed it as possible for Europeans to be incorporated into Indian nations.[127]

What he viewed as not possible—his second reference to incorporation—was the reverse form of political incorporation, that is, Indians' incorporation into the settlers' government. (The modern Court has exactly reversed the two, as will appear below.) This other Marshall reference to incorporation is found in the context of his discussion of the law of conquest.

Incorporation can take place by violence as well as by purchase. This happens when an invader conquers a land—Aeneas transporting Illium to Italy. After conquest,

> Humanity . . . acting on public opinion, has established as a general rule, that the conquered shall not be wantonly oppressed. . . . Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired.[128]

In the case of the Europeans and Indians, however, incorporation—the humanitarian rule after conquest—was impossible. The Indians had not been conquered, and they would not mingle.[129]

Here was a dilemma. "To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence."[130] So the "Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles

124. Locke, Of Civil Government, ch. 8, par. 119–20. Although this passage was not included, Locke was argued to the Court. 21 U.S. 567, 569, 570.

125. The Road at 37 (1980).

126. 21 U.S. at 593.

127. See generally Williams (cited in note 110) for a study of the early background of European attitudes and legal practices toward Indians. See also Cohen, The Spanish Origin of Indian Rights in the Law of the United States, 31 Geo. L.J. 1 (1942).

128. 21 U.S. at 589.

129. *Id.* at 590.

130. *Id.*

adapted to the condition of a people with whom it was impossible to mix."[131] A new rule, different from that associated with the law of conquest and incorporation, had to be fashioned.

There then follows in Marshall's argument a remarkable confession:

> Every rule which can be suggested will be found to be attended with great difficulty. However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.[132]

131. *Id.*

132. *Id.* at 591–92. It is possible to read some sentiment for the notion of conquest in *Johnson v. McIntosh*. Marshall's opinion does make one direct statement about war in the New World, but the statement does not refer to Europeans making war upon the natives. Rather, as in *Worcester* and in similar reference to the territory east of the Mississippi, Marshall means hostilities between European nations as they attempted to assert and defend territorial claims:

"The British government which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right to extinguishing the titles which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword." 21 U.S. at 588.

Earlier Marshall had noted that discovery gives the right to acquire title from the native inhabitants "either by purchase or by conquest." *Id.* at 587. In neither *Cherokee Nation* nor *Worcester* was there any possibility that the Cherokee and their lands had been the object of conquest.

But Marshall then stated: "However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear . . . it becomes the law of the land." *Id.* at 591. Several interpretations of this statement are possible. For example:

1. The discovery rights were exercised through conquest rather than purchase. That is, the possibility of acquiring title—discovery—was realized by the English by an act of conquest.

2. The right of acquisition was not exercised by purchase. Instead acquisition was realized by the fiction of conquest. That is, there had been no conquest in fact, but there had been one in law.

3. The matter was deliberately left ambiguous by Marshall.

4. There was no purchase, no conquest in fact, and no conquest in law. Title was acquired in another way. The subject lands had become unoccupied. The Indians had withdrawn from them but not because of conquest in any traditional legal or factual sense. In the immediately preceding passage, Marshall asserts that, after the appearance of Europeans, "[f]requent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers and skill prevailed; as the white population advanced, that of the Indians necessarily receded; the country in the immediate neighborhood of agriculturists became unfit for them; the game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees, or deputies." *Id.* at 590–91. Instead of conquest or purchase, there had been Indian abandonment and non-Indian acquisition.

According to Marshall, no incorporation was effected. Indians and non-Indians were two people rather than one. Indian nations and the United States remained distinct. It followed that the chief benefit of incorporation to a conquered people—full property rights—did not accrue to the tribes. Indians could not transfer absolute title to property to any other than the successor to the European discoverer. This was, as I have noted, a fictitious limitation with no real impact. Even so, it did not go down easily with Marshall.[133] It is unnatural and uncivilized; it is American law.

I know of no comparable confession in the annals of the Supreme Court. This acknowledgement of the injustice of the American law has about it the sense of regrettable necessity but also of boundaries: So much but no more had to be done by the new nation and its law. It was fundamentally wrong, but it was done. This is the maximum permissible extent of it. This far and no farther. The injustice can be admitted because it is a fiction with no import in fact and because there is to be no further encroachment upon tribal sovereignty.

Whatever other meaning may be ascribed to Marshall's confession, at least this much is clear: Indian nations were not incorporated into the United States.

4. Cherokee Nation v. Georgia

Indians were not parties to the first three cases—*Fletcher v. Peck*, *New Jersey v. Wilson*, and *Johnson v. McIntosh*. These cases nevertheless established for Marshall a conceptual apparatus for Indian interests. The tribes had a protectible right to their land. They had not been incorporated into the United States and thus could not be said to hold full equality of property. There was a nagging, unjust pretension in the legal theory as Marshall elaborated it, but before the Cherokee cases there had been no instance where injustice was done in fact to an Indian party. Only non-Indian successors to Indian interests had been involved as parties litigant. *Cherokee Nation v. Georgia*[134] was the first true Indian case.

Georgia had moved to enforce its laws in Cherokee territory. The Cherokee Nation brought an original action in the Supreme Court seeking to enjoin the incursion. Marshall, writing for a majority, avoided the issue. He

133. The admission that American law is unnatural and uncivilized warrants close scrutiny. Europeans asserted the claims of discovery of North America. This legal fiction was one unnatural extravagance admitted by Marshall.

There was another. A limitation was thought to be placed on the tribes. There had been no conquest and no incorporation. The rule was that Indians could not transfer absolute title. Marshall laments this rule. But what is the sin he confesses? As I have noted, the restriction placed upon the tribes was an abstract tautology with no real impact. Absolute title could not be conveyed by Indians, but absolute title only meant something as between past European "discoverers." Even so, the rule constitutes a non-Indian pretension lacking a civilized, natural, or factual basis. Minor though it is, it is illegitimate.

Marshall found that this minor encroachment necessitated confession. And if he thought this offense grievous, I infer that he would regard a greater offense as more greatly intolerable. This inference is supported by the Marshall Court's next two Indian cases.

134. 30 U.S. (5 Pet.) 1 (1835).

found the Cherokee Nation lacked standing. It was not a foreign nation for jurisdictional purposes.

Marshall went on to elaborate his Indian jurisprudence. The absence of incorporation had a negative effect: Indians could not freely convey absolute title to their property. It also had a positive effect: tribal sovereignty continued. Marshall reported: "So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. . . . They have been uniformly treated as a state, from the settlement of our country."[135] Moreover, although nonincorporation imposed restraints upon Indian alienation of absolute title, protection was afforded their property interest, which Marshall now described as a "right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government."[136]

Marshall's opinion does not stop there, however, and the fateful sentences added to it seriously compromise the image of tribes as self-governing states. The Chief Justice explained that Indian nations were not foreign nations who might invoke original jurisdiction. Indian nations, he said,

> 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. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.[137]

Cherokee Nation arose in a highly charged political context. Marshall successfully skirted embroilment in the controversy by avoiding a decision on the merits of the case.[138] His method of doing so led him to describe the status of tribes as lacking independence in certain important respects, and it is to this language that the modern Court returns. But whatever doubt *Cherokee Nation* may cast on Marshall's view of tribes as independent nations, it did not adopt the doctrine of incorporation. Indeed, it was the absence of incorporation that made it necessary to distinguish Indian from foreign nations and so produced the disparaging language.

135. *Id.* at 16.

136. *Id.* at 17.

137. *Id.*

138. See generally C. Warren, 1 The Supreme Court in United States History 729–79 (1924); Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 Stan. L. Rev. 500 (1969). In an opinion concurring in the judgment, Justice Johnson used the occasion to say: "there are strong reasons for doubting the applicability of the epithet 'state' to a people so low in the grade of organized society as our Indian tribes most generally are." 30 U.S. at 21. An opinion by Justice Baldwin gave expression to similar sentiments. *Id.* at 31.

5. Worcester v. Georgia

Worcester v. Georgia[139] is the other of the Cherokee cases. Georgia was still asserting jurisdiction over Cherokee territory. Samuel Worcester, a missionary and American citizen, was imprisoned by Georgia for entering Cherokee territory without the state's permission. The procedural bar of *Cherokee Nation* was overcome since Worcester and not the tribe was the party. The case came before the Court on the merits. Georgia's action was held to be illegal. Marshall's opinion rehearsed, elaborated, and reshaped the rubrics of Indian law.

When he took up the substantive issues of the case, Marshall first addressed the question whether Georgia had extraterritorial jurisdiction.[140] His consideration of the question occupies 19 pages, most of the opinion.[141] The importance of his framing of the issue will not escape notice. He identified Georgia's action as a claim of extraterritorial jurisdiction, and he asked about its rightfulness. Because extraterritorial jurisdiction is exceptional and limited, the Court's negative answer is anticipated in the question. Georgia of course did not conceive of the Cherokee country within its borders as extraterritorial. That, Georgia had thought, was an issue to be decided and not to be assumed by the Court.

Marshall's framing of the issue not only entails a predisposition to the result. It also contains a restatement of the status of Indian nations in the American federal republic. If Indian country is extraterritorial to Georgia, then the tribe sovereign in that territory must constitute a unique political reality, a third sovereign entity in addition to states and national government.

In the pages that follow, Marshall carefully unpacks the contents of his initial statement of the case. He begins with a kind of preface on the unlikely posture of Europeans claiming "rightful property in the soil" or "rightful dominion" over its native occupants.[142] He repeats the twofold scheme developed in his earlier opinions: Discovery is the arrangement adopted by Europeans to sort out claims among themselves; separate regulations were to be determined between each European government and the Indian nations located in that government's "discovered" territory.[143] The United States succeeded to Great Britain's discovery and "right of purchasing such lands as the natives were willing to sell."[144]

The natives' rights had not been extinguished by war. There had been no conquest. "The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands

139. 31 U.S. (6 Pet.) 515 (1832).
140. *Id.* at 542.
141. *Id.* at 542–61.
142. *Id.* at 542–43.
143. *Id.* at 543–44.
144. *Id.* at 545.

from sea to sea, did not enter the mind of any man."[145] Such military powers against Indians as were given to the settlers were "only for defense, not war."[146] Military campaigns initiated by European governments were those against each other. This was warfare enough for the foreigners. With the natives they sought peace:

> The actual state of things, and the practice of European nations, on so much of the American continent as lies between the Mississippi and the Atlantic, explain their claims, and the charters they granted. Their pretensions unavoidably interfered with each other; . . . the extent of . . . discovery was the subject of unceasing contest. Bloody conflicts arose between them, which gave importance and security to the neighboring nations. . . . [T]heir alliance was sought by flattering professions, and purchased by rich presents. . . . [L]avish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need. . . .
>
> Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers. . .[147]

During and after the revolution, Indians were cause for great apprehension to the colonies. Consequently, "[f]ar from advancing a claim to their lands, or asserting any right of dominion over them," Congress sought to conciliate the tribes and thus to continue the policy of the Crown.[148] The new government's first treaty with a tribe, the Delawares, was illustrative. "The language of equality in which it is drawn, evinces the temper with which the negotiation was undertaken."[149]

In a summary paragraph, Marshall concludes his review of relations with Indian nations and the Cherokee in particular:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[150]

Georgia's attempted exercise of jurisdiction was extraterritorial and void.

145. *Id.* at 544–45.
146. *Id.* at 546. "[D]efensive war alone seems to have been contemplated." *Id.* at 545.
147. *Id.* at 546–47. Great Britain had officially treated the tribes as self-governing and independent. *Id.* at 548.
148. *Id.* at 549.
149. *Id.*
150. *Id.* at 561.

Having answered the first question, Marshall stated and quickly disposed of a second. Did the Supreme Court have jurisdiction? That Georgia's action was extraterritorial and void did not necessarily give the Court jurisdiction over the case. In the circumstance, however, Georgia's jurisdiction had not been inserted into a juridical vacuum. It intruded upon United States treaty relations with an Indian nation. The state was in direct conflict with the United States. The state's action was unconstitutional. The Supreme Court had jurisdiction.[151]

Worcester was Marshall's final statement of the law of relations with Indian nations.[152]

Cherokee Nation and *Worcester* were the only cases in which the tribes were parties and tribal interests were immediately in issue. The earlier opinions provided Marshall with the opportunity to develop his notion and the law of the subject. His original twofold scheme—discovery as between Europeans, contextual relations between Europeans and Indian nations—continued to be an analytical tool. But both that scheme and its supporting narrative underwent significant alteration, as did the consequent descriptions of tribal property rights and tribal status. By the time of *Worcester,* Marshall regarded Indian nations as "distinct, independent, political communities" who retained "their original natural rights" to the soil except "that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed."[153] This single limit on tribes also limited the discoverers, for it "was a restriction which those European potentates imposed on themselves, as well as on the Indians."[154]

The story of origins told in *Cherokee Nation* and *Worcester* is not one of mighty invaders who landed conquering armies to make war upon the resident nations. It is a story of supplicants bearing gifts and seeking alliance. Whatever changes may be detected from *Fletcher v. Peck* to *Worcester*—or from *Cherokee Nation* one term to *Worcester* the next—one theme remains consistent throughout: there had been no conquest and no succeeding incorporation.

151. Justice McLean, concurring, came to largely the same conclusion. See *id.* at 562, 579–81. His perspective, however, was somewhat different. McLean thought the self-government and independence enjoyed by tribes within the boundaries of a state were temporary. He anticipated that the tribes would either exchange lands within a state for lands in the western territory or remain in the state and become amalgamated. Justice Butler dissented both on procedural grounds—an improper record—and on substantive grounds (the reasons given in *Cherokee Nation*). *Id.* at 596.

152. Mitchel v. United States, 34 (9 Pet.) 711 (1835), concerned title to land in Florida. Grants had been made by Indians under the authority of Spain, before cession. Marshall wrote that portion of the opinion denying a motion to postpone final disposition. *Id.* at 723. Baldwin wrote for the Court. He followed the Johnson scheme, *id.* at 745–46, but referred also to English conquest, *id.* at 748–49. Spain had allocated to Indians a property right, and the United States was bound by the right under treaty. *Id.* at 752, 755–56.

153. 31 U.S. at 559.

154. *Id.*

Non-Indians could be incorporated into Indian nations. Indian nations had not been incorporated into the transplanted European culture and politics. Discrete territory for the tribes and most of the indicia of their nationhood had been preserved. United States policy was "to fix the Indians in their country."[155] The policy might also call for making farmers of the Indians—in the discourse of the day, making them civilized—but this did not translate into incorporation. Congressional action contemplated "the preservation of the Indian nations as an object sought by the United States."[156] The tribes were to be accorded protection as allies.[157]

B. New Origins for Old

Justice Stevens, writing for a unanimous Court in *National Farmers Union*, proposed that "at one time" the tribes exercised unlimited power but that "today" federal power over them is plenary.[158] The only explanation offered for the meantime is that "federal law has sometimes diminished the inherent power of Indian tribes."[159] This is not an explanation, but it is elaborated by an excerpt from *United States v. Wheeler*[160] that begins with the assumption that Indian nations have been "incorporated" into the United States.

No such incorporation had taken place through the end of John Marshall's tenure, but by the time of *Wheeler* in 1978, it is passed off as assumed fact. What happened in between? Because it is now frequently given as the legitimating ground for seizure of Indian land and autonomy, incorporation is a matter of no small importance. We need to be clear about it. Perhaps a closer look at the material quoted from *Wheeler* will help.

According to the *Wheeler* passage, Indian nations' "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised."[161] Divestiture of sovereignty implied by incorporation has been held to have occurred in areas

> involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-68; Johnson v. M'Intosh, 8 Wheat. 543, 574. They cannot enter into direct commercial or governmental relations with foreign nations. Worcester v. Georgia, 6 Pet. 515, 559; Cherokee Nation v. Georgia, 5 Pet., at 17-18; Fletcher v. Peck, 6 Cranch 87, 147 (Johnson, J., concurring). And as we have recently

155. *Id.* at 557.
156. *Id.*
157. *Id.* at 561–62.
158. 105 S. Ct. 2451 (1985).
159. *Id.* at 2452 n.14.
160. 435 U.S. 313 (1978).
161. *Id.* at 323.

> held, they cannot try nonmembers in tribal courts. Oliphant v. Suquamish Indian Tribe [435 U.S. 191 (1978)].[162]

These sentences quoted from *Wheeler* warrant close scrutiny.

The first sentence states that Indians cannot freely alienate their lands. Two cases are offered as authority. One is *Oneida Indian Nation v. County of Oneida*. The opinion in *Oneida* simply repeats Marshall's twofold analytic scheme (discovery as between Europeans, contextual regulation as between European and Native Americans). It also reaffirms the "sacredness" of the Indian property right.[163] The other authority is *Johnson v. McIntosh*, which rejected the proposition that Indians had been incorporated. The only possible limit on sovereignty to be found in that case is the restraint upon tribal conveyance of "absolute title," the abstract tautology which created no real limit on the Indians.

The next sentence from *Wheeler* says incorporation has implicitly divested tribes of the sovereign right to enter relations with foreign nations. Three cases are given as authority. The first is *Worcester*. On the page to which we are referred in that opinion, Marshall wrote:

> The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation," are words of our language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense.[164]

As this paragraph reminds us, *Worcester* was a ringing endorsement of the Cherokee Nation's independence, and not of their incorporation.

Cherokee Nation follows in the string of cites. It held that, for the purposes of jurisdiction, tribes are neither states of the Union nor foreign states. They are not foreign states, Marshall said, because their territory is part of the United States, because they are considered within the jurisdictional limits and restraints of the United States, and because they placed

162. *Id.* at 326.
163. 414 U.S. 661, 667–68 (1974).
164. 31 U.S. 559–60.

themselves under the protection of the United States by treaty. *Cherokee Nation* also spoke of the tribes as wards in a condition of pupilage. It said these things to explain why Indian nations are not constitutionally foreign nations. The explanation was disparaging, but necessary, because—and jurisdiction was denied because—the tribes had not been incorporated.

Fletcher v. Peck is the last case cited in the sentence. The page referred to is the one in Johnson's concurrence which states his straightforward solution to the Indian title issue—tribes have title. At that point in his opinion, what Johnson says about the tribes' commercial or governmental relations with foreign nations is: "All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets" (i.e. the discoverer's right to purchase land). The page is primarily devoted to establishing that, with respect to the claimed Yazoo lands, Georgia had "power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell."[165] There is no hint of implied divestiture of sovereignty and no hint of incorporation.

The *Wheeler* sentences employ Marshall cases as support for the incorporation of Indian nations.

In fact, the Marshall cases disclaim incorporation.

There is another and last sentence taken from *Wheeler*. It speaks of the loss of tribal court jurisdiction as one of the divestitures of sovereignty implicit in incorporation. The authority given for the proposition is *Oliphant v. Suquamish Indian Tribe*.[166] If there is to be some explanation of incorporation, then it must come from *Oliphant*. According to all the other cited authorities, incorporation never occurred. Marshall said it was impossible.

The issue in *Oliphant* was whether tribal courts have jurisdiction over non-Indians who commit crimes in Indian country. Writing for the majority, Rehnquist found that tribal courts do not have criminal jurisdiction over non-Indians. He said they lost it through incorporation.

After a review of history and treaties—the accuracy of which has been placed in serious doubt by Russel Barsh—[167] the opinion avers that tribes would have criminal jurisdiction over non-Indians but for the fact that jurisdiction is "inconsistent with their status."[168] There then follow three paragraphs that must be quoted. As far as I can determine they contain the event of incorporation. Incorporation takes place for the first time in these words:

> Indian reservations are "a part of the territory of the United States." United States v. Rogers, 4 How. 567, 571 (1846). Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their au-

165. 10 U.S. 147.

166. 435 U.S. 191 (1978).

167. Barsh, The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark, 63 Minn. L. Rev. 609 (1979).

168. 435 U.S. at 208.

> thority." Id., at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished." Johnson v. M'Intosh, 8 Wheat. 543, 574 (1823).
>
> We have already described some of the inherent limitations on tribal powers that stem from their incorporation within the United States. In Johnson v. M'Intosh, *supra*, we noted that the Indian tribes' "power to dispose of the soil at their own will, to whomsoever they pleased," was inherently lost to the overriding sovereignty of the United States. And in The Cherokee Nation v. Georgia, *supra*, the Chief Justice observed that since Indian tribes are "completely under the sovereignty and dominion of the United States, . . . any attempt [by foreign nations] to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility." 5 Pet. at 17–18.
>
> Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty. In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows: "[T]he restrictions upon the right of soil in the Indians amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves." Fletcher v. Peck, 6 Cranch 87, 147 (1810).[169]

In the third sentence of the first quoted paragraph, Justice Rehnquist employs the phrase "upon incorporation." The phrase is a performative utterance. The only evidence of the incorporation of Indian nations known to me is to be located in those words. I can discover no incorporating event or series of events outside them.

The sentence goes on to ascribe content to the incorporation of Indian tribes: they "thereby come under the territorial sovereignty of the United States." I am uncertain what that means. The underlying image appears to be that of emigrants escaping to our shores, foreigners coming under the territorial sovereignty of a previously established power. Since it was the European emigrants who came under the territorial sovereignty of the Native American nations, the image is fundamentally confused. The phrase "upon incorporation" invents a history that inverts the facts as well as John Marshall's theories.

Between the time of the coming of the Europeans and the Constitution, nothing transpired to change the original relationship between the natives and the emigrants. With the passage of the Constitution, the preexisting

169. *Id.* at 208–10.

treaties with tribes were recognized as valid. According to Marshall, Indian nations were still separate political communities that retained their original rights and were national powers with which the United States would continue to make treaties.[170] Marshall believed it possible for non-Indians to be incorporated into tribes but impossible to incorporate Indians into European-derived bodies politic.

In his own paragraphs on incorporation, Justice Rehnquist cites four cases. Three are from the Marshall Court: *Johnson v. McIntosh*, *Cherokee Nation*, and *Fletcher v. Peck* (Justice Johnson's concurrence). *Worcester* is omitted. This selection of cases—and the metamorphosis of the Marshall Indian jurisprudence into its opposite—will be recognized as the model followed by *Wheeler* later the same term. Rehnquist is the progenitor. There are some peripheral differences, but the basic treatment is the same, including the use of *Johnson v. McIntosh* as though it were authority for incorporation.[171]

170. Worcester v. Georgia, 31 U.S. at 559.

171. Quoted from Marshall's opinion in *Johnson v. McIntosh* is a statement about diminishment of Indian sovereignty. Marshall's statement was made as he began elaborating his twofold analytic scheme (discovery among Europeans; chosen regulation between European and Indian). The sentence appears in *Johnson* in context as follows:

> In the establishment of [the relations of discovery], the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.

21 U.S. (8 Wheat.) 543, 574 (1823).

It will be remembered that *Johnson v. McIntosh* involved a title dispute between non-Indians. The title of one of the parties was derived from a direct purchase from Indians. Purchase of land from Indians would, following the logic of Locke, mean the incorporation of the buyer into the tribe of the seller. Purchase of land from Indians had to take place through the discovering European sovereign—licensed purchase—to prevent this result. The doctrine of discovery allowed Marshall, without actually harming Indian interests, to avoid unsettling both chains of title and theories of non-Indian incorporation into tribes.

Quite apart from subsequent modifications of his approach, Marshall's only indication in *Johnson* of diminished tribal sovereignty was the reference to ultimate dominion or absolute title. This abstraction had no practical effect on tribes and, in any event, was certainly not imposed by conquest or implied by incorporation.

Johnson is an odd choice for Rehnquist to have made as supporting authority for incorporation. It is the case in which Marshall specifically allowed for the incorporation of non-Indians into the tribes and specifically rejected the notion that tribes had been or could be incorporated into the United States.

Justice Rehnquist also quotes from Marshall's opinion in *Cherokee Nation*. The quotation is taken from the point in the opinion where Marshall distinguished Indian from foreign nations. One of the rhetorical sources consulted by Marshall was international attitude. Hence the sentence selected by Rehnquist: "They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility." 30 U.S. at 17–18.

This is a version of discovery describing the effects of the doctrine upon competing foreign sovereigns. It is not a statement of incorporation. There is language in *Cherokee Nation* that can be construed as depreciating the tribes' independent sovereignty, but it cannot be read as supporting their incorporation

or as reversing Marshall's expressed view that incorporation is impossible. The words of disparagement must be read in light of the opinion's reaffirmation of Marshall's commitment to the tribe's nationhood:

> So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state, from the settlement of our country. The numerous treaties made with them by the United States, recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States, by any individual of their community. . . . The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

Id. at 15. The absence of incorporation continued to be one of the first principles of Marshall's thinking about tribal status as it had been since *Johnson v. McIntosh*.

The third Marshall Court case employed by Justice Rehnquist is *Fletcher v. Peck*. Rehnquist quotes from the conclusion of Justice Johnson's concurrence, which argued that Indians hold fee simple title to their land. Johnson noted that treaties entered with the Cherokee acknowledge them to be an independent people. 10 U.S. (6 Cranch) 87, 146–47. He also noted that the United States legislated "upon the conduct of strangers or citizens within [tribal] limits" and had acted to restrain "all persons from encroaching upon their territory." *Id.* He also said, in the statement quoted by Rehnquist: "the limitation upon [tribal] sovereignty amounts to the right of governing every person within their limits, except themselves."

The question is what Johnson meant by this limitation and whether he referred to a derogation of sovereignty implied by incorporation. That is, did the United States exercise governmental authority over non-Indians in Indian country and did it do so in challenge to tribal government? Just what was "the right of governing every person" in Indian country except Indians?

Johnson wrote in 1810. His reference to legislation governing non-Indians in Indian country was undoubtedly a reference to the trade and intercourse laws. A listing of the statutes from 1789-1810 bearing on Indians is provided in Cohen, Handbook of Federal Indian Law 485–87 (1942) (Cohen I). In treaties, Indians had agreed to deliver to American authorities any non-Indians accused of major crimes. See Treaty with the Cherokee, 1785, Art. 6, Kappler, 2 Indian Affairs: Laws and Treaties 8, 9–10 (1904). The 1786 treaties with the Choctaw and the Chickasaw had similar provisions. See *id.* at 11, 14. If this agreement constituted a qualification of tribal sovereignty, it was consensual.

Legislation pursuant to treaties was enacted in order to bring a needed and sought-after accord with Indians. Peace had been repeatedly threatened by the encroachment of non-Indians seeking land as well as profits from sharp trade practices. The treaties had promised protection for the tribes and the integrity of their territorial boundaries. The promises did not coincide with frontier realities. The reliability of the United States as a treaty signatory was cast in doubt. There was unrest among the tribes. To protect Indians from treaty violations by non-Indians and to secure peace and guarantee Indian rights, Congress responded with legislation that made private purchases of land invalid, subjected trade to licensing and regulation, and provided for punishment of injuries done to Indians. As Prucha summarizes:

> The trade and intercourse laws were necessary to provide a framework for the trade and to establish a licensing system that would permit some control and regulation, but this was merely a restatement of old procedures. The vital sections of the laws were in answer to the crisis of the day on the frontier, and the provisions pertained to the tribes of Indians with whom the nation dealt as independent bodies. Neither President Washington nor the Congress was concerned with the remnants of tribes that had been absorbed by the states and had come under their direction and control. The laws sought to provide an answer to the charge that the treaties made with the tribes on the frontiers, which guaranteed their rights to the territory behind the boundary lines, were not respected by the United States. The laws were not primarily "Indian" laws, for they touched the Indians only indirectly. The legislation, rather, was directed against lawless whites and sought to restrain them from violating the sacred treaties.

Prucha, The Great Father 92 (1984). See also *id.* at 42–51, 89–93, 102–14, 143, 160–61, 165–67.

Johnson's opinion argued for absolute tribal property rights. His reference to the United States' right to govern non-Indians on tribal lands could only have meant in 1810 the right to enforce and respect the treaties that acknowledged the Indian nations' independence. The limitation on their sovereignty was the right of the United States to govern those non-Indians whose frontier lawlessness was a threat to tribal sovereignty. For Johnson as for Marshall, there was no general conquest of Indians, no incorporation, and no implied divestment of tribal sovereignty. Johnson, like Marshall, can only be said to represent an attitude and position very different from that for which Rehnquist invoked his aid.

The only case Rehnquist does not take from the Marshall Court is *United States v. Rogers*,[172] authored by Chief Justice Taney. Taney's sentiments are much closer to Rehnquist's and require the observation that Rehnquist did not create the incorporation of the tribes *ex nihilo*.

Rogers was indicted by a federal grand jury for the murder of one Nicholson in Cherokee territory. Rogers and his victim had become members of the tribe. (The only reference in the opinion to incorporation is Taney's recognition that the two men had been incorporated into the tribe.)[173] Rogers argued that the federal court had no jurisdiction because he was a Cherokee.

His argument contained two lines of defense. One was the treaty with the Cherokee Nation that secured to the tribe its right to govern its own members. Taney found that the treaty also provided that Cherokee law should be consistent with the Constitution and acts of Congress. The treaty did not affect the validity of the trade and intercourse law Rogers had been indicted under.[174]

The other line of defense was the trade and intercourse law. Crimes committed by one Indian against another were excepted from its coverage.[175] Taney found that the two adopted Cherokees were not Indians.[176] To Indians, race was not a dispositive criterion,[177] but for Taney it was, and he introduced a racial standard into the definition of an Indian.

His theory was that federal law accompanies the citizen. Rogers was white. According to Taney, his race sealed his citizenship. Incorporation into the tribe did not count. Peace among the tribes would be difficult, he reasoned, "if white men of every description might at pleasure settle among them, and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indians born."[178] Whites could not escape responsibility to the laws of the United States by becoming tribal members. "Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. He was still a white man."[179]

Tribal determination of membership was overridden by Taney. That should have been enough and was more than the decision demanded. Federal law was applicable in Cherokee territory by express treaty agreement. If Rogers and Nicholson were not Cherokee, then federal law applied to them. That was the end of the matter. Or should have been.

172. 45 U.S. (4 How.) 567 (1846).
173. *Id.* at 567.
174. *Id.* at 573.
175. *Id.* at 570.
176. *Id.* at 572.
177. See text at notes 76–77 *supra*.
178. 45 U.S. at 573.
179. *Id.*

Taney seized the occasion to say more. He declared himself as if there had been no treaty, no case law, and no Marshall Court. Nothing had changed since Marshall's tenure except the attitude of the Chief Justice. Marshall had celebrated the Cherokee and their independence. The same nation, and the same history, are presented altogether differently by Taney: "[F]rom the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in a spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices."[180] Without citation or reference of any kind, Taney proclaimed:

> The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.[181]

The assertion is a contradiction of the fact of the Cherokee treaties, Supreme Court precedent, John Marshall's elaborate legal fiction about discovery, and the historical record. It was also dictum.

The particular part of the opinion employed by Justice Rehnquist relates to Indian country and immediately precedes the just-quoted sentences. Taney wrote: "The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any particular state. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States, as a place of domicile for the tribe, and they hold and occupy it with the assent of the United States, and under their authority."[182]

Taney neglected to mention the singular nature of Cherokee territory. He spoke as though all Indian lands are held under the United States. This is not so.

Worcester assumed the aboriginal lands of the Cherokee within the boundaries of Georgia were extraterritorial to the state. When the Cherokee were removed from Georgia, the Trail of Tears terminated in western territory beyond state boundaries. The Cherokee surrendered their aboriginal land in the east in exchange for the new western land. The treaty made the new Cherokee territory expressly subject to federal law. It also—and this was critical—conveyed title to the new lands to the Cherokee in fee

180. *Id.* at 572. If treatment of the tribes is a question, then "it is a question for the law-making and political department of the government, and not for the judicial." *Id.*

181. *Id.*

182. *Id.*

simple.[183] Unlike other Indian country, Cherokee territory was owned by the Indians. Like any fee simple, it was held under the laws of the United States. Taney's reference to Indian land as territory of the United States and as held under the United States is a reference to land held in fee simple by mutual agreement between the Cherokee Nation and the United States as treaty signatories.

The grounds for Taney's dicta are, at best, questionable. Overreaching though they were, they still fell short of declaring the incorporation of the tribes into the United States. Justice Rehnquist stretches them to include incorporation.[184]

The *Rogers* decision did not oust a tribal court. There is no evidence that the tribe claimed jurisdiction. The Cherokee had agreed by treaty that federal law applied in the lands where the crime was committed. The land itself had been expressly conveyed to the tribe in fee simple. The only nonconsensual limitation of tribal authority imposed by the decision was that the Cherokee adoption of whites did not insulate the whites from federal law. If the Cherokee were incorporated within the United States—and Taney never said they were—it was done by treaty. There was no conquest, no nonconsensual incorporation, and no implied divestiture of sovereignty.

Taney's statements do offer some support for Rehnquist's approach. However, that support can only be drawn from the portions of *Rogers* grounded not in law or history but, I think it fair to say, in ethnocentrism and racism. Am I wrong to detect more than a hint of ethnocentrism also in Justice Rehnquist's remark that the "principle" that tribes have given up their right to try non-Indians "would have been obvious a century ago when most Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice' "?[185]

* * * * * *

I intrude upon my account of constitutional law and Indian nations at this juncture in order to note a dilemma and therefore clarify my larger concerns. It is possible, but I think both too easy and too incomplete, to say that this is all old hat—that the Court has always used precedent selectively and that ethnocentrism, if it does lie behind the utterances of Taney and Rehnquist, has been evident before. To say that there is nothing new here is no explanation, however. The manipulation of precedent is a symptom whose cause remains to be identified. And if ethnocentrism is an explanation, it is only a partial one. Also I believe there is something additional and singular going on in what we see happening in federal Indian law.

183. Treaty with the Western Cherokee, 1828, Kappler, 2 Indian Affairs: Law and Treaties 288, 288–89; Treaty with the Western Cherokee 1833, *id.* at 385, 386–87; Treaty with the Cherokee, 1835, *id.*, at 439, 404–41.

184. 435 U.S. 210.

185. *Id.* at 212.

Stevens, Marshall, Rehnquist, and Taney take stabs at some account of the beginning and its aftermath. Their versions differ radically. None, with the possible exception of Marshall, acknowledges a constitutive injustice. None draws upon the Western stories of origin or introduces some other means for confronting and transcending the transplantation of European culture to a Native American world—what we might call, following Hannah Arendt, the primoridal crime that lies at the beginning of a society.

I think we encounter here in the particular circumstances of federal Indian law some of the mysterious irrationality of much non-Indian response to Indians. Further examples will mount up on the pages that follow. They are some evidence of an incapacity for talking openly and honestly about the injury in our origin. Unless it is acknowledged and transcended, this original wrong can only be extended into the present and so be augmented, as I judge happened in *Oliphant*.

Not the least dilemma is this: the Western stories of origin may enrich understanding, but even they—the *Aeneid* anyway—fall short in the American context. A more adequate paradigm or a more adequate language or a more adequate universe of possible explanations is necessary.

On the way to one, I can at least try to craft a truthful story of what has been done.

* * * * * * *

C. The Commentators

John Marshall elaborated a version of discovery to suit the needs of security of title in American real estate law. When Indian interests were directly presented to him, as they were in *Cherokee Nation* and *Worcester*, he confirmed the independence of Indian nations. He expressly rejected the notion of incorporation. Marshall's jurisprudence has been inverted by the modern Court. *Oliphant* was the beginning but not the end of incorporation. In the next section I shall return to the subject.

I have said that one of the phenomena of federal Indian law is the willingness of the Supreme Court to supply whatever justification is needed for the actions of Congress. There is a further, corresponding phenomenon. Academic commentators fulfill the same role for the Court that the Court performs for the Congress. Whatever is done can be subsequently justified.

1. In the original *Handbook of Federal Indian Law* (Cohen I), Felix Cohen did argue in favor of tribal independence and sovereignty, and his argument had an undoubted salutary effect upon the Supreme Court.[186] But Cohen also engaged in harmful fiction that has been equally influential. Cohen proposed that judicial decisions on tribal powers had followed three principles: tribes possess the powers of a sovereign state, these powers are subject to qualifications by treaty and statute, and "[c]onquest renders the

186. See C. Wilkinson, American Indians, Time and the Law (1986); Barsh & Henderson, The Road 112–13 (1980).

tribe subject to the legislative power of the United States."[187] According to Marshall, there had been no conquest (and hence no consequent incorporation). Cohen's conquest myth—it is historical as well as juridical myth—supplies a basis for exercise of power over Indians that the Court had not imagined until then. Cohen of course offers no clue about the date or means of such an event.[188]

The fiction slipped quickly and perniciously into the Supreme Court's arsenal. Justice Reed, writing in *Tee-Hit-Ton Indians v. United States*,[189] accepted it as commonplace: "After conquest [Indians] were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term."[190] (Note the parallels to Rehnquist's "Upon incorporation . . . .") *Tee-Hit-Ton* held that aboriginal Indian lands can be seized without payment of just compensation. Conquest seemed somehow to legitimate the taking. Why this should be so is unclear. More puzzling still is the fact that the natives of Alaska have certainly never been conquered, unless the *Tee-Hit-Ton* opinion itself managed the feat by employing the Cohen myth. It is the *Aeneid* without Aeneas, without the battle, and without the compact between native and invader.

2. The 1982 revision of Cohen (Cohen III) republishes the statement of the conquest myth, with embellishment.[191] According to Cohen III, the tribes have been incorporated as well as conquered. Between Cohen I and Cohen III, Justice Rehnquist had invented incorporation in his *Oliphant* opinion. The 1982 *Handbook* adopts it as ancient fact. A section entitled "Inherent Limitations" begins: "Most external powers of sovereignty were implicitly lost to the tribes by virtue of their incorporation within the United States."[192] The *Handbook* tries to add scholarly legitimation to the notion by conveniently getting up a case law pedigree. We are assured that the "proposition [of incorporation] was first recognized" by none other than *Johnson v. McIntosh* and *Cherokee Nation*. *Worcester* is mentioned as one of "other early decisions [that] had alluded to the inability of tribes to enter into direct commercial or governmental relations with foreign tribes."[193]

187. F. Cohen, Handbook of Federal Indian Law 123 (1942) (Cohen I).

188. The Road 59–60 n.36, 112–13, 278–79 (1980). As Barsh and Henderson note, "that the fiction of conquest is a part of the law of tribal status is itself an historical fiction." *Id.* at 60.

189. 348 U.S. 272 (1954).

190. *Id.* at 279. It should be added that Justice Reed's reading of case law is equal to his reading of history. On the same page that he conquered the Indians, he overwhelmed John Marshall. He said: "The great case of Johnson v. McIntosh denied the power of an Indian tribe to pass their right of occupancy to another." *Id.* *Johnson v. McIntosh*, it will be remembered, did no such thing. In fact it depended upon the opposite proposition. Marshall's first ground for denying plaintiff's claim in that case was that the tribe had extinguished the Indian title conveyed to the non-Indians. The tribe could do this because a non-Indian making an unlicensed purchase of property from Indians incorporated himself into the tribe and became subject to its law in consequence of the power of the tribe to pass their right of occupancy.

191. Strickland et al., Felix S. Cohen's Handbook of Federal Indian Law 241–42 (1982) (Cohen III).

192. *Id.* at 245.

193. *Id.* at 244.

Not even Justice Rehnquist had stated explicitly that *Johnson v. McIntosh* supported incorporation. He, more clever, had only made it seem to do so.

In the process of invoking *Cherokee Nation* for this new reverse turn in Indian law, Cohen III makes a sentence which quotes words from Marshall's opinion: "the tribes are subject to the superior sovereignty of the United States which may by legislation regulate 'the trade with them, and manag[e] all their affairs as they think proper.' "[194] The reader is led to believe that Marshall approved extensive federal power over the internal affairs of tribes, all of whom had been incorporated into the United States. A cursory reading of the cases reveals something quite the opposite.

In fact Marshall did say the United States could "manage all their [i.e., tribal] affairs as they think proper." But whatever Cohen III would lead us to believe, the phrase "manage all their affairs" had a particular meaning for Marshall about which there can be no doubt.

He discusses the phrase in *Worcester v. Georgia*. It came from the treaty with the Cherokee. Marshall's exegesis of it begins: "To construe the expression 'managing all their affairs,' into a surrender of self-government, would be, we think, a perversion of the necessary meaning [of the words], and a departure from the construction which has been uniformly put on them."[195] Congress possesses power "as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade" but not

> as respects the management of all their affairs. . . . It is . . . inconceivable, that [the Cherokee] could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. . . . Such a construction would be inconsistent with the spirit of this and all subsequent treaties; especially of those articles which recognize the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace, covertly, into an act annihilating the political existence of one of the parties.[196]

It is conceivable that Marshall determined that management of tribal affairs meant one thing in *Cherokee Nation* and its opposite in *Worcester*. It is more likely that the 1982 *Handbook* simply neglected minimum standards of scholarship.

In the immediately preceding section (limitations of tribal sovereignty effected by statutes and treaties), Cohen III observes that some treaties contain clauses permitting federal supervision within Indian territory, citing an earlier section of the text.[197] Federal supervision within Indian country and its legal basis are critical issues. The reader who turns to the earlier section

194. 30 U.S. at 17.
195. 31 U.S. at 553–54.
196. *Id.* at 554.
197. Strickland et al., (Cohen III) at 242 n.2 (cited in note 191).

will find there this footnote statement made about treaty provisions for federal supervision: "In 1831 [the year of *Cherokee Nation*] the Supreme Court found that all Indian tribes are dependent nations in regard to the United States, rendering such provisions legally unnecessary."[198] This is nonsense.

The danger in these otherwise minor offenses is that they are elements composing a larger picture painted by Cohen III, which the Supreme Court takes seriously and which has devastating consequences for the tribes.

III. From Tribal Loss to United States Gain: Plenary Power

After an introductory review of cases and their typical Indian law themes, I took up the question of the origin and basis of Indian nations' loss of sovereignty. *National Farmers Union* proposed that tribes once had complete sovereignty but no longer do so. I sought to identify what took place in the meantime. Treaties, and statutes enacted pursuant to them, would account for tribal yielding of sovereignty, but the treaties give evidence of only limited surrender of power. The other suggested possibility was that tribal sovereignty had been defeated by conquest or incorporation. The Marshall Court cases were cited as support for this supposition, but they proved to hold something quite different. They reveal little or no loss of tribal sovereignty.

Investigation reveals that conquest is derived from Felix Cohen and first took place in *Tee-Hit-Ton*; and further, that incorporation was invented by Justice Rehnquist in 1978. Conquest and incorporation happen when the Court denies tribes their sovereign rights. Denial of tribal sovereignty has no ancient or legitimating origin. There is no redeeming or transforming language for the reality. Instead, interpretive violence is done to texts,[199] and political violence is done to Indian nations.

A. Congress's Plenary Power

Indian nation loss is United States gain. If there is no legitimating account of the loss, the next question is whether there is a legitimating account of the gain; that is, whether there is a valid basis for the United States to take up and exercise power over tribes.

198. *Id.* at 65 n.37.

Getches, Wilkinson, & Rosenfelt, Federal Indian Law (1979), presents very little on the subject. It quotes Cohen's statement on conquest, *id.* at 253–54, and makes a few equivocal remarks as an introduction to a section on "The Federal–Tribal Relationship." *Id.* at 143. It asks a rueful question after *Oliphant* and *Wheeler*. *Id.* at 277–78.

Price & Clinton, Law and the American Indian (1983), after opening with excerpts from *Johnson v. McIntosh*, gives an excerpt from Jennings, The Invasion of America: Indians, Colonialism and the Cant of Conquest (1975). *Id.* at 132. The excerpt exposes the mythology of conquest and its related ideology.

See also Collins, Implied Limitations on the Jurisdiction of Indian Tribes, 54 Wash. L. Rev. 479 (1979), which is basically accepting of the status quo but is also mildly critical.

199. On the issue of hermeneutical violence, see F. Kermode, The Genesis of Secrecy 1–2 (1979).

National Farmers Union says the unlimited power over their affairs that was formerly exercised by tribes in now possessed by the United States. The opinion then describes the power, now translated from tribes to United States, as "plenary"; "the power of the Federal Government over the Indian tribes is plenary."[200]

John Marshall wrote about plenary power. In *Gibbons v. Ogden*, he said Congress's power to regulate interstate commerce is plenary:

> This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government.[201]

All the power to regulate interstate commerce is in the hands of Congress. The states delegated it and retained none for themselves. The power to regulate interstate commerce is plenary in the sense that it belongs wholly to Congress.[202]

The Constitution also delegates to Congress the power to regulate trade with the Indian tribes. Marshall did not expressly say that Congress's power under this clause is also plenary, although the thought is certainly present. In the course of making another point in *Cherokee Nation*, he accepted the argument that the Indian, like the interstate, commerce clause meant the whole power was conferred upon the Congress with none remaining in the states.[203] Power over commerce with tribes could then be described as plenary because, as between Congress and the states, Congress has it all.

The Articles of Confederation had granted Congress the power of "regulating the trade and managing all affairs with the Indians," subject to certain rights of the states.[204] This language had been repeated in the Treaty of

200. 105 S. Ct. 2451 (1985).

201. 19 U.S. (6 Wheat.) 1 (1824).

202. On various meanings of "plenary," see Engdahl, State and Federal Power over Federal Property, 18 Ariz. L. Rev. 283, 363–66 (1976). The finest study of federal plenary power over Indians is Nell Jessup Newton's Federal Power over Indians: Its Sources, Scope, and Limitations, 132 Pa. L. Rev. 195 (1984) ("Newton, Federal Power").

Congress could fully regulate interstate commerce within states to the extent that interstate commerce could be identified. However, Marshall did not conceive of the power extending to matters internal to states. The present Court seems prepared to let Congress do as it will with the states under the covers of the Commerce Clause. The power to regulate commerce with foreign nations certainly does not include the power to intrude upon the internal affairs of foreign nations. The *Worcester* Marshall would say that, in this respect, Indian Nations are more like Foreign Nations than states. One of the arguments employed by the present Court in explaining the lack of legal limitation upon federal exercises of commerce power over the state is that states have the protection of the political process. Tribes lack this protection. See further below.

203. 30 U.S. at 19.

204. Articles of Confederation, art 9. Madison found this article "obscure and contradictory." The Federalist No. 42, at 279, 284 (J. Cooke ed. 1961). For further comment on the frustration of the

Hopewell with the Cherokee Nation. By the terms of that treaty, Congress was to have the right of "regulating the trade with the Indians, and managing all their affairs."[205] I noted earlier that Marshall construed this language in *Worcester*. He read it to mean that Congress has power to regulate trade with Indians, no more. It did not mean that the tribe was divested of self-government. Tribal political existence was not thus to be annihilated.[206]

Marshall's *Worcester* reading of Congress's power to regulate commerce with the Indian tribes is the same as his *Gibbons* reading of Congress's power to regulate commerce among the states and with foreign nations. The power belongs wholly to Congress. In relation to its object, the power is unlimited. However, it cannot be extended beyond the specified relationship. It has no force with respect to affairs internal to the foreign nation, state, or tribe. This reading of the Indian commerce clause is consistent with Marshall's general view of the relation of the federal government to the separate, distinct Indian nations.

Justice Baldwin's views on Indian tribes and federal power over them were very different from Marshall's, but it was Baldwin who drew into Indian law Marshall's reading of "plenary" from *Gibbons*. Baldwin dissented in *Worcester*. He did so on the merits, he said, for the reasons he had stated the previous term in his opinion in *Cherokee Nation*. In *Cherokee Nation* he wrote a lengthy concurring opinion. He wrote because, although he agreed with the result, he certainly disagreed with Marshall's reasoning. Baldwin characterized the relationship with the tribes as one in which the United States had "the right of soil, sovereignty and jurisdiction."[207] He therefore thought the territory clause was relevant to Indian law.[208] Baldwin believed Indian country was United States territory. He never said exactly how it became so, except by his interpretation of treaties. For example, he was willing to describe the Treaty of Hopewell as "an indenture of servitude."[209]

Baldwin apparently thought territory could be taken by proclamation: "before the convention acted, congress had erected a government in the north-western territory, containing numerous and powerful nations or tribes of Indians, whose jurisdiction was contemned, and whose sovereignty was overturned, if it ever existed, except by permission of the states or congress, by ordaining, that the territorial laws should extend over the whole district."[210]

According to Baldwin, Congress has been given complete power over Indians by both the Commerce Clause and the Territory Clause. He believed

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Continental Congress in dealing with the tribes, see Clinton, Review, 47 U. Chi. L. Rev. 846, 851–57 (1980).

205. 31 U.S. at 553.

206. *Id.* at 554.

207. 30 U.S. at 40.

208. Art. 4, sec. 3, provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

209. 30 U.S. at 39.

210. *Id.* at 40.

this power was "plenary" not in the sense that it left nothing to the states but that it left nothing to the tribes. And he invoked *Gibbons* for support of his belief. Congress's power

> is the same power which was delegated to the old congress, and according to the judicial interpretation given by this court in Gibbons v. Ogden, the word "to regulate" implied, in its nature, full power over the thing to be regulated; it excludes, necessarily, the action of all others that would perform the same operation on the same thing. Applying this construction to commerce and territory, leaves the jurisdiction and sovereignty of the Indian tribes wholly out of the question. The power given in this clause is of the most plenary kind. Rules and regulations respecting the territory of the United States—they necessarily include complete jurisdiction.[211]

Baldwin's grammar is murky, but clearly he disagrees with Marshall. The disagreement is far less about the meaning of the word "plenary" than about the objects of plenary power, the status of the tribes, and the relationship between the tribes and the United States.[212] Baldwin's dissenting views are historically as well as juridically unsubstantiated; they have much in common with the position on plenary power taken by today's Court in *National Farmers Union*.

In that recent case the Court said "all aspects of Indian sovereignty are subject to defeasance by Congress."[213] The present Court believes that plenary power means the United States can do whatever it wishes to Indian nations. Such power is not only plenary but is also the most singular and extensive power of Congress. (The only greater and more unusual power would be the power to declare nuclear war, thereby ending all nations. I think Congress has no such legitimate power.)[214] If *National Farmers Union* is right, then it is difficult to imagine that such power has a legitimate ground.

One suggestion of a basis for the power was made in a footnote to *McLanahan v. Arizona State Tax Commission*:[215] "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."[216]

The treaty power would not give Congress power over Indians that is plenary in the Baldwin–*National Farmers Union* sense unless Indian nations

211. *Id.* at 44.

212. Indian Nations delegated nothing, and if states had no power over tribes, they also did not delegate it.

213. 53 U.S.L.W. 4650 n.10, citing Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians, 466 U.S. 765 (1984). The cited passage is the last sentence of the last footnote in Escondido, *id.* at 788 n.30, which, in turn, cites United States v. Wheeler, 435 U.S. 314, 323 (1978).

214. Ball, Nuclear War: The End of Law, *in* Nuclear Weapons and Law 287 (A. Miller & M. Feinrider eds. 1984).

215. 411 U.S. 164 (1973).

216. *Id.* at 172 n.7.

had agreed in treaties that it should be so. I have already noted that a reading of the treaties does not yield the interpretation that Indian nations committed such acts of national self-annihilation. The Commerce Clause is an equally insufficient ground for a Baldwin–*National Farmers Union* kind of plenary power.

Baldwin's assertions about a possible Commerce Clause basis for plenary power over Indians did not triumph over the Marshall interpretation even when plenary power over Indians was enjoying one of the most expansive periods prior to this one. In the notorious late 19th-century case of *United States v. Kagama*,[217] the Court said it "would be a very strained construction" to make the Commerce Clause support the plenary power over Indians.[218] The broadest modern reading of the Commerce Clause does not support congressional power to take away all aspects of Indian national sovereignty.[219] Either such power has a legal ground other than the treaty power and the Commerce Clause, or it is unauthorized and illegitimate.[220]

The *McClanahan* footnote, purporting to end confusion, said the Commerce Clause and the treaty power are the basis for federal authority over Indians. Justice Thurgood Marshall was the author of that footnote. Nine years later in *Merrion v. Jicarilla Apache Tribe*,[221] he wrote: "when Congress acts with respect to the Indian tribes, it generally does so pursuant to its authority under the Indian Commerce Clause, or by virtue of its superior position over the tribes." The treaty power drops out, and "superior position" is added. There is no recognition of the departure from his earlier formula, the one that was to end confusion.

Thurgood Marshall's new entry, "superior position" over tribes, is another attempt to fill the gap between "at one time" and "today." "Superior position," in the form of a proposition with judicial backing, may be traced to *United States v. Kagama*.[222]

Three years prior to *Kagama* the Court decided *Ex parte Crow Dog*.[223] Crow Dog, an Indian, was convicted in federal district court of murdering another Indian in Indian country. The Supreme Court found that Crow Dog should not have been tried in federal court because jurisdiction had been preserved to the tribe. In the process of interpreting an applicable treaty, the Court inclined to the Marshall Court view that Congress's power was external to the tribe's affairs. An incensed Congress passed the 1885 Major Crimes Act subjecting tribal Indians to federal prosecution for cer-

217. 118 U.S. 375 (1886).

218. *Id.* at 378.

219. See Garcia v. San Antonio Metropolitan Transit, 105 S. Ct. 1005 (1985). The Indian commerce power, assimilated to the foreign commerce power, would render it closer to the treaty power with which it was originally aligned.

220. See text *infra* at notes 222, 230, 236–38, 257, 265, 280, *passim*.

221. 435 U.S. 130, 155 (1980).

222. 118 U.S. 375 (1886).

223. 109 U.S. 556 (1883).

tain crimes, including murder.[224] When the *Crow Dog* pattern was repeated and Kagama, an Indian, murdered another Indian in Indian country, the defendant was charged under the new law. The Court found that Congress had power to enact the questioned legislation and that there was federal jurisdiction to try Kagama.

It is not at all clear that there is a legitimate basis for attributing such power to Congress. The Marshall Court certainly thought the tribes were separate and distinct. Marshall observed that treaties with Indian nations frequently included an article according to which the tribes placed themselves under the protection of the United States. Such "articles are associated with others, recognizing their title to self-government," he said. "The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state."[225] In Marshall's terms, the relationship between a powerful nation and weaker nations produced an alliance between self-governing sovereigns. (This was as close as he would come to an American equivalent to the mythological compact between Trojans and Italians.)

That was in 1832. In 1886 in *Kagama*, the Court still agreed there was no constitutional basis for Congress to enact a code of criminal law for Indian country. The Constitution twice employs the phrase "excluding Indians not taxed"—in Article I and in the Fourteenth Amendment. In both instances the phrase applies to the base for apportioning representatives and, the Court noted, supports no congressional power.[226] Likewise, the Indian Commerce Clause offers no support. It might uphold a code of trade but not a code of law wholly unrelated to trade.[227]

Having admitted that there was no constitutional basis, Justice Miller looked elsewhere. First he proposed that within the United States there are but two sovereigns, the states and the United States, and that Indians must be subject to one or other.[228] He repeated the view, stated by Taney in *United States v. Rogers*, that Indian country is part of the territory of the United States.[229] However, after rehearsing notions of territoriality and dual sovereignty, Miller did not rest upon them. What finally counts is his view of Indians. According to Miller, this is the support for Congress's power:

224. 23 Stat. 385 § 9, 18 U.S. § 1153.
225. Worcester v. Georgia, 31 U.S. (6 Pet.) at 560–61.
226. 118 U.S. 378.
227. *Id.* at 378–79.
228. *Id.* at 379.
229. *Id.* at 380–81.

> These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so lately due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . . The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection. . . . It must exist in that government, because it 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.[230]

The grounds conjured by Miller to uphold Congress's power are that the federal government "owns" the country and that Indians are weak and helpless.

The Supreme Court adopted the *Kagama* view of Indians, and superiority became the familiar reason for Congress to have its way with tribes. The case of *Lone Wolf v. Hitchcock*[231] is illustrative. After the Civil War, the treaty system had come under attack by Christian reformers, whose opinion of Indians was identical to that expressed by Justice Miller in *Kagama*.[232] Indians were said to be wards, not treaty partners. This attitude and the reformers, however, were less responsible for bringing a conclusion to treaty making than was legislative jealousy. Treaties were the prerogatives of the President and the Senate. The House wanted a larger piece of the action than that of simply appropriating funds for treaty arrangements made by others. The solution lay in doing away with treaties as the mode of relations with Indian nations. Treaty making came to an end in a sentence tacked onto an appropriation bill in the House in 1871.[233] The Senate went along with the change on the assumption that the obligations of existing treaties would be unimpaired.[234]

This action was taken a year after the Supreme Court had held in *The Cherokee Tobacco*[235] that subsequent congressional action controls a prior Indian treaty. As a matter of the constitutional law of housekeeping, the proposition is not free of complexity, but it is unexceptionable. Internally, legislation is on a par with treaties so that the "last expression of the sovereign will must control."[236] The external effect is quite another matter.

Externally and absent the consent of the treaty partner, Congress cannot by legislation choose to transfigure a treaty relationship with another nation

230. *Id.* at 384–85.
231. 187 U.S. 553, 566–67 (1903).
232. See, e.g., Prucha, The Great Father 501–33 (1984).
233. 16 Stat. 556.
234. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566, 25 U.S.C. § 71.
235. 78 U.S. 616 (1870).
236. Chinese Exclusion Case, 130 U.S. 581 (1889).

and elect to govern that nation by statute. It could only do so by declaring war, winning, and accepting unconditional surrender. In 1871, Congress by statute took over the government of Indian nations. Although it is settled law that the last expression of the sovereign prevails within the United States government, it can scarcely be thought constitutional for Congress to seize control of another nation or a state by means of a sentence, tacked onto an appropriation bill, calling for the end of treaty relationships. The constitutionality of the 1871 Act in this sense has never been tested or clarified. All that *Kagama* said was that "after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress."[237]

The 1871 sentence reads:

> 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; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventyone, shall be hereby invalidated or impaired.[238]

The sentence may be read to mean that future treaty making with Indians had been brought to an end. The constitutional future would then be either no relationships with tribes other than those prescribed by existing treaties or executive agreements with them (together with special legislation sought by the tribes). With respect to existing treaty obligations, the only constitutional and moral reading of the sentence is that the United States was to keep its promises already made.

In *Lone Wolf v. Hitchcock*, however, neither the Constitution nor morality would move the Court to limit the will of a Congress bent upon giving effect to superiority over Indians.

In 1867 the treaty of Medicine Lodge provided that no cession of reservation land could be valid unless it bore the signatures of three-fourths of the tribe's male members. In 1892 the United States obtained from the Indians an agreement to surrender reservation lands.[239] In 1900 Congress enacted legislation that ratified the agreement but also made changes in it.[240] The tribes sought judicial relief. They pointed out that Congress had made unilateral changes in the agreement, that a fraction of the seized land's worth was to be paid them,[241] that the land remaining to them could not be made to support their agricultural needs,[242] and that the signatures had been obtained by fraud and deceit. As the tribe also pointed out, whatever else might be said about the alleged agreement, it had not been signed by the

237. 118 U.S. at 282.
238. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566.
239. 187 U.S. 554.
240. *Id.* at 554–60.
241. *Id.* at 561.
242. *Id.* at 558.

required three-fourths of the members and was in clear violation of the treaty.

In response the Supreme Court said a treaty cannot "materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians."[243] Congress possesses "power over the property of the Indians, by reason of its exercise of guardianship over their interests, and . . . such authority might be implied, even though opposed to the strict letter of a treaty with the Indians."[244] Moreover, congressional violation of treaty promises, due process, just compensation, and morality are not subject to judicial review because "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department."[245]

The Court went on to support its position by quoting the *Kagama* language on the weakness and helplessness of Indians.[246] It also maintained that *Cherokee Nation* had held that "full administrative power was possessed by Congress over Indian tribal property."[247]

Lone Wolf gives Congress greater power than any conferred by the Constitution. Congress is given power to violate treaties with Indian nations and to exercise complete control over Indian land without basis or limit in law. The only ground or restriction offered for this power is *Kagama*'s assertion about the helplessness of Indians.

Lone Wolf's proposal that Congress's plenary power over Indians is a nonreviewable political question has not prevailed.[248] But the ideas that Congress's power is plenary in the sense that it is total power over tribes and that this power is grounded in superiority are very much alive and well. *Kagama* and *Lone Wolf* lead directly to Justice Thurgood Marshall's statement in the 1982 case of *Merrion v. Jicarilla Apache Tribe* about the derivation of Congress's authority from its "superior position" over the tribes.[249] Justice Marshall did not there cite *Kagama* and *Lone Wolf*, but those cases and their reasoning are the source of the idea.

That Thurgood Marshall finds *Lone Wolf* viable and acceptable is indicated by one of his footnotes in a 1984 case. "At one time," he wrote, employing a now familiar introductory phrase, "it was thought that Indian consent was needed to diminish a reservation, but in Lone Wolf v. Hitchcock . . . this Court decided that Congress could diminish reservations unilaterally."[250]

243. *Id.* at 564.
244. *Id.* at 565.
245. *Id.* at 565, 568.
246. *Id.* at 566.
247. *Id.* at 568.
248. See text *infra* at notes 263–64.
249. 455 U.S. 130, 155 n.21.
250. Solem v. Bartlett, 465 U.S. 463, 470 n.11 (1984).

Although Marshall did not make specific, favorable use of *Kagama* and *Lone Wolf* in his opinion in *Merrion*, Justice Stevens did so in a dissent.[251] Stevens cited *Lone Wolf* as support for the proposition that "[t]he United States retains plenary authority to divest the tribes of any attributes of sovereignty."[252] For the same proposition he also cited the page in *United States v. Wheeler*[253] that approvingly employed *Lone Wolf* as one of the authorities for the statement "that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."[254]

There is abundant other evidence of the present vitality of *Lone Wolf*'s theory of plenary power and superiority. In *United States v. Sioux Nation*, for example, Justice Blackmun maintained "the Lone Wolf holding [has been] often reaffirmed."[255]

That the present Court continues to entertain the *Lone Wolf* perspective is clear. That power to violate treaties has been often (or justifiably) reaffirmed is not clear. Justice Blackmun cites *Rosebud Sioux Tribe v. Kneip*,[256] which approved *Lone Wolf*, but no other cases are cited by either Justice Blackmun or by *Rosebud*. In any event, given *Lone Wolf*'s ethnocentrism as law, there seems to be no legitimate reason and no constitutional ground for the Court to continue giving free play to blatant violations of treaties with the tribes.[257]

B. The Court's Plenary Power

Professor Nell Jessup Newton argues that since the 1930s the Court has been narrowing the plenary power doctrine. She says there are fewer cases where congressional acts have been upheld on the basis of implied power. She is also careful to point out, however, that the doctrine and the judicial

251. 455 U.S. at 159, 169 & n.18 (Stevens, J., dissenting).

252. See *id.* at 172 n.23.

253. 435 U.S. 313 (1978).

254. *Id.* at 319. Stevens's formulation later commanded the vote of a unanimous Court in *National Farmers Union* where it was expressed as a sentiment taken not from *Lone Wolf* but from *Wheeler's* section on incorporation. Congress's acquisition and exercise of power as well as Indian loss of power is thus explained by incorporation. The statement that Congress has power to end tribal sovereignty is repeated in the last footnote to Justice White's opinion for the Court in Escondido Mutual Water Co. v. La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians, 466 U.S. 765, 787–88 n.30 (1984). As a *Wheeler*-incorporation sentiment, the statement then reappears in Justice O'Connor's majority opinion in Rice v. Rehner, 463 U.S. 713, 719: tribal sovereignty "exists only at the sufferance of Congress and *is subject to complete defeasance*" (emphasis added). Stevens then employs it as a *Wheeler*-incorporation-based notion in his opinion for a unanimous Court in *National Farmers Union*, 53 U.S.L.W. 4650 n.10.

255. 448 U.S. 371, 411 n.27 (1980).

256. 430 U.S. 584, 594 (1977).

257. In the *Sioux Nation* case, Justice Blackmun pointed out that "[t]he Sioux do not claim that Congress was without power to take the Black Hills from them in contravention of the Fort Laramie Treaty of 1868." 448 U.S. at 411 n.27. Does this mean that the tribes have acquiesced in assertions of superiority? Actually, the Sioux have consistently denied federal power to seize the Black Hills and have opposed United States violation of its treaty promises. It was counsel for the Sioux who failed to deny the federal power. See also Newton, Federal Power 233–35 (cited in note 202).

attitude remain and that the Court continues to uphold congressional acts.[258]

If extraconstitutional exertions of power by Congress figure less in the opinions, then there are several possible explanations. One is the increasing skill of Indian lobbyists that prevents Congress from acting without taking their interests into account. Another is the Court's expanded conception of the Commerce Clause. The more the Commerce Clause may be made to embrace, the fewer congressional actions will be found to fall outside of it. A third explanation is the infrequency of Indian challenges to plenary power. For example, as Newton says, Indian litigants have had increasing success by arguing that the federal government has trust obligations to the tribes.[259] To argue this trust is to grant its premises, including federal superior power.[260]

It may be that Congress's power over Indians has met with some judicial narrowing. This does not mean that federal plenary or implied power over Indians is contracting. Far from it. The power continues to expand. Now it is taking place in the Supreme Court rather than in Congress.

Escondido Mutual Water Co. asserted that "all aspects of Indian sovereignty are subject to defeasance by Congress."[261] This statement was repeated in *National Farmers Union* as authority for the proposition that "the power of the Federal Government over the Indian tribes is plenary."[262] Notice the difference. The plenary power is ascribed not just to Congress but to the federal government. It is a general federal power available to the judicial as well as to the legislative branch.

Lone Wolf said plenary authority over tribes was exercised by Congress and, as a political question, was not a subject for judicial review. In the 1977 case of *Delaware Tribal Business Committee v. Weeks*,[263] the Court said separation of powers and Congress's plenary power over Indians do "not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny." Henceforward the Court would give some consideration to the merits of challenged statutes. In 1980 the Court said the political question doctrine "has long since been discredited in takings cases, and was expressly laid to rest in Delaware Tribal Business Committee."[264]

The development is thought to constitute a new limit on congressional exercises of plenary power over the tribes. Commentators have advocated greater judicial scrutiny as a protection for the tribes.[265] The announced new policy of review, however, has not resulted in any action of Congress

258. Newton, Federal Power 232–35 (cited in note 202).
259. See text *infra* at notes 281–314.
260. Newton, Federal Power 233 (cited in note 202).
261. 466 U.S. 787–89 n.30 (1984).
262. 53 U.S.L.W. 4650 & n.10.
263. 430 U.S. 73, 84 (1977).
264. United States v. Sioux Nation, 448 U.S. 371, 413 (1980).
265. Newton, Federal Power (cited in note 202), is an example. This seems to me to urge the fox into the hen house.

being struck down by the Court. The Court has never limited Congress's will with the tribes.

The new policy of review does not limit the Congress. Rather it inserts the Court into consideration of the merits of Indian law with two consequences. On the one hand, every time the Court reviews legislation and adds its imprimatur, congressional plenary power becomes more enhanced and more deeply embedded in the system. On the other, the Court becomes a more regular and acceptable participant in fashioning substantive Indian law. The Court eases itself into position next to Congress ready to exercise the unlimited, unlegitimated plenary power. Little notice is then taken when the Court begins to wield this power on its own, moving by itself against the tribes where Congress has held back.

The policy of judicial scrutiny of Indian legislation was announced in *Delaware Tribal Business Committee* in 1977. The following year, the Court began independent operations against the tribes with the invention of incorporation in *Oliphant v. Suquamish Indian Tribe*.[266]

John Marshall denied tribes jurisdiction in *Cherokee Nation*. During the years afterward until the present, Congress took much of the tribes' lands and much of their governmental integrity. Congress did so with the Court's sanction. But following *Cherokee Nation*, the Court did not again act on its own against the tribes until *Oliphant* when it deprived their courts of criminal jurisdiction over non-Indians on reservations. Since *Oliphant*, the Court has increasingly acted against Indian nations, unaided by either Congress or the Constitution.

For example, in *Montana v. United States*[267] the Court inflicted two major losses upon the Crow Tribe. The tribe lost both the bed of the Big Horn River and the right to regulate hunting and fishing on reservation lands owned by nonmembers of the tribe. The latter loss was held to be an implication of "original incorporation."[268] The Court went on to give implied divestment a wide sweep. Tribal powers were viewed as originally dependent, for the most part, upon affirmative legislation: "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[269] If this is true, the Court may deny power to the tribes unless legislation expressly protects it. The notion that tribes retain powers "necessary to protect self-government" has not restrained the Court's diminishment of the tribes.

In *Rice v. Rehner*[270] the Court took from tribes their power to regulate liquor. "Tradition," the Court said, had not recognized such a tribal

266. 435 U.S. 191 (1978).
267. 450 U.S. 544 (1981).
268. *Id.* at 563.
269. *Id.* at 564 (*citing* Mescalero Apache Tribe v. Jones, 411 U.S. 145; Williams v. Lee, 358 U.S. 217; and United States v. Kagama, 118 U.S. 375).
270. 463 U.S. 713 (1983).

power.[271] If "tradition" had not recognized the power, then the tribe did not possess it. (This is to ascribe to "tradition" a choice made by the Court in the circumstances. The Court determines what tradition is, as well as how and what it recognizes. The method is a variation on inferring losses of tribal sovereignty from incorporation, where incorporation is effected by the decision itself.)

The majority opinion in *Rice* points out that federal regulation of liquor traffic with Indians is "one of the most comprehensive [federal] activities in Indian affairs" (quoting Cohen III).[272] This fact makes the case particularly noteworthy because the Court not only acts on its own but does so in an area thoroughly covered by the legislative and executive branches.

It can be argued that this new phase constitutes a radical reversal of the decisions and opinions of the Marshall Court. It can also be argued that there is a certain thread of consistency connecting the contemporary Court to its past, but the consistency discovered by this argument is the consistent arrogation of power.

Worcester ringingly endorsed tribal autonomy. In private correspondence after the opinion, one of the participants, Justice Story, wrote: "The Court has done its duty. Let the nation now do theirs."[273] The laudable morality and courage of his sentiment is certified by another letter, this one to his wife: "Thanks be to God, the Court can wash their hands clean of the inequity of oppressing the Indians and disregarding their rights."[274]

Story and his colleagues who voted with Marshall in the majority were doubtless moved by a duty to regard the rights of Indians. But it is also true, as Professor Burke noted, that the final consequence of the case was an enhancement of the Court's role and power. It yielded nothing in fact for the Cherokee, who were forcibly marched out of Georgia. "Perhaps the real winner in the Cherokee cause," Burke wrote, "was the Supreme Court."[275]

Burke's point is that the Court ensured that no conflict over enforcement of its decree could arise until the 1833 term following. After the Court handed down its decision, there was nothing further for it to do until the state refused to obey the order. The Court rose before the return of the messenger who bore the requisite documentation of Georgia's refusal of obedience.[276] The Court had been concerned about what it regarded as deficiencies in the Judiciary Act of 1789. The Act foreclosed possible avenues of enforcement available to the Court. *Worcester* and its aftermath precipi-

271. *Id.* at 722.
272. *Id.*
273. Letter from Story to George Ticknor, Mar. 8, 1832, in 2 The Life and Letters of Joseph Story 83 (W. Story ed. 1851), *cited in* Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 Stan. L. Rev. 500, 527 (1969) ("Burke, The Cherokee Cases").
274. *Id.* at 87, *cited in* Barsh & Henderson, The Road 60 (1980).
275. Burke, The Cherokee Cases at 531 (cited in note 273).
276. *Id.* at 524 ff. See also 1 C. Warren, The Supreme Court in United States History 216–29 (1924).

tated a cure. A remedial extension of jurisdiction[277] was effected by amendments in 1833.[278] Concern for the Indians faded.[279] Whatever the cause and whatever the explanation for *Worcester*, the fact remains that the tribes' difficulties were the occasion for extension of the Court's power.

That much remains the same. The tribes continue to be a means for judicial enlargement. However, now, unlike then, the augmentation is managed at the direct expense of the tribes.

The Court gives conquest and incorporation as explanations of how the tribes lose power. Conquest and incorporation turn out to be recent inventions of the Court that cover the Court's contemporary infliction of loss upon the tribes. When Congress takes up and exercises the governmental power supposedly lost by the tribes, the Court describes that power as plenary. Explanations for the legitimacy of its use by Congress are in no better case than those for the legitimacy of its loss by the tribes. Superior position is proffered as a ground. But superior position draws no validity from the Constitution.

Indian nations have prevented recent congressional deployment of plenary power against them. But the plenary power does not lie idle. Like Ariel, it reappears, transported from Congress to the Supreme Court, where its lack of both limits and legitimacy is matched by a lack of appeal from its results.[280]

277. Burke, The Cherokee Cases 526–27 (cited in note 273).

278. *Id.* at 531.

279. Jeremiah Evarts, the leading non-Indian advocate of the tribes, died in 1831. His legal research had been influential and had worked its way into the opinions of Justices supporting the Indian cause, Thompson in *Cherokee* and Marshall in *Worcester*. See *id.* at 502, 505, 509, 516–17, 522. See also Prucha, The Great Father 201–7 (1984).

280. A review of the commentators discloses the following coverage of the constitutional base for plenary power (or the absence of such a base):

1. Cohen I. The original *Handbook* included an extensive discussion of the bearing of the Constitution upon the federal relation to Indian nations. F. Cohen, Handbook of Federal Indian Law 80–100 (1942) (Cohen I). Cohen opened his consideration of the Constitution with a quotation outlining "the creation of a new power, a power to regulate Indians." *Id.* at 89, 89 *quoting* Rice, The Position of the American Indian in the Law of the United States, 16 J. Comp. Leg. 78 (1934). He added that references to this new power had become so frequent that it might seem "captious to point out that there is excellent authority for the view that Congress has no constitutional power over Indians except what is conferred by the commerce clause and other clauses of Constitution." *Id.* at 90. Indian cases had been influenced, he recorded, by "the peculiar relationship between Indians and the Federal Government," *id.*, a relationship that he identified as that between guardian and ward. *Id.* at 169ff. I shall discuss this relationship in the next section. The point to be made here is that Cohen was candid about the absence of a constitutional basis for much beyond regulation of trade with the tribes. Since the United States had come to exert wide power over Indians, he could only be "practically justified in characterizing such federal power as 'plenary.' " *Id.* at 91.

2. Cohen III. In place of Cohen's circumspect and thorough discussion of the possible constitutional bases of federal power over Indians, the 1982 Cohen offers an abreviated summary with this singular explanation: "it is somewhat artificial to analyze the constitutional provisions separately. For most purposes it is sufficient to conclude that there is a single 'power over Indian affairs,' an amalgam of the several specific constitutional provisions." Strickland et al., Cohen's Handbook of Federal Indian Law 211 (1982) (Cohen III).

Cohen III emphasizes the "relationship" between the United States and Indians and says this relationship is "premised upon broad but not unlimited federal constitutional power." *Id.* at 207. Nothing is said about implied Indian losses of power or implied federal gains of power. Nor is anything said

IV. POTENTIAL LIMITS ON PLENARY POWER

Indian loss has been United States gain. In the hands of the federal government, power over the tribes is said to be plenary in the singular modern

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about extraconstitutional or nonconstitutional bases for federal plenary power over Indians except the surprising, plainly erroneous statement that, although the Court may have relied upon the *Kagama* theory at one time, "this reasoning has not been followed." *Id.* at 220.

The text thus repeats an earlier footnote statement: *Kagama* "has not been applied in modern decisions." *Id.* at 210–11 n.22. This version of Cohen was published in 1982. Leaving aside other cases that were available to the authors before publication and not taking into account subsequent developments, the two 1978 cases of *Oliphant* and *Wheeler* placed specific reliance upon *Kagama*. Oliphant v. Suquamish Indian Tribe, 435 U.S. at 212; United States v. Wheeler at 323.

Footnote 22 adds: "The trust responsibility has not been cited as an independent source of congressional power since United States v. Candelaria, 271 U.S. 432 (1926)." In my discussion of the trust doctrine, I shall show the several ways in which this is a false statement. Suffice it for now to note that *Oliphant* and *Wheeler* also relied upon the tribes' alleged dependent status as a ground for extending power over them and diminishing what remained to them. United States v. Wheeler, 435 U.S. at 326; Oliphant v. Suquamish Indian Tribe, 435 U.S. at 207–9. See also William v. Lee, 358 U.S. 217, 219 n.4 (1959).

Cohen III leaves the reader believing that the federal government–Indian nation relationship is based upon the Constitution insofar as federal power is concerned and that a trust obligation limits that power. Supposedly, if there exists any nonconstitutional ground, it is the trust responsibility to tribes which is a ground not for federal power but only for federal obligation. (As I shall show in the next section, this is not how the trust doctrine functions.)

The 1982 *Handbook*'s rosy picture of the basis of federal power over Indians is misleading both generally and in its particulars. It creates the illusion that Congress is acting within constitutional parameters and within conscionable limits established by a Court safeguarding tribes and their rights. Like Pippa, Cohen III would have us think the Congress and the Court are in their heaven; all's right with the tribes.

3. Getches, Rosenfeld, & Wilkinson, Federal Indian Law (1979). This book is a generally accepting, unanalytic presentation of cases. A brief introduction to its section on federal-tribal relations concludes: "A relationship of dependence and trust not only gives the federal government broad plenary powers over Indian affairs, but also imposes a trustee's duties of protection and fair dealings upon the government." *Id.* at 143. It subsequently includes, uncritically, a law review note declaiming that "[t]he plenary power of the United States Government over the Indian and his tribe emanates from three sources," the Constitution, the guardian-ward relation, and federal ownership: "First, the Constitution grants to the president and to Congress powers over Indian affairs which have been construed as giving broad authority to the federal government. Second, the courts have applied the theory of guardian and ward to the federal government's relationship to the tribe. Third, federal authority is inherent in the federal government's ownership of the land which the tribal units occupy." *Id.* at 182, *quoting* Comment, The Indian Battle for Self-Determination, 58 Calif. L. Rev. 445 (1970). The excerpt concludes that the potential scope of the power is unlimited. *Id.* at 185.

A 1983 supplement to the casebook raises some questions about federal power and the Court's direction. Getches, Rosenfelt, & Wilkinson, 1983 Supplement to Federal Indian Law 34, 42. They are standard-form, noncommittal casebook questions.

4. Price & Clinton, Law and the American Indian (1983). Price and Clinton, the only other casebook in the field of Indian law generally, includes but brief reference to the constitutional underpinnings. It adopts a somewhat critical, questioning attitude toward the claimed constitutionality of broad federal power and toward the offered nonconstitutional arguments. See *id.* at 131–33, 34–35, 168–69 (1983). It also makes note of the contribution of ethnocentrism to the idea of a federal trusteeship over Indians. *Id.* at 169.

Professor Clinton addressed the subject of limits in an article, Isolated in Their Own Country (cited in note 13). He noted that constitutional limits had been drawn from the Commerce and Treaty Clauses. But he also observed that the Court has been unwilling to enforce "any effective check on the exercise of congressional authority in the area of Indian affairs." *Id.* at 996–97 n.97. He added that the Court has "frequently and uncritically accepted that the Indian commerce clause enables" Congress to regulate internal tribal matters. *Id.* at 996.

However, Clinton goes on to state that the "notion that congressional authority over Indian affairs as 'plenary' developed historically as a product of the federal trusteeship power, not as a characteristic of congressional power under the Indian commerce clause. It appears that the Supreme Court has aban-

sense of "unlimited." With plenary power, Congress and now the Court may dismantle tribes as they wish. No provision of the Constitution sanctions the exercise of a plenary power of this sort. The Court contends it is warranted by superiority.

Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercises unrestrained power over Indian nations, then what we say is not true, and we have a different kind of government than we think we have. And if our government is different in fact in relation to Native Americans, perhaps it is not what we believe it is in relation to other Americans, including ourselves. The Court is regarded as the institution of restraint and a protector of rights. If the Court restrains neither Congress nor itself in taking away tribal rights, then we are confronted by a fundamental contradiction between our political rhetoric and our political realities. This is another way of raising the issue posed in the Introduction about whether we have a means and a language for confronting and overcoming original injustice.

Awareness of the need for constraints and claims that they exist have led in Indian law to the assumption that plenary power over Indian tribes is subject to limits. I turn now to a consideration of the possible restraints: the trust doctrine, federalism, and the Bill of Rights. The question is whether these are limits upon the government in its relation to Native Americans.

A. The Trust Doctrine

The trust doctrine is not a new game but a new way of shuffling the old deck. Much has been made of fiduciary duties owed to Indians by the United States as trustee. Cohen III says "the trust relationship is one of the primary cornerstones of Indian law."[281] Another scholarly commentator writes: it "is generally accepted that the United States owes fiduciary duties to American Indians."[282] President Nixon declared to Congress that the

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doned the position that the federal trusteeship power forms a separate and independent source of congressional authority." *Id.* at 999. He cites the reader to a later footnote, which gives Justice Thurgood Marshall's statement: "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes" and for treaty making. McLanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973). Marshall's statement could not be relied upon. Subsequently in *Merrion* he spoke about the federal government's superior position over the tribes—force, not the Constitution, as a source of congressional power.

5. Newton, Federal Power (cited in note 202), is the most complete recent assessment of plenary power over Indians. Newton detects a narrowing of the Plenary power doctrine and a move toward enumerated constitutional powers. *Id.* at 229–33. However, she notes, as Cohen III fails to do, the continuing viability of the older approaches—the broad scope of claimed power and its "might-makes-right" basis. *Id.* at 234. See also *id.* at 235–36. In her view, the plenary power's older, blatantly ethnocentric basis in Indian inferiority has been repudiated, but a continuing failure to define the power's limits encourages its further assertion and expansion. *Id.* at 236.

281. Strickland et al., Felix S. Cohen's Handbook of Federal Indian Law 22 (1982) (Cohen III).

282. Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213 (1975).

"special relationship between the Indian tribes and the Federal government . . . continues to carry immense moral and legal force."[283]

In spite of these firm, important statements, review of the actual workings of the trust doctrine in Indian law yields a much less certain assessment. In fact, it is difficult not to credit the harsh judgement that talk of an Indian trust is "racial discrimination and unfettered United States power disguised as moral legal duty."[284]

Although the trust doctrine has undeniably served as a remedy in certain instances of federal mismanagement of tribal lands and money, it appears in fact primarily to give moral color to depradation of tribes. If so, the trust doctrine is not a limit on plenary power and instead makes exercises of plenary power seem the right thing to do.

1. The Origin and End of the Doctrine

The trust doctrine is, for the most part, a creation of the 1970s. It is typically said to originate in John Marshall's statement in *Cherokee Nation* that the tribes' "relation to the United States resembles that of a ward to a guardian."[285] Marshall's statement has been equated with a finding that Indians are wards of the United States. Even this misreading would not allow stretching Marshall's analogy to fit a federal trusteeship. As late as the original *Handbook* in 1942, Cohen's only discussion of the trust doctrine was his explicit denial that there was justification for using "trust" as synonymous with a "guardian-ward" relationship.

Cohen's extended analysis of wardship demonstrates that wardship is to be dissociated not only from trusteeship but also from an accurate description of Indian status. "It is clear," Cohen noted, that the guardian-ward relation "does not exist between the United States and the Indians, although there are important similarities and suggestive parallels between the two relationships."[286] He went on to observe that the possible meanings and combinations of meaning of "wardship" are "two to the tenth power minus one, that is to say, 1023."[287]

One of these, Cohen pointed out, was Marshall's usage in *Cherokee Nation*, which was a "suggestive analogy" and nothing more.[288] Marshall did not say that tribes are wards. Wardship would not constitute a trusteeship in any event, according to Cohen, and also would not limit plenary power or protect tribes. As Cohen was frank to acknowledge, talk of wardship is a

283. 116 Cong. Rec. 23,131, 23,132 (1970). See also Note, Rethinking the Trust Doctrine in Federal Indian Law, 98 Harv. L. Rev. 422 (1984).

284. Indian Law Resource Center, United States Denial of Indian Property Rights: A Study in Lawless Power and Racial Discrimination," *in* Rethinking Indian Law 15, 19 (cited in note 35). See also Coulter & Tullberg, Indian Land Rights, *in* The Aggressions of Civilization 185, 198–203 (Cadwalader & Deloria eds. (1984)); G. Hall, The Federal-Indian Trust Relationship 17–18 (1979).

285. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1835).

286. F. Cohen, Handbook of Federal Indian Law 169 (1942) (Cohen I).

287. *Id.* at 170 n.289.

288. *Id.* at 170.

way of attempting to legitimate "congressional legislation that would have been unconstitutional if applied to non-Indians."[289]

The likely origin of the trust doctrine is not Marshall's notion of wardship but the later ethnocentrism that also produced the notions of superiority and unrestrained plenary power. For example, in the 1877 case of *Beecher v. Wetherby*, the Court announced its presumption that, in dealings with tribes, "the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."[290] The "semi-barbarous condition" of Indians was expected some day to "give place to the higher civilization of our race."[291] Later, in *Kagama*, when the Court upheld the extension of federal criminal law to reservations, it did so because of alleged tribal weaknesses and helplessness.[292] Still later, when *Lone Wolf* held Congress could take Indian property in violation of treaty obligation, it did so because of a supposed congressional duty of "care and protection of the Indians."[293] The first congressional assertion of trust power over Indian land came during this period in the form of the General Allottment Act of 1887.[294] The Act has no apparent legitimating basis.

This uninspiring heritage gave rise to the trust doctrine. Indian trust terminology entered the Court's vocabulary in 1942, the same year in which Cohen's *Handbook* appeared. The Court spoke of "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."[295] It said the government had "moral obligations of the highest responsibility."[296]

Of course if the trust is composed of moral obligations, it is not legally enforceable. Nevertheless in the 1970s a few lower court cases did grant equitable and monetary relief to tribes who sued the United States for breach of the trust.[297] For example, *Pyramid Lake Paiute Tribe v. Morton*[298] directed the Secretary of interior to submit regulations consistent with a trust duty regarding water in Pyramid Lake, although no statute or treaty imposed such responsibility on him.[299]

289. *Id.*

290. 95 U.S. (5 Otto) 517, 525 (1877).

291. *Id.* at 526. See also, e.g., United States v. Kagama, 118 U.S. 375, 384 (1886); Choctaw Nation v. United States, 119 U.S. 1, 28 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903); United States v. Sandoval, 231 U.S. 28, 46 (1913).

292. 118 U.S. at 383–84.

293. 187 U.S. at 564–65.

294. 25 U.S.C. § 348.

295. Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

296. *Id.* at 297. For possible prior cases, see Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213, 1230–31 (1975).

297. See Newton, Enforcing the Federal-Indian Trust Relationship After Mitchell, 31 Cath. U.L. Rev. 635, 637 n.11 ("Newton, Federal-Indian Trust Relationship").

298. 345 F. Supp. 252 (D.D.C. 1973).

299. Professor Newton compares the *Pyramid Lake* case with another in which the court failed to find the trust duty argued. Newton (cited in note 297) at 676–78, (comparing North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980)).

In 1980, the Supreme Court held that the General Allotment Act's provision for land to be held in trust did not place a fiduciary duty upon United States management of timber (*Mitchell I*).[300] The Court subsequently held that other statutes and elaborate federal control over Indian resources did create such a trust obligation (*Mitchell II*).[301] The Court's construction of statutes and regulations in the latter case was said to be "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II* appears to reverse *Mitchell I*'s contraction of the trust duty and remedies for its breach. However, as a student note correctly observes, a theory like that of *Mitchell II* (a trust duty arises out of federal control) is tautological: the United States controls tribal resources because of a claimed trust obligation, and the United States has this trust obligation because it controls tribal resources.[302]

A dissent in *Mitchell II* borrows Cohen's notion that a guardianship is not a trust.[303] The dissent says the majority has for the first time held "the United States is answerable in money damages for breaches of the standards applicable to a private fiduciary."[304] In its broadest protective application, according to the dissent, the trust doctrine had heretofore served five purposes, not including a right to recover against the United States. It (1) precludes certain exercises of state jurisdiction in Indian territory; (2) bars certain exercises of state court jurisdiction over Indian property rights; (3) produced the canons of construction designed to favor Indians; (4) aids determination of liability where Indian property has been unlawfully converted; and (5) serves to emphasize the standard of care in Indian affairs.[305]

Whether *Mitchell II* will ultimately yield protection of tribal interests beyond the five instances enumerated by the dissent cannot be predicted. Uncertain, too, is the protection afforded by the five uses. The first two concerning state jurisdiction will be considered in the next section. The third, the canons of construction, as I have already noted, are equivocal. They can be taken up and followed[306] or totally ignored.[307] The final two uses may aid moral rhetoric but will be of little concrete significance absent real remedies.

The trust doctrine is likely to continue as an impulse and shield for federal power and is unlikely to transcend its ethnocentric origins. These origins are immediately visible in the Court's 1980 explanation that trusteeship allows Congress to seize property in violation of the Fifth Amendment. In

300. United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I).
301. United States v. Mitchell, 77 L. Ed. 580, 596 (1983) (Mitchell II).
302. Note, Rethinking the Trust Doctrine in Federal Indian Law, 98 Harv. L. Rev. 422, 428 (1984).
303. 463 U.S. 228, at 234 n.v8.
304. *Id.* at 235 n.9.
305. *Id.*
306. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985); Montana v. Blackfeet Tribe of Indians, 53 U.S.L.W. 4625, 4627 (1985).
307. Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 255, 256–57 (Brennan, J., dissenting).

that case the Court said when Congress acts "as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests,"[308] and "transmutes the property from land to money, there is no taking" in violation of the Fifth Amendment.[309] The following year, the Bureau of Indian Affairs asserted: "By the authority vested in it through numerous treaties, congressional acts, court decisions and executive orders, the U.S. today holds in trust some 53 million acres for the benefit of and use by Indian tribes and individuals."[310] Congressional acts, court decisions, and executive orders do allow the Bureau to make exorbitant claims to wield a trust. Neither the early treaties nor the Constitution support such an arrogation of power. It simply has no legitimate foundation.

Besides serving as an extraconstitutional moral excuse in the familiar ways, the trusteeship may always provide cover for novel operations against tribes. *United States v. Dann*[311] is an example. That was the case in which the Court held a "payment" had been effected, although the Indians received no money and opposed the conversion of their land. The trust doctrine was the device the Court struck upon for executing this maneuver. The United States was not only the judgment debtor to Indians, the Court said, but was also trustee to Indians. Therefore the United States as debtor can pay itself as trustee, say this change in bookkeeping constitutes payment to Indians, and the Court will certify the fiction as a reality.

Beyond these instances of the deployment of trust doctrine against the tribes, there is a fundamental threat to them in the theory itself even when trust litigation is successful. To bring suit on the trust requires acceptance of the premises of the trust—that the United States is a trustee for the tribes and can legitimately claim such power over them and their resources. Positive employment of the trust by tribes may mean indirectly embracing the degrading ethnocentrism that supports the theory. Reliance upon the trust may also divert tribes from developing other concepts and from insisting upon the right to manage their own resources.[312]

In sum, the trust is an affirmative basis for claims of power and does not arise from the Constitution. It is of advantage to tribes in recovering for federal executive abuse in mismanaging tribal land and money. It has sometimes been a moral referent for congressional actions and judicial decisions as well as judicial canons of construction. But the trust doctrine is not now and never has been a limit on congressional power. Nor is it likely to

308. United States v. Sioux Nation of Indians, 448 U.S. 371, 408 (1980).

309. *Id.* at 409, *quoting* Three Tribes of Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 553, 390 F.2d 686, 691 (1968).

310. Dep't of the Interior, BIA Profile: The Bureau of Indian Affairs and American Indians 7 (1981). (The Bureau also holds many tribal funds.)

311. 470 U.S. 39, 42 (1985).

312. See Newton, Federal-Indian Trust Relationship 681–82 (cited in note 297); *id.* Federal Power 233 (cited in note 202).

be.[313] The basis for the doctrine is the same as that for assertions of plenary power and superiority. Reluctantly and sadly, I must acknowledge some truth in the claim that the trusteeship is "an impudent act of self-assertion."[314]

313. See Menominee Tribe v. United States, 607 F.2d 1335 (Ct. Cl. 1979), *cert. denied*, 445 U.S. 950 (1980).

314. The Agressions of Civilization 203 (Cadwalader & Deloria eds. 1984) (*quoting* J. Hobson, Imperialism, A Study 240 (1965)). See also Newton, Federal-Indian Trust Relationship 645, 681–82 (cited in note 297).

The trust doctrine has drawn various responses from the commentators:

a) Cohen I and Cohen II

All that Cohen had to say about trust in his 1942 *Handbook* was to distinguish it from wardship. F. Cohen, Handbook of Federal Indian Law 172 (1942) (Cohen I). And wardship, he said, had as one of its functions the upholding of "legislation that would have been unconstitutional if applied to non-Indians." *Id.* at 170.

According to Cohen III, the trust concept "first appeared" in *Cherokee Nation* in 1831, Strickland et al., Felix S. Cohen's Handbook of Federal Indian Law 220 (1982) (Cohen III), and now "is one of the primary cornerstones of Indian law." *Id.* at 221. The only other case mentioned as an origin for the trust doctrine is *Kagama*. *Id.* at 220. *Kagama*, it says, "relied on the guardianship theory as a separate and distinct basis for congressional power." *Id.* at 220. Without explanation of what happened to the distinction Cohen drew between the two, guardianship and trust become interchangeable terms in the 1982 *Handbook*. *Id.* at 220, 210 n.22.

As I have already noted, Cohen III says *Kagama*'s guardianship theory as an extraconstitutional basis for congressional power "has not been followed." *Id.* at 220, 210–11 n.22. It drops a footnote to this statement, which reads: "The trust responsibility has not been cited as an independent source of congressional power since United States v. Candelaria, 271 U.S. 432 (1926)." *Id.* at 220 n.31. *Candelaria* never uses the word "trust." It refers to Pueblo Indians as wards of the United States. Since Candelaria, the trust as well as the inferior position of Indians have been repeatedly cited as the independent source of congressional power. As pointed out above, *Sioux Nation* in 1980 said the trust allowed Congress to exercise "its plenary powers over the Indians and their property, as it thinks is in their best interest" without being subject to the Fifth Amendment in doing so. 448 U.S., 371, 408. As I also pointed out, in 1978 United States v. Wheeler cited tribes' "dependent status," 435 U.S. 313, 326, and Oliphant v. Suquamish Indian Tribe cited their "dependence," 435 U.S. 191, 207–9, as grounds for subordination of tribes to the federal government.

A subsequent section of Cohen III continues to equate trusteeship with guardianship, Strickland, et al., Felix S. Cohen's Handbook of Federal Indian Law 650 (1982) (Cohen III). It proposes that the guardianship-trust "arises out of the constitutional plan to delegate plenary authority over Indian affairs to the federal government and the duties of protection undertaken by treaty and federal statute." *Id.* at 651. The only clarification of this fanciful statement is a citation to the volume's earlier discussion. *Id.* at 651 n.58.

Cohen III presents the trust doctrine as though it were an ancient concept that has long since ceased to serve as a basis for federal assertion of power. The Indian trust, we are to think, has become a primary limit on federal power. Indians have a phrase to describe such statements. They call it "blowing smoke." In this case, I think the consequence is more harmful than smoke. I think it makes a major contribution to the false picture of what law does to tribes. It leads the reader to believe that limits have been observed and that, within those limits, the United States has acted with moral responsibility.

b) Price and Clinton

Price and Clinton give a mixed review to the trust doctrine. On the one hand, they cite it, in the form of canons of construction, as a limitation on federal power, Price & Clinton, Law and the American Indian 137 (1983), and attribute its Supreme Court origins to *Cherokee Nation*. *Id.* at 168. On the other hand, they also acknowledge that ethnocentrism "helped create the federal trusteeship over Indian affairs" and question whether the doctrine has "a continued viable role." *Id.* at 169. They also note that "[i]nvocation of the federal trust relationship as a source of Indian rights is a fairly recent phenomenon," *id.* at 179, and remark that it is an open question whether trust theory can serve to compel federal authorities to protect Indian rights, *id.* at 195.

c) Getches, Rosenfelt, and Wilkinson

B. Federalism

Although the Commerce Clause delegates to Congress the power to regulate trade with Indian tribes, it does not empower the federal government to wield plenary control over the tribes. If that power does not have a constitutional, authorizing base, the question is whether it has any constitutional or other limits. The trust doctrine is held out as restricting Congress's power. In reality the trusteeship is less limitation than premise for exercises of power over Indian nations. It allows the Supreme Court and the 1982 *Handbook of Federal Indian Law* (Cohen III), the dominant treatise in the field, to paint a false picture of the plenary power as functioning morally within conscionable, legal constraints. If conquest and incorporation are attempts at justification by referrals to the past, and superiority is an attempt at justification by referral to ethnocentric sentiment, the trust doctrine is an attempted justification by referral to morality. So far, analysis of the cases reveals that tribal loss and United States gain have neither legitimacy nor limitation.

I turn now to the possibility that there are limits arising from the Constitution. The first such possibility is the constitutional structure of national-state governments sometimes referred to as federalism.[315]

The state-national government scheme belongs to the division of power designed to protect the citizenry. It was expected that the distribution of power would allow the fledgling nation to grow in strength but not at the expense of the people. States were to be responsible for the daily and the experimental while the national government was to be responsible for the exceptional.[316] "It is one of the happy incidents of the federal system," Justice Brandeis proposed, "that a single courageous state may serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country."[317] In its most recent return to the subject, the Supreme

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This casebook avers that a "relationship of dependence and trust not only gives the federal government broad plenary powers over Indian affairs but also imposes a trustee's duties of protection and fair dealings upon the government." Getches, Rosenfelt & Wilkinson, Federal Indian Law 143 (1979). It presents the trust doctrine primarily as a post-1942 application of fiduciary principles to United States management of Indian property. *Id.* at 206. After noting that the Supreme Court has never set aside an act of Congress as beyond its power over Indians, it includes portions of the Cox memorandum to Judge Gunter in the Maine land claim controversy. *Id.* at 248–52. Presumably the memo indicates how limits on congressional power might be successfully argued in future. (The index to the book lists "Congressional power" under "Trust Relation" and directs the reader to pages 175–77 where *Kagama* is set out. This may be the authors' way of indicating that the origins of trust and of congressional power lie in that case and its ethnocentrism.)

The article by Newton, cited in note 297 is the most accurate treatment of the subject. The Chambers article cited in note 296 was descriptively accurate at the time it was written.

315. On the wider meaning of federalism as a statement of community, see Ball, Lying Down Together 72–76, 79–80, 90–91, 113–14 (1985).

316. "The state is still that government which most affects citizens in their daily lives." Diamond, The Federalist on Federalism: "Neither a National Nor a Federal Constitution, but a Composition of Both," 86 Yale L.J. 1273, 1283 (1977). More cases are tried in "Georgia State courts than in all the federal courts in the nation." Bell, Some Concluding Reflections, 9 U. Tol. L. Rev. 871 (1978).

317. New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). About no-fault insurance it has been said, for example, that "we may end up with a uniform federal system or

Court reiterated the Brandeis conception, proposing that the "essence of our federal system is that within the realm of authority left open to them under the constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary."[318]

Neither state nor national government is an end in itself nor an independent reality to be sustained in and for itself. Both are instruments of the people, according to the Madisonian rhetoric of federalism. The Court presently says "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[319] The only limitation protecting "States as States"—at least for Commerce Clause purposes—"is one of process rather than result": "The political process ensures that laws that unduly burden the States will not be promulgated."[320]

The jurisprudence of federalism has not always been expressed in these terms. State and national governments have been conceived as independent, dual sovereigns with separate spheres of activity. As late as 1976, in *National League of Cities v. Usery*,[321] later overruled, states as states were held to have a core of traditional governmental functions enjoying legal immunity from federal regulation.

In whatever terms the state-national structure is talked about and maintained, the protection it was designed to afford citizens has not proved available to tribes. In some ways federalism has been a stimulus to state encroachment upon Indian country.

This development was not to be anticipated at the conclusion of John Marshall's tenure as Chief Justice. *Fletcher*, *Johnson*, *Cherokee Nation*, and *Worcester* all involved states, mostly Georgia. One indisputable conclusion of those cases was that governmental power over Indian nations, regardless of its ground and scope, belonged exclusively to the national and not to state government.[322] As Marshall left the matter in *Worcester*, Indian country was extraterritorial to the states.[323]

State law for Indian country was also void because it intruded upon the federal government's treaty relations with Indian nations.[324] Although Worcester was a non-Indian American citizen, Georgia had no jurisdiction

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minimum federal standards, but we should never have had anything save for experimentation by the states." Friendly, Federalism: A Foreword, 86 Yale L.J. 019, 1034 (1977).

318. Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005, 1015 (1985).

319. *Id.* at 1018.

320. *Id.* at 1019–20.

321. 426 U.S. 833 (1976).

322. On the general background see F. Prucha, The Great Father (1984); The Federalist No. 42; Clinton, Review, 47 U. Chi. L. Rev. 846 (1980).

323. See Walters, Review Essay: Preemption, Tribal Sovereignty, and Worcester v. Georgia, 62 Ore. L. Rev. 127, 141–43 n.66 (1983).

324. For an assessment of present Court practice, see Clinton, State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine, 26 S.D.L. Rev. 434 (1981).

over him. That Indians in Indian country are immune from state jurisdiction was reaffirmed in *The New York Indians*[325] and *The Kansas Indians*,[326] and in *Harkness v. Hyde*[327] and *Langford v. Monteith*.[328] As late as 1949, Justice Black could remark that the "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."[329]

This freedom from state jurisdiction was a function of the nature of Indian nations and Indian country. It did not arise from a notion that tribes are federal instrumentalities. Nor did it arise from a notion of federal preemption of state regulation. Cherokee territory did not constitute a sphere—anymore than did the moon—where the state was free to regulate unless it had been preempted by federal legislation. As a matter of constitutional law, absent tribal consent to annexation, Indian country was extraterritorial to the states, and state intrusion was redressable by the federal courts under the treaty power and the Supremacy Clause.

John Marshall, it had been suggested, "conceived a whole new dimension of federalism and of the American national political system."[330] That is possible. At the time, the United States had the luxury of abundant undivided land beyond the Mississippi, and Marshall had the luxury of not having to spell out the details of a political map for a federal republic that included Indian nations. A plausible system consonant with Marshall's sketch may be readily portrayed. All that has to be granted is that tribes are permanent. They are, after all, older than the United States and give every indication that they will continue. It is simply a matter of juridical recognition of their historical permanence. Early on, there were persistent assumptions that Indian tribes would compose states[331] or send representatives to Congress.[332] In recent times there have been proposals for a "treaty federalism" to include tribes in the governmental structure.[333]

In the event of systemic accommodation of permanent tribes, federalism might offer to tribal government the same structural, procedural, political protection that it offers state and national government. And the diversity and strangeness of tribal government might bestow the benefit of experimentation that is said to be the genius of states.

Federalism including Indian nations has not so far been the outcome. Instead tribes find themselves in a state-national vise. Many Indians believe their "worst enemy is the dominant federal establishment which exercises

325. 72 U.S. (5 Wall.) 761 (1866).
326. 72 U.S. (5 Wall) 737 (1866) (state tax).
327. 98 U.S. 476 (1878).
328. 102 U.S. 145 (1880) (state and territorial court civil process do not reach into Indian courtry excepted by treaty and enabling act).
329. Rice v. Olsen, 324 U.S. 786, 789 (1949) (note the reference to "policy" not "law".)
330. Barsh & Henderson, The Road 60 (1980).
331. See, e.g., A. Abel, A Proposal for an Indian State 1778-1878, Annual Report of the Am. Hist. Ass'n 1907, at 89; Prucha, The Great Father 302–9 (1984).
332. Treaty with the Cherokee, 1835, Art. 7, Kappler, 2 Indian Affairs: Laws and Treaties 439, 442–43 (1904).
333. Barsh & Henderson, The Road 59, 275–82 (1980).

such great control over their lives and affairs."[334] The fear, arising from much experience, is that state control is worse.[335] Federal attitudes and policy pit the states against the tribes. "States stand to inherit governmental authority on reservations if tribes lose it; federal Indian policy makes them natural rivals so long as tribal governments are not considered permanent."[336]

Worcester laid the basis for a federal system that would include tribal government. Instead, Indian country has steadily become territory of the states as well as of the United States, and Indian nations have been steadily subjected to the jurisdiction of the states as well as the United States. Federalism has not benefitted the tribes. This story of federalism and Indian law is the subject of the present section.

*1. The Post-*Worcester *Background*

In the 1846 case of *United States v. Rogers*,[337] Chief Justice Taney, as though he were writing on a clean slate, held that the United States had jurisdiction to try cases of white crime in Indian country. He also said tribes had not been owners of the territory but had been subject to the dominion and control of the European governments and their successors in interest.

In 1871 Congress provided that relations with the Indian nations were no longer to be carried out by treaty. That same year, the Supreme Court upheld a federal excise tax applied to tobacco products in Indian country.[338] Fifteen years later, *Kagama* referred to federal "ownership of the country . . . and the right of exclusive sovereignty which must exist in the National Government."[339] The opinion also proposed there were only two sovereigns in the United States, the states and the national government. Tribes were not independent sovereigns and were exclusively subordinate to the federal government.[340] *Kagama* did not pretend there was a constitutional ground for such ownership and control. Instead the Court offered the vague, nonconstitutional view that Congress was free to do with the tribes what it chose because of "necessity" as well as "ownership." Since "the people of the States where [tribes] are found are often their deadliest enemies," the Court said, the tribes are dependent upon the federal government and its protection.[341]

334. Commission on State-Tribal Relations, Handbook: State-Tribal Relations 38–39 (undated).

335. The need for state-tribal reconciliation is discussed in Barsh & Henderson, The Road 230 (1980).

336. Commission on State-Tribal Relations 40 (cited in note 334).

337. 45 U.S. (4 How.) 567 (1846).

338. The Cherokee Tobacco, 78 U.S. (1 1 Wall.) 616 (1871). Compare United States v. 43 Gallons of Whiskey, 108 U.S. 491 (1883).

339. United States v. Kagama, 118 U.S. 375, 380 (1886).

340. *Id.* at 379.

341. *Id.* at 384.

The next year, 1887, Congress passed the General Allotment Act. Its purpose was to do away with tribes and assimilate their members into the states. It provided for subdivision of reservations, assignment of plots to individual Indians, and the sale of the remaining "surplus" land to non-Indian homesteaders.[342] In a phrase taken up by Theodore Roosevelt, the Act was "a mighty pulverizing engine for breaking up the tribal mass."[343]

Indian landholdings were reduced from 138 million acres in 1887 to 48 million acres in 1934.[344] Indians lost millions of acres in a single act, reservations were drastically reduced in size, and the sale of allotments soon produced a crazy-quilt pattern of ownership. Land management and jurisdiction faced bizarre obstacles.

There was no constitutional basis for the General Allotment Act and its aftermath.[345] The federal government has been unable or unwilling to protect Indian country. Non-Indian desire for land, for minerals, and for the Christianization-Americanization of Indians prevailed. Allotment was formally called to a halt by the Congress in 1934,[346] but the conversion of Indian country has not ended.

The goal of doing away with tribes was revived in 1953 when Congress adopted the termination policy in a resolution declaring that tribes "should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians."[347] Implementing legislation withdrew recognition from some tribes. Although the policy is no longer pursued by Congress[348] and recognition has been restored to some of the "terminated" tribes,[349] the resolution has never been formally disavowed.[350]

2. Williams v. Lee

An equivalent to termination policy was taken up by the Supreme Court in 1959 and is still lodged in its doctrine and decisions. It functions in many ways like incorporation, except that the theoretical focus is upon the states. Tribal losses are made to appear as the rights of states.

342. Ch. 119, 24 Stat. 388, codified as amended in various sections of 25 U.S.C.

343. F. Prucha, The Great Father 671 (1984) (quoting Merrill Gates' remarks to the Lake Mohonk Conference). The Five Civilized Tribes were excluded from the original Allotment Act, but their land was subsequently allotted, their governments dismantled, and their territory, opened for settlement, was later to become the State of Oklahoma. *Id.* at 737–57.

344. See Getches, Rosenfelt, & Wilkinson, Federal Indian Law 74 (1979).

345. It could be argued that, by accepting allotments, Indians waived their rights to object. But then the question would be whether Indians did in fact voluntarily comply, i.e., whether they had other options and chose this one.

346. Indian Reorganization Act, 25 U.S.C. § 461 et seq.

347. H.R. Con. Res. 108, 83d Cong., 1st sess., 67 Stat. B132 (1953).

348. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 96-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 450-450n, 455-458e).

349. See, e.g., Menominee Restoration Act, 25 U.S.C. §§ 903-903f.

350. See text *infra* at notes 418–35, 443, 519 *passim*.

I specify 1959 as the beginning of judicial termination because that year the Court decided *Williams v. Lee*,[351] which has been viewed by some as the watershed of modern Indian law.[352]

The *Williams* opinion, written by Justice Black, occupies a scant seven pages in the official reports. It follows the familiar modern formula of describing what was true "at one time" but has "today" been changed. The language is somewhat different, but the mythic litany is the same: "Originally the Indian tribes were separate nations within what is now the United States. Through conquest and treaties they were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land."[353] Later in the opinion, Black repeats the refrain in a slightly different version: "the broad principles of [*Worcester*] came to be accepted as law. Over the years this Court has modified these principles where essential tribal relations were not involved."[354]

Also familiar is the opinion's account of the basis for power over the tribes. That power, says the Court, "is derived from [the Commerce Clause] and from the necessity of giving uniform protection to a dependent people. United States v. Kagama."[355]

The tribe won in *Williams*, but the statement of the standard by which this victory was achieved was to prove inimical to tribal protection. In *Williams*, the non-Indian operator of a reservation store sued an Indian customer to collect for goods sold on credit. The action was brought in state court. The Supreme Court held the case was one for tribal rather than state courts. That was the result. The reasoning is confused and internally inconsistent. The real consequence was to put the Court in position to assault tribal sovereignty by directing state forays into Indian country.

The Court could have followed *Worcester*. All it needed to do was point out that states have no jurisdiction in Indian country. That would have been a simple, obvious, correct resolution of the controversy, but this was not the Court's response. Instead it pursued a confusion of two other possibilities.

One possibility was that of delegation. This possibility depends upon two questionable assumptions. The first is Black's assumption that the federal government has complete jurisdiction over the tribes. From the footnotes it appears he thought such power came from either the Commerce Clause or *Kagama*'s notion of Indian inferiority.[356] In addition, he said that "[t]hrough conquest and treaties" the tribes had been "induced to give up

351. 358 U.S. 217 (1959).
352. See C. Wilkinson, American Indians, Time, and the Law (1986).
353. 358 U.S. at 218.
354. *Id.* at 219.
355. *Id.* at 219 n.4.
356. *Id.* at 219 n.4; 220 n.5.

complete independence."[357] He did not say how or when tribes were conquered or in which treaties they surrendered sovereignty.

Black's second assumption is that the federal government can delegate its jurisdiction to the states as the 1953 termination policy sought to do: "when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which Worcester v. Georgia had denied."[358] There are two faults here.

One is that *Worcester* said Indian country was extraterritorial to the states. Black does not explain how this bar is overcome.

The other unexplained leap concerns the supposed source of federal power. *Kagama*'s doubtful argument for extraordinary federal power was based upon tribal dependence: the federal government has jurisdiction over tribes out of necessity created by tribal "weakness and helplessness." It said the tribes "owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies."[359] If the federal government has power over tribes only because of tribal weakness in the face of predatory states, Black does not say how and when the federal government has power to deliver the tribes to the states.

The possibility of delegation rests upon questionable assumptions. Black pursued it nonetheless. He found a general statute expressing Congress's "willingness to have any State assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept such responsibility."[360] In the circumstances of *Williams*, the responsibility had been declined. The state's enabling act contained an express disclaimer of jurisdiction over Indian lands.[361] The state had not accepted jurisdiction under the general congressional legislation.[362] There had been no delegation. The state lacked jurisdiction. Black concluded: "The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken away from them, it is for the Congress to do it."[363]

A funny thing happened on the way to this conclusion. Black slipped in a second possibility. He had said that "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."[364] They can only acquire such power by federal delegation. The single question would then be whether Congress had granted jurisdiction to the state. (In this case it had not.) However, Black imported a quite different question: "Essentially, absent governing Acts of

357. *Id.* at 218.
358. *Id.* at 221.
359. 118 U.S. at 384.
360. 358 U.S. at 222.
361. *Id.* at 223 n.10.
362. *Id.* at 222–23.
363. *Id.* at 223.
364. *Id.* at 220.

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."[365]

How could this be the question? Black said "the States have no power to regulate the affairs of Indians on a reservation."[366] Absent governing acts of Congress, there can be no state action on a reservation. It makes no difference whether state action infringes or does not infringe tribal government.

Black must have been thinking something like this: A general law of a state, valid within its own jurisdiction and not directed at Indian country, might have an indirect or spillover effect. For example, a non-Indian commits a crime on a reservation. No Indian is involved. No tribal criminal jurisdiction is asserted. The state tries, convicts, and punishes the criminal. In a habeas corpus proceeding, the defendant argues that the state had no jurisdiction. In this event, according to Black, the question would be "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Because in *Williams*, reservation Indians were sued in state court in a case where a tribal court had jurisdiction, Black held "that to allow the exercise of jurisdiction . . . would undermine the authority of tribal courts."[367]

All of this sounds harmless enough. It is not. Return to the hypothetical that I suggested must have been in Black's mind. As I put it, the hypothetical was the case of *Worcester v. Georgia*. (The only difference was that, in *Worcester* but not in my hypothetical, the state intended to intervene directly in Indian country, and this difference is of no effect in Black's thinking.)

According to John Marshall, Indian country is extraterritorial to the state. According to Black, the question is whether the state action infringes upon tribal self-government. Black's proposition is incompatible with both *Worcester* and his own statement "that the States have no power to regulate the affairs of Indians on a reservation." Now he has posited an inchoate state power in Indian country, ready to expand as the Court shrinks the scope of tribal government. The narrower the Court's view of what is essential to tribal self-government, the less there is to be infringed, and the more there is for states to accomplish in Indian country.

The delegation theory that Black gave as one possibility for a decision in *Williams* rests on questionable premises but is at least confined to statutory interpretation. The focus is upon congressional legislation. The second possibility—infringement—is focused upon tribal government, is potentially unlimited, shifts the initiative from Congress to the Court, and is realized by positing a potential state role in Indian country that runs counter to the *Worcester* conclusion.

365. *Id.*
366. *Id.*
367. *Id.* at 223.

The Black excursus on infringement makes possible the expansion of both Court and state power at the expense of the tribes. The Court's new power over tribes is set up by making it necessary to judge what infringes tribal self-government. This judgment can only be given by first determining the nature and extent of tribal government. It is not the tribes who may say what they find essential. Nor is it only Congress that may decide what is essential to tribal government. By framing the issue as he did, Justice Black acquired for the Court the power to determine what shall constitute and furnish tribal government. The Court may thus remove from the tribes and distribute to the states all those rights that the states seek and that the Court finds are not essential to tribes. No congressional grant is necessary. Of course, without saying so, Black assumes the states are in position to receive and exercise these powers—that is, that they have a legitimate presence in Indian country.

Such state potential constitutes yet another anomaly in the tale woven by Black. He noted that Congress "encouraged tribal governments and courts to become stronger and more highly organized."[368] This policy appears to encourage the independent tribal self-government to which *Worcester* alluded. Not so.

Self-government is not an end in itself for Indians as it is for non-Indians. According to Black, the purpose of encouraging tribal self-government is not self-government. The goal is not tribes that can sustain themselves, but tribes fit for assimilation into the states. In the Black view, the tribes presently fail to meet the standards for consumption by the states. Self-government is encouraged so that tribes can be found worthy of the states—calves fattened for the feast. In Black's terms, by strengthening tribal government, "Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them."[369] In *Williams*, the state had apparently judged the tribes to be unripe, as yet too undeveloped and too great a burden: the state "has not accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable."[370]

The pieces of *Williams* do not fit together. The declaration that "States have no power to regulate the affairs of Indians on a reservation"—the delegation possibility—has not proved influential in subsequent cases. From the standpoint of the later cases, the infringement possibility has proved dominant, but not without alteration. The critical passage in *Williams* has proved to be the statement that "[e]ssentially, absent governing Acts of

368. *Id.* at 220.
369. *Id.* at 220–21.
370. *Id.* at 222–23.

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."[371]

This statement has been translated into a two-test analysis of state authority in Indian country. The first test is preemption ("absent governing Acts of Congress"). This is one alteration of the *Williams* doctrine. The issue in *Williams* was not preemption but delegation. The second test read out of *Williams* is infringement ("whether the state action infringed on the right of reservation Indians" to self-government). Black found that state jurisdiction over non-Indian claims against Indians did constitute an infringement. Tribal government was given play. More recent cases find no infringement. Consequently, the Court has expanded state jurisdiction and contracted the scope of tribal jurisdiction.

Tribes lose no matter how the game is played. The stronger a tribal government is and therefore the greater its scope, the worthier and more ripe it is for absorption by the state. The weaker a tribal government is and therefore the narrower its scope, the more its powers will be found nonessential and therefore subject to acquisition by the state.

In the contexts of both jurisdiction and control of natural resources, where Black vaguely assumed a latent legitimacy of state authority in Indian country, the Court has come to assume patent state authority. By talking in terms of preemption and infringement the Court no longer affirms that states are excluded from Indian country unless permitted by Congress. Now the states exercise authority in Indian country unless excluded by Congress. *Worcester* has been stood on its head, and Black's unstated, contradictory assumption about the presence of states in Indian country has become a first principle of constitutional Indian law. The story does not end there. The two tests have been collapsed into one, and even that test has been discarded. Less and less is the Court constrained to give the appearance that there are rational limits upon its power to dispatch the states to take over the reservations.

Since *Williams*, the creative potential of *Worcester* for federalism has been replaced by a Court-administered federalism that assaults tribal government.

371. *Id.* at 220. The "always" to which Black refers cannot include the time when *Worcester* was decided. *Worcester* presented neither a case of preemption nor a case of infringement on self-government. *Worcester* did not ask whether Georgia's action infringed the right of the Cherokee Nation to make and be ruled by their own laws. *Worcester* held that Georgia's action was extraterritorial as well as an infringement upon United States treaty relations.

"Over the years," Black averred, "this Court has modified [the *Worcester*] principles in cases where essential tribal relations were not involved." *Id.* at 219. (None of the cases cited and discussed by Black as supporting the proposition does so. See *id.* at 220 (New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Utah & Northern Railway v. Fisher, 116 U.S. 28 (1885)). He thereby set in motion the process of dismantling tribes by judicial decree unaided by Congress.

3. *Cohen II*

Black's unelaborated notion of the relation of states and tribes—subsequently taken up, developed, and made dominant by the Court—may have been influenced in part by a contemporary treatise on Indian law. At critical points in the opinion, Black cites the reader to "*Cohen, Federal Indian Law.*" Thereby hangs a tale.

I have noted the mischief caused by Cohen's unaccountable endorsement of the myth of conquest in his 1942 *Handbook of Federal Indian Law* (Cohen I). I have also identified failures in the 1982 version of Cohen (Cohen III). Both books, especially the original, do have strengths and do make positive contributions to Indian law. The Cohen which influenced Black was a 1958 version of Cohen (Cohen II). It is still freely employed by the Supreme Court.

In 1973, Justice Thurgood Marshall followed Cohen II and referred to it as "a leading text on Indian problems."[372] Justice Marshall made that statement a year after the University of New Mexico Press brought the original Cohen back into print. The Foreword to the reissue explained that Cohen II had made the republications of Cohen I necessary:

> In the early fifties, both the executive and the legislative branches of the Federal Government determined to follow a new policy concerning Indians: a policy of terminating all tribes and ending Federal services to Indians. Cohen's book, which had been originally published under the auspices of the Department of the Interior, then proved embarrassing. Based on his painstaking studies and drawn from his rich background . . . it presented legal and moral arguments demonstrating that the American Indian was possessed of certain rights, among them self-governance and self-determination. The response of the Department of the Interior was simple: rewrite Cohen's book and discredit the original under the guise of a revision. . . . [T]he introduction to the vulgate version clarifies the main purpose of the revision. It claims that one of the reasons for the rewriting was "for the purpose of foreclosing, if possible, further uncritical use of the earlier edition by judges, lawyers and laymen."
>
> Soon the 1958 "edition" of what was once Felix Cohen's work was the only book available on Federal Indian Law, and after the Government Printing Office's supply of this edition was exhausted, it was reissued by two other publishers. It became confused with the original work . . . Many of the carefully considered arguments that were made by Cohen were omitted, and the theme of this 1958 edition is entirely different. From a well-reasoned, balanced discussion of the countless undecided questions (most of which are still unresolved), the book deteriorated into a volume with a new and constant theme: the Federal Government's power over Indian Affairs is plenary.[373]

372. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170 (1973).

373. Bennett & Hart, Foreword to F. Cohen, Handbook of Federal Indian Law v. (1942) (Cohen I). (This is the foreword to the University of New Mexico's 1971 reprint of the 1942 original.)

At the time Justice Marshall wrote, there was ample warning that, in the volume he was using, "[t]ribal power and tribal abilities are downgraded; a preoccupation with federal power over tribes is evident; Cohen's description of history is mitigated without specific disagreement or citation to opposing authorities. Where Cohen sees the tribes as sovereign peoples, entitled to self-government and responsible for their own destinies, the 1958 edition tends to see them as thorns in the side of the American system of government."[374]

Black employed Cohen II in *Williams v. Lee*. That case, departing from later 19th-century precedent as well as from *Worcester*, took up the concept of terminating the tribes in favor of the states. Termination was the policy that Cohen II sought to advance with its revisions of history and law.[375] Black's recasting of Indian law is not identical with that of Cohen II, but the latter can be seen as having contributed to the former.

One of Black's citations to the authority of Cohen II is a citation to that volume's initial sections on the subject of jurisdiction in Indian country.[376] Among other things, Cohen II there states:

> In the exercise of its plenary power over Indian affairs, Congress has largely excluded, until recently, state jurisdiction, . . . there has resulted, in many instances, a jurisdictional vacuum—a situation abhorred in law. This gap has been filled by the exercise, or assumption, of tribal jurisdiction—a situation that will prevail until Congress legislates otherwise to place Indians in the same status as other citizens of the United States, that is, under the jurisdiction of the States wherein they reside.
>
> . . . Under certain circumstances, a de facto jurisdiction theretofore assumed and exercised by a State may be accorded great weight where Congress has not prescribed exclusive federal jurisdiction.[377]

Perhaps the confecting of a "jurisdictional vacuum" and a state's "de facto jurisdiction" contributed specifically to the confusion of *Williams v. Lee*. More generally, perhaps Cohen II's inclusion of the contradiction of both tribal self-government and tribal termination influenced Justice Black's attempted reconciliation of the two; that is, self-government as

374. *Id.* at xviii (quoting P. Deloria).

375. See Federal Indian Law 501 (1958) (Cohen II). (Citations are to the 1958 volume; however, I have throughout employed the 1966 reprint of the 1958 volume.)

376. 358 U.S. 217, 220 n.5 (1959) (citing Cohen II at 307–26).

377. Federal Indian Law 307–8 (1958) (Cohen II) (citations omitted) (compare Cohen I at 358–65). Of course, if Congress terminated all the tribes, there would be nothing left for the Department of the Interior's Bureau of Indian Affairs. It is unlikely that the Bureau would have advocated the new policy in such a way as to advocate the dissolution of its empire. The Bureau posed what it saw as the only alternatives: "Self-government or rule by the Department (of the Interior) is the Indian's alternative." *Id.* at 395. That is, either the states or the Bureau would have the tribes. But the tribes were not yet ready for the states. See *infra* note 378. There would still be necessary a long interim of pupilage under the Bureau. It has been correctly noted that "allotment worked to the states' satisfaction, but termination did not. The allotment program first liquidated most reservation land, and required the states to extend their laws later. Termination required them first to extend their laws, then to wait some indeterminate time until the Bureau was prepared to terminate its trusteeship of tribal lands." Barsh & Henderson, The Road 223–41 (1980). The Bureau lost nothing.

readying tribes for termination and absorption into the states. Cohen II's peculiar ideas of federal power, state power, and tribal nonpower have directly influenced cases since *Williams v. Lee*.[378]

4. Land

In *Montana v. United States*,[379] the Court stated no test or principle for state presence in Indian country. It simply took land from a tribe and awarded it to the state. The Court held that the bed of the Big Horn River within the Crow reservation belongs to Montana rather than the Crow tribe. It was as forceful an emblem of defeat to Indians generally as the battle with Custer was an emblem of victory. The conceptual means for the Court's action against the Crow were notions of stateness or the equality of states.

The Court held that land under navigable waters in the western territory had been held "in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established States."[380] When Montana entered the Union, it therefore took

378. The notion that the goal of tribal self-government issues in absorption by the states is Black's. (The dilemma confronting Black was first explored by Justice McLean in his concurring opinion in *Worcester*. Worcester v. Georgia, 31 U.S. (6 Pet.) 563, 589–94 (1832). McLean concluded that, although self-governing tribes within states might be viewed as temporary, it would be a "singular argument" to say that tribes ought to be tolerated as independent when their government was primitive but not tolerated as they became more advanced. Black makes the "singular argument.") Cohen II does not specifically equate the strengthening of independent tribal government with qualification for emancipation from the Bureau and absorption into the states. See Federal Indian Law 395–500 (tribes), 501–14 (states) (1958) (Cohen II).

Black also cites the House Report that accompanied the termination act known as Pub. L. 280. 358 U.S. at 221 (1959). The formulation attempted by that report, however, is also different from Black's. The report sought to have it both ways: tribal weakness made federal or state criminal jurisdiction necessary; tribal strength invited sate civil jurisdiction—"the Indians of the several States have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction to the Indian Country within their borders." H.R. Rep. No. 848, July 16, 1953, accompanying H.R. 1063, 2 U.S. Code Cong. & Adm. News 2409, 2412 83d Cong., 1st sess. (1953).

Black's critical formulation about state infringement of tribal self-government also appears to be his own. Black offered a "cf." citation to Utah & Northern Railway v. Fisher, 116 U.S. 28 (1885), as authority for the infringement idea. Cohen II simply repeated the Cohen I reading of *Utah*, i.e., that *Utah* stands for the proposition that "a railroad purchasing a right-of-way through a reservation must pay taxes on that right-of-way as though the lands were entirely withdrawn from the reservation." F. Cohen, Handbook of Federal Indian Law 257 (1942) (Cohen I); Federal Indian Law 853 (1958) (Cohen II). That is a correct representation of the case which, in effect, held that the right-of-way was not reservation land. Cohen II also follows Cohen I's misreading of *Utah* in the only other citation to the case in the treatises. Both inaccurately reference *Utah* as holding that "[o]rdinarily an Indian reservation is considered part of the territory of the State." F. Cohen, Handbook of Federal Indian Law 119 n.32 (1942) (Cohen I); Federal Indian Law 510 n.1 (1958) (Cohen II). This inaccurate reading of the case runs directly counter to the other, accurate reading.

In later pages not cited by Black, Cohen II addresses the notion of "reserved state powers," and explains that "the sovereignty of the State over its own territory is plenary and therefore the fact that Indians are involved in a situation, directly or indirectly, does not ipso facto terminate State power. State power is terminated only if the matter is one that falls within the constitutional scope of exclusive Federal authority." Federal Indian Law 510 (1958) (Cohen II) (citations omitted). The language is the same as that of Cohen I. F. Cohen, Handbook of Federal Indian Law 119 (1942) (Cohen I). The ambiguity and error in this instance therefore originates with Cohen I.

379. 450 U.S. 544 (1981).

380. *Id.* at 551.

title to the bed of the Big Horn even though the Big Horn lay in Indian country.

This result can only be achieved by taking three steps. First, the United States must be assumed to have held title to the bed of the Big Horn. The Court said the initial question to be decided was "whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868."[381] But this question could not arise unless the United States owned the riverbed.

The Crow reservation was a reserved portion of the aboriginal land of the tribe. The 1851 treaty did not convey these lands to the United States; it "recognize[d] and acknowledge[d]" the tract as the territory of the Crow, its native occupants.[382] Likewise in the Treaty of 1868, the United States "agree[d] that the designated tract was "set apart for the absolute and undisturbed use and occupation of the Indians."[383] The treaties indicate that the Crow, in agreeing to a peaceful settlement, withdrew into the lands they reserved to themselves. The treaties give no hint that the United States owned the reserved land which included the bed of the Big Horn. The Court offers no explanation of how or when the United States might have acquired title. There was no conveyance, no cession, no conquest, and no incorporation.

Content can be given the Court's silence about how the United States gained title to the original land of the Crow. In the course of the opinion, the Court made passing reference to the case of *Minnesota v. Hitchcock*.[384] In that case Indians ceded some of their lands to the United States but excepted others. The treaty was construed as a *grant* of the *retained* lands *from the United States* to the Indians.[385] *Spalding v. Chandler*[386] was given as authority for this exegesis of the treaty. *Spalding* said: "It has been settled by repeated adjudications of this Court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States."[387] All treaty cessions by Indians to the United States were therefore to be read as United States grants to Indians of the retained aboriginal land not ceded.

The case of *United States v. Winans*, not discussed in *Montana*, stated the obvious when it observed that a treaty reservation "was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[388] In the 1851 and 1868 treaties between the Crow and the United States, the Crow's reservation of tribal lands to themselves is espe-

381. *Id.* at 550–51.
382. Treaty of Fort Laramie, 1851, art. 5, Kappler, 2 Indian Affairs: Laws and Treaties 594 (1904).
383. Treaty with the Crows, 1868, Art. 2, *id.* at 1008.
384. 185 U.S. 373 (1902) (cited at 450 U.S. 552 (1981)).
385. 185 U.S. 389–90.
386. 160 U.S. 394 (1895) (cited at 185 U.S. 390).
387. 160 U.S. at 402–3.
388. 198 U.S. 371, 381 (1905).

cially resistant to construction as a grant of the reserved land from the United States (which never owned it) to the Crow.

In any event, the Court in *Montana* does not indicate whether the bed of the Big Horn in aboriginal Indian country fell to the United States by hermeneutics or by some other means. At some point it was taken from the Crow without compensation. As far as I can determine, the taking occurred when the Court announced its opinion in *Montana* in 1981—a technique becoming familiar to the Court by more frequent use.

In addition to positing United States ownership of the submerged land (the first step), the Court also maintained that the United States had not "conveyed" the riverbed when it "conveyed" the reservation containing the river (the second step). In doing so, the Court devised a further fiction denying to the Crow nation the sovereignty attributed to the state of Montana.

The fiction works this way. The United States did not convey the bed of the Big Horn to Montana when it became a state. Nevertheless, there is, said the Court, an "established presumption" according to which "beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty."[389] When Montana became a state, however, the Crow reservation already existed, and the Big Horn lay within the reservation. The "established presumption" could not convey to Montana what the United States had conveyed to others. The Court assumed that the United States somehow owned the bed of the Big Horn by 1851 or 1868. The question then became whether the United States had "conveyed" the riverbed prior to Montana's statehood. The United States had "conveyed" the Crow's reserved aboriginal lands to them. Was the riverbed included in this "conveyance"? The reservation boundaries were described in detail. The river lay within the boundaries. But there was "no express reference to the riverbed" in the "conveyance."[390] Since there was no express reference to it, the riverbed was presumed not to have been "conveyed." By way of apparent explanation, the Court twice in two pages writes the same sentence: "Rather, '[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory.' "[391]

The United States did not expressly convey the riverbed to Montana but was presumed to have done so. The United States "conveyed" the reservation to the Crow but was presumed not to have "conveyed" to them the riverbed within the "conveyed" lands. According to the Court, riverbeds are "strongly identified with the sovereign power of government."[392] Therefore, a "court deciding a question of title to the bed of a navigable water

389. 450 U.S. 553.
390. *Id.* at 554.
391. *Id.* (*quoting* United States v. Holt State Bank, 270 U.S. 49 (1926)).
392. *Id.* at 552.

must . . . begin with a strong presumption against conveyance" unless the intention to do so is made plain.[393] The "strong presumption" against conveyance was not overcome by the "conveyance" of the reservation to the Crow. The "strong presumption" against conveyance was overcome by the "established presumption" that it passed to the state.

If riverbeds are strongly identified with sovereignty and there is a presumption against nonexpress conveyance, the right to the riverbed never shifted from the sovereign Crow nation to the sovereign United States. But to say that would be to say that we should take seriously the shell game the Court plays with riverbed conveyances and presumptions. The serious reality of the case is: the Court decided that, as between a tribe and a state, the tribe does not count.[394]

The third step taken by the Court, in addition to assuming United States ownership and no "conveyance" of the riverbed to the Crow, involved the equality of statehood. New states "enter the Union and assume sovereignty on an 'equal footing' with the established States."[395] If the established states held title to lands below the high-water mark of navigable waters, then new states' equal footing requires that they be granted such title also.

Cherokee Territory was extraterritorial to the established state of Georgia. There were navigable rivers within Cherokee Territory. It is not reasonably conceivable that Georgia held title to riverbeds otherwise extraterritorial to itself. That Montana was awarded the bed of the Big Horn means Montana entered the Union on a more equal footing than Georgia. Or it means that the Court will employ state sovereignty as a rubric for depriving tribes of land.

5. Water[396]

At issue in *Montana* was the bed of the Big Horn, not its waters. The underlying land was important chiefly because its owner would have jurisdiction to regulate fishing. The Court's confused explanation for awarding the land to Montana invoked the prerogatives of a state joining the union. Montana's stateness expanded its holdings and diminished those of the tribe. Federalism did not limit state power over Indians. None of the re-

393. *Id.* at 552.

394. The Court cited as precedent for denying the tribe's title the case of United States v. Holt Bank, 270 U.S. 49 (1926). 450 U.S. 552–54. The land in issue in *Holt Bank* had been covered by a lake and had been drained. The land surrounding the lake had been ceded to the United States by the Chippewa. Nothing was said about the lake bed. According to Montana, this ommission was significant and should have had the effect of leaving title to the bed in the Chippewa. There was supposed to be a strong presumption against implied conveyance of a riverbed by a sovereign. According to Montana, the "mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance." *Id.* at 554. How was this presumption overcome in *Holt* except by the presumption that tribes do not count?

395. *Id.* at 551.

396. I omit consideration of other natural resources because the Bureau of Indian Affairs controls timber, rangeland, and mineral resource development and leasing under the supposed federal trust.

straints of *Williams v. Lee* was considered by the Court, although loss of the land diminished the tribe's self-governing authority as well as its holdings. The state was awarded the land and the accompanying power to regulate activities in the heart of Crow country.

Had the contest in Montana concerned the waters of the Big Horn, a somewhat different balance of power might have been the outcome. The proposition that the United States held the beds of navigable waters for future states does not include the water. The rule in this context favors the tribes. According to the *Winters* doctrine—from *Winters v. United States*[397]—the United States reserved use of sufficient water for the present and future needs of Indians on their reservations. The significance of reserved water rights increases with increases in demand for scarce water supplies. In much of the arid western states, water rights give power. The tribes' recognized priority in water allocation provides a counterbalance to state power. To this extent federalism may be said to work to the advantage of Indians.

The tribal benefit, however, is not unmitigated. State infringement may take place by various doctrinal means.

The Colorado River affords one example. The Supreme Court apportioned the water of the Colorado among California, Arizona, and Nevada. It also acknowledged tribes' reserved rights and provided them with shares.[398] The amount of water set aside for the Indians depended upon the extent of irrigable land on their reservations. Certain reservation boundaries were left to be determined. A supplemental decree identifying acreage, amounts of water diversion, and priority dates was issued in 1979.[399]

Affected tribes contested the decree and sought increases in the amounts of water allocated to them.[400] In the earlier proceedings, the tribes had been represented by the United States as trustee. The tribes pointed out that the United States had failed to present evidence of all tribal claims. The United States had neglected to include certain tribal lands and the corresponding water rights. The Court held that relitigation was precluded and refused to reopen the determination.[401] It expressed the "fear that the urge to relitigate, once loosed, will not be easily cabined" and said it did not want "to open a Pandora's Box, upsetting the certainty of all aspects of the decree."[402] Although the tribes were not present in the earlier proceedings, their representation by the United States as their trustee was held binding upon them,[403] and finality of litigation was said to bar redress for their loss of water to the competing states.

397. 207 U.S. 564 (1908).
398. Arizona v. California, 373 U.S. 546 (1963); 376 U.S. 340 (1964).
399. Arizona v. California, 439 U.S. 419 (1979).
400. Arizona v. California, 460 U.S. 605 (1983).
401. *Id.* at 616.
402. *Id.* at 625.
403. *Id.* at 626–28. Where the Court decree adjudicated boundary extensions, then tribal water rights were increased to accompany the added land. *Id.* at 640–41.

The majority was unmoved by Justice Brennan's observation, in dissent, that the "Tribes will suffer a manifest injustice if we fail to consider the omitted lands claims."[404] As he went on to note, "the Tribes stand to lose forever valuable rights to which they are entitled . . . . This loss occurs entirely because the United States failed to perform its obligations as trustee and advocate" in presenting evidence of all the Indians' irrigable land.[405]

Again in *Nevada v. United States*,[406] finality worked in favor of states and against tribes, and federalism was no limit. Early in this century, the United States undertook a reclamation project in Nevada. In 1913 it sought an adjudication of water rights on behalf of both the Pyramid Lake Paiute Reservation and the project. Eventually (1944), the United States agreed to a settlement that included water rights for irrigation on the reservation. In 1973 the government filed suit seeking additional rights for the tribe for enough water to maintain the lake and its fishery. The lake was once said to be "the most beautiful desert lake in North America" with a fishery that "brought it worldwide fame."[407] Diversions from the rivers feeding the lake have reduced its size by 20,000 acres.[408]

The government had acted as trustee for the Indians in the original litigation and the eventual settlement. At the same time it represented the conflicting interests of its own project and the farmers who, attracted to the area by the project, were now dependent upon it. Notwithstanding the United States' conflict of interests and inadequate representation of the tribe, the Indians were once again held bound by what had been done.[409]

6. Jurisdiction: General Considerations of Origin

In *Montana*, the Court awarded the bed of the Big Horn to the state. Its explanation invoked notions of state sovereignty. The *Winters* doctrine offers some protection to tribal water supplies, but in *Arizona v. California* and *Nevada v. United States* the Court refused to adjust settlements unfair to tribes. It offered finality as the reason. In these land and water cases no consideration was given to state infringement upon the tribes and their ability to govern themselves. The *William v. Lee* ideas of federal delegation to states, of preemption, and of infringement on self-government were not

404. *Id.* at 648.
405. *Id.* at 648 (Brennan, J. dissenting).
406. 463 U.S. 110 (1983).
407. *Id.* at 114 (*quoting* Wheeler, The Desert Lake (1967)).
408. *Id.* at 115, 119 n.7.
409. In a footnote to his concurring opinion Justice Brennan said that "the tribe retains a Winters right, at least in theory, to water to maintain the fishery." *Id.* at 146n. Such a right is one in theory and not in water.

Justice Rehnquist, for the majority, stated: "We, of course, do not pass judgment on the quality of representation that the Tribe received." *Id.* at 135 n.14. In a 1951 suit brought before the ICC for receipt of less water than it should have been entitled to in earlier litigation, the tribe was awarded $8,000,000 for waiver of further claims of liability against the United States. The quality of representation provided by the United States had been at least as poor as the $8,000,000 indicated. See *id.*. See also *id.* at 144 n.16. The tribes did not receive the water they needed, nor was their loss fully compensated by money damages.

raised. Where the loss to tribes appears less material—jurisdiction as compared to land and water—the approach of *William v. Lee* has been thought important.[410]

a) Jurisdiction tied to allotment. Congress's allotment strategy was the chief means by which tribal lands became subject to state jurisdiction. First, federal jurisdiction was extended into Indian country. Then state jurisdiction followed. *Worcester* held Georgia could not exercise authority in Cherokee Territory. Presumably the United States could not do so either, absent treaties, except with respect to regulation of trade between the Indians and non-Indians.

However, in the 1846 case of *United States v. Rogers*,[411] Chief Justice Taney upheld federal regulation of a white in Indian country. Twenty-five years later, Congress determined that relations with the tribes would be conducted by statute rather than treaty and in 1885 passed the Major Crimes Act extending federal jurisdiction over certain offenses committed by Indians in Indian country.[412] *United States v. Kagama*[413] found the Act could not be supported by the Commerce Clause but upheld it nonetheless on the ground of necessity. Then in 1887 the General Allotment began the liquidation of most Indian country and made allotees subject to state-territorial jurisdiction. The Indian Reorganization Act of 1934 discontinued allotment but could not undo it.[414]

Those reservations that still exist after allotment and termination typically present more or less complicated checkerboard patterns of ownership with greater or lesser percentages of non-Indian parcels of land. "Checkerboard" is not an altogether apt description because there are usually more than two colors of squares. Reservation maps typically employ several colors, each designating a different form and identity of ownership.

A reservation may embrace land that is largely owned by non-Indians.[415] In 1948 Congress defined Indian country as: "(a) all land within the limits

410. It would be reasonable to suppose that the more clearly material the subject, the more careful the Court would be about its loss to the tribes. The reverse proves to be the case. Equality of statehood and finality are thought sufficient explanations for deprivation of natural resources. Deprivations of jurisdiction elicit complex *Williams*-type arguments.

411. 45 U.S. (4 How.) 567 (1846).

412. For good general treatment of the subject of criminal jurisdiction see G. Hall, An Introduction to Criminal Jurisdiction in Indian Country (1981); Clinton, Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze, 18 Ariz. L. Rev. 503 (1976); *id.*, Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective, 17 Ariz. L. Rev. 951 (1975); Collins, Implied Limits on the Jurisdiction over Indian Tribes, 54 Wash. L. Rev. 479 (1979).

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

414. Also, the winds of policy were soon to shift against the tribes once more. See text beginning at note 418.

415. See, e.g., Solem v. Bartlett, 465 U.S. 463, 470 (1984) (citations omitted):

> Although the Congress that passed the surplus land acts anticipated the imminent demise of the reservation and, in fact, passed the acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land act. Rather, it is settled law that some surplus land acts diminished reservations . . . and others did not.
>
> Our precedents in the area have established a fairly clean analytical structure for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to

of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."[416]

Here is the way Justice Thurgood Marshall explains the situation:

> In the latter half of the nineteenth century, large sections of the western States and Territories were set aside for Indian reservations. Towards the end of the century, however, Congress increasingly adhered to the view that the Indian tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately-owned parcels of land. This shift was fueled in part by the belief that individualized farming would speed the Indians' assimilation into American society and in part by the continuing demand for new lands for the waves of homesteaders moving West. As a result of these combined pressures, Congress passed a series of surplus land acts at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement. Initially, Congress legislated its Indian allotment program on a national scale, but by the time of the Act of May 29, 1908, Congress was dealing with the surplus land question on a reservation-by-reservation basis, with each surplus land act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise.
>
> The modern legacy of the surplus land acts has been a spate of jurisdictional disputes between State and Federal officials as to which sovereign has authority over lands that were opened by the acts and have since passed out of Indian ownership. As a doctrinal matter, the states have jurisdiction over unallotted opened lands if the applicable surplus land act freed that land of its reservation status and thereby diminished the reservation boundaries. On the other hand, Federal, State, and Tribal authorities share jurisdiction over these lands if the relevant surplus land act did not diminish the existing Indian country under 18 U.S.C. § 1151(a).
>
> Unfortunately, the surplus land acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When the surplus land acts were passed, the distinction seemed unimportant. The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest. . . . Only in 1948 did Congress

purchase land within established reservation boundaries. The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.

416. 18 U.S.C. § 1151.

uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries.[417]

Briefly stated, the checkerboard pattern is a jurisdictional mess. (In the absence of tribal agreement, it should be remembered, there is no legitimating constitutional ground for any tribal loss of land or jurisdiction nor for any corresponding federal or state gain of land or jurisdiction.)

b) Jurisdiction tied to other congressional actions. Jurisdictional confusion resulted from the federally instigated intrusion of state authority under allotment. The confusion was subsequently compounded by Congress.

i) Public Law 280. In 1953 Congress adopted a resolution stating it to be the policy that Indian tribes "should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians."[418] This was the statement of termination policy. Public Law 280 was passed in 1953 in the spirit of termination.[419]

The act unilaterally transferred to five states civil and criminal jurisdiction over reservations within their borders[420] and provided a way for any other state to assume jurisdiction over reservations. The act did not terminate the trust status of Indian lands. Sixteen states have assumed or attempted to assume limited jurisdiction.[421] In 1968—but not until then—the act was amended to require Indian consent to state assumption of jurisdiction.[422] Justice Black had the unamended Public Law 280 in mind in *Williams v. Lee* when he said Arizona had not accepted Indian jurisdiction "possibly because the people of the State anticipate that the burdens accompanying such power might be considerable."[423]

The jurisdictional complexity produced by Public Law 280 is illustrated in the state of Washington. The state assumed full jurisdiction where it was requested by tribes to do so. Where tribes made no request, the state nevertheless asserted partial jurisdiction. In the latter instance, state authority depended upon who owned the property on which the subject offenses or transactions might occur. Although the Ninth Circuit found the consequent jurisdictional chaos too bizarre to meet any formulation of the rational basis test, the Supreme Court upheld the system.[424]

In a thoughtful discussion of Public Law 280, Professor Carole Goldberg notes that Indians contested the constitutionality of the act before a federal

417. Solem v. Bartlett, 465 U.S. at 466–68 (citations omitted).
418. H.R. Con. Res. 108, 83d Cong., 1st sess., 67 Stat. B132 (1953).
419. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 28 U.S.C. § 1360.
420. California, Minnesota, Nebraska, Oregon, and Wisconsin were originally included, and Alaska was added later.
421. In addition to the six above, these are Arizona, Florida, Iowa, Montana, Nevada, North Dakota, South Dakota, Wyoming. See C. Goldberg, Public Law 280: State Jurisdiction over Reservation Indians 7 (1975).
422. Pub. L. 90-284, title 4, Apr. 11, 1968, 82 Stat. 80, 25 U.S.C., §§ 1321–26.
423. 358 U.S. 223.
424. Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) (*citing* 552 F. 2d, at 1335).

district court and the Supreme Court of Oregon. The act was upheld in both instances, but, as she says, the courts' "reasoning leaves troublesome questions."[425] The trouble comes from the absence of any constitutional basis for Public Law 280 and from reliance on insupportable notions of inherent residual state power over tribes. I think the jurisdictional confusion resulting from Public Law 280 is unconstitutional as well as irrational.

ii) McCarran Amendment. Public Law 280 specifically withheld from states jurisdiction to adjudicate water rights. However, the McCarran Amendment[426] waived United States sovereign immunity in comprehensive state water rights adjudication, and *Colorado River Conservation District v. United States*[427] held that it also provided states with jurisdiction to adjudicate Indian water rights held in trust by the United States. (Tribes' reserved water is assumed to be held by the United States, which may waive tribal rights.)[428] Abandoning Indian water rights claims to state courts intrudes upon the jurisdiction of federal courts[429] and may injure tribal rights insofar as state courts are an inappropriate forum for adjudicating tribal protections.

c) Jurisdiction tied to statehood. The idea of the equality of states was invoked by the Court as a ground for awarding the bed of the Big Horn to Montana. The equality of states also serves as a ground for extending state jurisdiction into Indian country.

John Marshall's decision in *Worcester* made it improbable that the federal government had any jurisdiction over tribes that could be delegated to states. It was certain that states had no inherent or residual authority in Indian country. However, as I noted earlier, both Cohen I and II refer to such residual state power, and attempted justifications of Public Law 280 also make use of it.

The idea of delegation began to take form in Indian Law with *United States v. McBratney.*[430] That case held federal courts had no jurisdiction of murder committed by a white upon a white on the Ute reservation. It reached this result on the ground that Colorado had acquired jurisdiction over whites on the reservation. Colorado had acquired this jurisdiction, according to the Court, "by its admission into the Union by Congress, upon an equal footing with the original States."[431]

The Court reasoned as follows: The United States entered a treaty with the Utes. The United States set apart a reservation for the tribe and prom-

425. C. Goldberg, Public Law 280: State Jurisdiction Over Reservation Indians 21 (1975). (The cases are Agua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs, 347 F. Supp. 42 (C.D. Calif. 1972), and Anderson v. Britton, 212 Ore. 1, 318 P.2d 291 (1957), *cert. denied*, 356 U.S. 962 (1958)).

426. 43 U.S.C. § 666.

427. 424 U.S. 800 (1976).

428. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 566 n.17 (1983).

429. 424 U.S. at 821 (Stewart, J. dissenting), 826 (Stevens, J. dissenting).

430. 104 U.S. 621 (1881).

431. *Id.* at 624.

ised to protect the rights of the Indians. The tribe promised to deliver wrongdoers for punishment under United States law and to allow the United States to pass laws for the reservation. Treaties are subject to repeal by subsequent federal statute. The act of Congress admitting Colorado as a state did not contain words excepting the Ute Reservation. By thus admitting Colorado on an "equal footing" with no exception for the Utes, the enabling act repealed the treaty and gave the state jurisdiction over Ute territory now included within that of Colorado.

There are lacunae in the argument. Quite apart from construing the absence of language as an implied repeal of prior action, and quite apart from the moral and legal validity of repealing a treaty by subsequent statute when the United States has accepted performance but not itself performed the treaty obligations, the opinion assumes without explanation that Colorado could have authority in Ute territory. The Court might have believed that Congress could delegate its treaty jurisdiction and had done so in the enabling act impliedly delegating jurisdiction while impliedly repealing the treaty. Or it might have overruled *Worcester* by implication and assumed that states have residual authority over Indian country so that equality of statehood meant Colorado's assumption of this authority. Or the Court might have been admitting Colorado to the Union on a more equal footing than states like Georgia which had no jurisdiction of crime in Indian country.

The Court took an even more curious turn after *McBratney*. First, in response to that decision, Congress was careful in subsequent enabling acts specifically to except Indian country as it had not done upon the admission of Colorado. So when Congress specifically admitted a new state thereafter, Indian reservations were expressly excepted from the state's authority, and they were expressly retained under absolute jurisdiction and control of the United States.

This was the case when Montana was admitted as a state. The enabling act provided that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States"; but in *Draper v. United States*[432] the Court held such language did not deprive Montana's courts of jurisdiction "resulting from the very nature of the equality conferred on the State by virtue of its admission into the Union."[433] Because "equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so."[434]

When Congress admitted Colorado to the Union, Indian reservations were not expressly excepted. Thereby either an Indian treaty was impliedly repealed and jurisdiction impliedly delegated to the state or the state impliedly fell heir to a residual state authority that had impliedly come into

432. 164 U.S. 240 (1896).
433. *Id.* at 243.
434. *Id.* at 244.

being after *Worcester*. In any event, when Montana was admitted, Congress expressly excepted Indian reservations. According to the Court, Congress could not have meant what it said. Here are the three sentences at the core of the Court's conclusion:

> Indeed, if the meaning of the words which reserved jurisdiction and control over Indian lands contended for by the defendant in error were true, then the State of Montana would not only be deprived of authority to punish offenses committed by her own citizens upon Indian reservations, but would also have like want of authority for all offenses committed by her own citizens upon such portion of the public domain, within her borders, as may have been appropriated and patented to an Indian under the terms of the [General Allotment Act]. The conclusion to which the contention leads is an efficient demonstration of its fallacy. It follows that a proper appreciation of the legislation as to Indians existing at the time of the passage of the enabling act by which the State of Montana was admitted into the Union adequately explains the use of the words relied upon and demonstrates that in reserving to the United States jurisdiction and control over Indian lands it was not intended to deprive that State of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians, and that a consideration of the whole subject fully answers the argument that the language used in the enabling act becomes meaningless unless it be construed as depriving the State of authority to it belonging in virtue of its existence as an equal member of the Union.[435]

The meaning of "statehood" and "equality of states" in these cases is uncertain. Whatever their meaning, the terms override the express language of Congress.

In both *McBratney* and *Draper*, the conflict was between federal and state court jurisdiction. Federal courts were ousted in favor of state courts. No tribal court asserted jurisdiction, and there was no direct intrusion upon tribes. However, these cases introduce the possibility of state jurisdiction in Indian country. Once admitted onto reservations, any state presence may be an indirect incursion upon the tribes, and that presence always bears the potential of a direct challenge. The state jurisdiction that ousts the federal government may also defeat tribal government.

The notion of the equality of states has recently been invoked in a way that comes much closer to a direct threat to tribes. I have noted that the *Winters* doctrine protects Indian reserved rights to water. But in the 1983 case of *Arizona v. San Carlos Apache Tribe*,[436] the future development and reach of that doctrine was cast in doubt.

Winters rights are unique federal rights. They do not function like state water rights and may be wholly dissimilar to them. For example, unlike

435. *Id.* at 246–47. See the Court's explanation of *McBratney* and *Draper* in Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 561–65 (1983).

436. 463 U.S. 545 (1983).

"state-law claims based on prior appropriation, Indian reserved water rights are not based on actual beneficial use and are not forfeited if they are not used."[437] *Winters* rights would appear peculiarly appropriate for clarification in federal rather than state courts. However, *Arizona v. San Carlos Apache Tribe* justified "virtual abandonment of Indian water rights claims to the state courts."[438] It did so by interpreting the McCarran Amendment to limit federal court jurisdiction and to remove any limits on state court jurisdiction over Indian water rights.

A crucial question in construing the McCarran Amendment was whether it might be said to apply to those states whose enabling acts—like that of Montana at issue in *Draper*—reserved Indian jurisdiction to the federal government. The Court resolved this question by finding that the amendment applied to all states. It grounded this finding—without further clarifying the subject—in the old metaphysics of statehood: "We need not rely on the possibly overbroad statement in United States v. Draper . . . that equality of statehood is the rule . . . in order to conclude that, in this context at least, 'equality of statehood' is sensible, necessary, and, most important, consistent with the will of Congress."[439] The Court provided for dismissal of the federal suit, even though the case had been "brought by Indians on their own behalf and sought only to adjudicate Indian rights."[440] Whatever equality of statehood means, it may ultimately have power to override tribal as well as federal authority.

Inchoate notions of statehood giving rise to state jurisdiction in Indian country figured in another recent case, *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*.[441] Reversing the customary pattern, a tribe brought suit in a North Dakota court against a non-Indian contractor. (The tribe's courts did not at the time have jurisdiction over a claim by an Indian against a non-Indian; the tribal code was subsequently amended to provide such jurisdiction.[442])

In the course of concluding that federal law did not require the state to forgo jurisdiction, the Court turned to Public Law 280. I have noted that Public Law 280 purported to transfer civil and criminal jurisdiction over tribes to the states, and I noted that the measure was questionable on a variety of grounds. In its *Wold Engineering* opinion the Court assumed the validity of Public Law 280 and gave it another twist. First the Court said that it "previously has recognized that Pub. L. 280 was intended to facilitate rather than to impede the transfer of jurisdictional authority to the

437. *Id.* at 574 (Stevens, J., dissenting).

438. *Id.*

439. *Id.* at 564–65.

440. *Id.* at 570. The circumstance was somewhat similar in *Escondido*, where state interests were beneficiaries of the water allocation. See Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 768–70, 782–84 (1984).

441. 467 U.S. 138 (1984).

442. *Id.* at 142 n.1.

States."[443] Then it added: "Nothing in the language or legislative history of Pub. L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction."[444]

What "pre-existing" state jurisdiction in Indian country?

The Court relied upon a decision of the North Dakota Supreme Court, *Vermillion v. Spotted Elk*. There the state court "had taken an expansive view of the scope of state-court jurisdiction over Indians in Indian country"[445] and found that North Dakota had jurisdiction over Indian country preexisting Public Law 280. The disclaimers in the enabling act—similar to those applying in Montana and discussed in *Draper*—"foreclosed civil jurisdiction over Indian country only in cases involving interests in Indian lands themselves."[446] That is, North Dakota came into existence with preexisting—also termed "residual" or "residuary"—jurisdiction over Indian country. This position of *Vermillion* was embraced by Justice Blackmun writing for the majority in *Wold Engineering*. As Justice Rehnquist noted in dissent, "Vermillion was not in any sense good law," and the majority's position was "wholly untenable."[447]

Near the beginning of the *Wold Engineering* opinion, Justice Blackmun observed that "[l]ong before North Dakota became a State, this Court had recognized the general principle that Indian territories were beyond the legislative and judicial jurisdiction of state governments. Worcester v. Georgia . . . ; see generally Williams v. Lee . . . . That principle was reflected in the federal statute that granted statehood to North Dakota."[448] Several pages later Justice Blackmun accepted North Dakota's claim to inherent jurisdiction over Indian country. I have read the intervening pages carefully. They do not explain how the Court was able to leap from the opening statement of the extraterritoriality of Indian country to its denial several pages later.

The intervening pages take us back to *Williams v. Lee*, which had affirmed "that the States have no power to regulate the affairs of Indians on a reservation."[449] That is one *Williams*, the one consistent with *Worcester*, the one cited by Blackmun at the beginning of his opinion, and the one supporting Justice Rehnquist's dissent ("the expansive jurisdiction of Vermillion was discredited, two years after it was claimed, by our decision in Williams v. Lee").[450]

There is another *Williams v. Lee*, for it also said that "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

443. *Id.* at 150.
444. 85 N.W.2d 432 (N.D. 157).
445. 467 U.S. at 143–44.
446. *Id.*
447. *Id.* at 160–61.
448. *Id.* at 142.
449. 358 U.S. 217, 220.
450. 467 U.S. at 160.

ruled by them."[451] This is the other *Williams* that gave rise to a two-test or two-barrier standard—a preemption test ("absent governing Acts of Congress") and an infringement test ("whether the state action infringed" tribal self-government). This other *Williams* drew Justice Blackmun's attention in the intervening pages of his *Wold Engineering* opinion as he leapt from Indian country's extraterritoriality to preexisting state authority in Indian country.

Justice Blackmun's statement of the other *Williams* is a typical statement of the contemporary two-test approach, beginning with a version of the familiar "at one time" litany:

> Although the Court has departed from the rigid demarcation of state and tribal authority laid down in 1832 in Worcester v. Georgia, . . . the assertion of state authority over tribal reservations remains subject to "two independent but related barriers." First, a particular exercise of state authority may be foreclosed because it would undermine "the right of reservation Indians to make their own laws and be ruled by them." Second, state authority may be preempted by incompatible federal law.[452]

Justice Blackmun held that neither barrier prevented the exercise of jurisdiction in the *Wold Engineering* case. In the process of investigating the potential bar of preemption, he found Congress's action in Public Law 280 had no preemptive effect. Public Law 280 was not "meant to divest States of pre-existing" jurisdiction.[453]

However the two-barrier test is analyzed, it is predicated upon original state authority in Indian country. (That is, states exercise authority in Indian country unless it infringes tribal self-government or has been preempted.) Justice Blackmun does not explain how state authority entered Indian country. He does not say when or how a departure "from the rigid demarcation of state and tribal authority laid down in 1832 in Worcester" prevailed and produced inherent state jurisdiction on reservations. Mystically, there arises in Indian country the power of an inexact unstated statehood or stateness or state sovereignty that by nature displaces tribal sovereignty as well as federal authority.[454]

451. 358 U.S. 220.

452. 467 U.S. at 146 (citations omitted).

453. *Id.* at 147.

454. Doctrinal explanations do not carry very far. What makes the possible doctrinal explanation of inchoate stateness interesting is that it runs exactly counter to the views of state sovereignty expressed by Justice Blackmun in Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985). It may therefore illustrate the peculiar form of inconsistency and incoherence that grips individual justices and the Court when they decide Indian cases. Justice Blackmun's voting shift from National League of Cities v. Usery, 426 U.S. 833 (1976), to *Garcia* resulted in the overruling of the former. He explained that states' "residuary and inviolable sovereignty," 105 U.S. at 1017 (quoting Madison), lay in the constitutional structure rather than in notions of sovereignty.

Moreover, what he found impossible for the Court to do was "to identify certain underlying elements of political sovereignty that are deemed essential to the States" or to "single out particular features of a State's internal governance that are deemed to be intrinsic parts of state sovereignty." *Id.* at 1016. Attempts to do so, he said, lead "to inconsistent results at the same time that [they] disserve principles of democratic self-governance." *Id.* Of course singling out essential elements of self-governance is ex-

7. Specific Exercises or Types of Jurisdiction

a) Regulation of hunting and fishing. Indian rights to hunt and fish and to regulate hunting and fishing have been vindicated. They have been protected in the face of strong non-Indian opposition in the northwest United States.

Treaties with northwestern tribes typically provided that Indians had "the right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the Territory."[455] The Supreme Court has construed this language as reserving to tribes the right to take up to 50% of each run of fish passing through their fishing areas.[456]

Indian hunting and fishing rights have also been protected in the face of termination. The hunting and fishing rights guaranteed to the Menominee Tribe were held to survive that tribe's termination by Congress.[457]

Moreover, Indian hunting and fishing rights have been found resistant to state "equal footing" arguments.[458] Most recently the Court has held that a state may not exercise concurrent jurisdiction with tribal hunting and fishing regulations on reservation land owned by the tribe.[459] In arriving at this conclusion the Court resorted to the post-*Williams* two-test analysis. On the one hand such state regulation might infringe upon the essentials of tribal self-government.[460] On the other hand it might be preempted by congressional action. The Court relied predominantly on the second test or barrier. In addition to identifying extensive federal agency involvement promoting tribal development of wildlife resources, the Court found that Congress had confirmed tribal power to regulate hunting and fishing. For example, Public Law 280 expressly exempted hunting and fishing from state control.[461]

In spite of these vindications of Indian hunting and fishing rights, the Court has left them vulnerable to state power in important ways. There have been repeated warning signs about subjection of tribal hunting and fishing to state regulation. After all, one of the original and continuing impulses of the European newcomers and their descendents had been to recreate Indians by turning them from nomadic hunting and fishing to settled

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actly what the Court does when it inquires whether state action in Indian country is barred by the essential elements of tribal self-governance.

Garcia took the Court out of the business of protecting state sovereignty under the Commerce Clause and left such protection to the federal structure and the political processes. Owing to post-*Worcester* developments, the federal structure and the political process do not afford tribes any protection.

455. See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

456. *Id.* at 686. See also Puyallup Tribe v. Dep't of Game, 433 U.S. 165 (1977) (*Puyallup III*).

457. Menominee Tribe v. United States, 391 U.S. 404 (1968).

458. United States v. Winans, 198 U.S. 371 (1905). Getches, Rosenfelt, & Wilkinson were misled into thinking that *Winans* put an end to the equal footing doctrine generally with respect to Indian country. Getches, Rosenfelt, & Wilkinson, Federal Indian Law 67 (1979). Of course, the Court may kill the doctrine permanently again and then revive it permanently again.

459. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

460. *Id.* at 334 n.16, 336 & n.19.

461. *Id.* at 337 & n.21, 340 n.25.

farming. And present policies supporting self-determination may favor a capitalistic exploitation of wildlife that conflicts with indigenous practices.

One warning was sounded by *Organized Village of Kake v. Egan*[462] in which Justice Frankfurter, employing one of the possible *Williams* approaches and making explicit its implicit reliance on residual state authority, opined that "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."[463] He added that the Court had "never held that States lack power to regulate the exercise of aboriginal Indian rights" to hunt and fish.[464]

Two subsequent Court opinions held that states do have certain regulatory power. One was *Puyallup Tribe v. Washington Game Department (Puyallup III)*,[465] which upheld Washington's authority to regulate on-reservation fishing by tribal members.[466] In the first of two earlier installments of that litigation (*Puyallup I*),[467] although the right at issue was guaranteed by treaty, Justice Douglas saw "no reason why the right of the Indians may not . . . be regulated by an appropriate exercise of the police power of the State" when it is "in the interest of conservation."[468] In the second installment (*Puyallup II*),[469] Douglas confirmed and embroidered *Puyallup I*:

> Rights can be controlled by the need to conserve a species; and the time may come when the life of the steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent steelhead from following the fate of the passenger pigeon; and the Treaty does not give Indians a federal right to pursue the last living steelhead until it enters their nets.[470]

There is no apparent intended irony in the picture of non-Indians rescuing endangered fish from Indians.

Supporting Justice Douglas's opinions are the assumptions that states promote conservation of species and that Indians do not. However, at least some state officials are reported to concede that their scientific game management only recently has replaced a more traditional system of setting bag

462. 369 U.S. 60 (1962).

463. *Id.* at 75.

464. *Id.* at 76.

465. 433 U.S. 165 (1977) (*Puyallup III*).

466. As noted above, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), held that a state could not exercise concurrent hunting and fishing jurisdiction with a tribe. *Mescalero* was therefore in need of distinguishing the two cases that upheld state regulatory authority. *Mescalero* sought to distinguish *Puyallup III* on two grounds. The lands in issue did not belong to the tribe, and an applicable treaty provided that fishing rights were to be exercised by Indians "in common with all citizens of the Territory." *Id.* at 332 n.15, 342.

467. Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968) (*Puyallup I*).

468. *Id.* at 398.

469. Dep't of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (*Puyallup II*).

470. *Id.* at 49.

limits—one known to them as SALY (same as last year).[471] They also concede that scientific management "is administered in light of the politics of state game commissions and the economic expectations of motel, bar, liquor store and gas station owners throughout a particular game habitat."[472]

Even if states are conservationists and tribes are not, there is no basis for allowing states to exercise hunting and fishing regulatory power over tribes. Justice Douglas offered no ground, and there appears to be none.[473]

In addition to the *Puyallup* cases, the other affirmation of state authority to regulate hunting and fishing on a reservation came in *Montana v. United States*.[474] Besides awarding the bed of the Big Horn to Montana, that case also found the tribe lacked authority to regulate non-Indian hunting and fishing on reservation land owned by nonmembers of the tribe—that is, such regulation is a state prerogative.

In reaching this conclusion Justice Stewart, writing for the majority, achieved a unique juridical hybrid by linking the *Williams v. Lee* standard with the Court's incorporation of the tribes in *Oliphant v. Suquamish Tribe* and *United States v. Wheeler*. According to Stewart, "through their original incorporation into the United States," the tribes lost many inherent powers.[475] Moreover, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[476] Because regulation of hunting and fishing by nonmembers on the reservation "bears no clear relationship to tribal self-government or internal relations," it is not permissible.[477]

Stewart improved upon the invention of incorporation: now, unless Congress expressly delegates a power to the tribes, they have remaining only those powers "necessary to protect tribal self-government or to control internal relations." *Williams v. Lee* is one of the cases cited as authority for this new wrinkle on incorporation. *Williams* affirmed the assumption that states have no authority in Indian country. But it did also provide that state actions would be subjected to examination to insure that they did not infringe upon tribal self-government. Stewart mates this aspect of *Williams* with *Oliphant* and *Wheeler*. The more the tribes are incorporated, the more powers are stripped from them by implication, the less there is for states to infringe upon, and the greater scope is given to state regulation.

A practical effect of this mating would be that in litigation tribes would have the burden of showing that any exercise of power is necessary to their

471. Commission on State-Tribal Relations, Handbook: State-Tribal Relations 25 (undated). See also Johnson, The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error, 47 Wash. L. Rev. 207 (1972).
472. *Id.*
473. See Johnson, cited in note 471.
474. 450 U.S. 544 (1981).
475. *Id.* at 563.
476. *Id.* at 564.
477. *Id.*

survival. They must show a "clear relationship" of the tribal regulation to their self-government. The burden is actually heavier than that, if Stewart is right, for they have to show that the activity they wish to regulate endangers the tribe's political or economic security.[478]

There are two vicious circles here. One of the reasons Stewart gave for denying tribes the disputed right to regulate hunting and fishing was that they could not punish non-Indian violators. They could not punish violators because the Court had deprived them of that right. "By denying the Suquamish Tribe criminal jurisdiction over non-Indians," Stewart wrote, "the Oliphant case would seriously restrict the ability of a tribe to enforce any purported regulation of non-Indian hunters and fishermen."[479] Therefore the regulatory power was not essential and could be removed. That is, because the Court has taken some powers away from the tribes, the Court may take others as well. The Court's conquest of the tribes is ground for further conquest.

The other vicious circle is related to the first. The more independent, stable, well-differentiated, and further away from extinction a tribe is—the more developed its self-government—the less likely a contested regulation will survive the Court. There is much that a well-developed government does that is not designed merely for its survival. But the further away from mere survival a tribal government is, then, under the Stewart rationale, the less chance its regulations will be allowed. Only those tribal actions will be permitted that meet threats to the tribes' security. The better and more effective a tribal government is, the more it stands to lose to Court decree. The result is to force tribes into a permanent subsistence level of politics and economics.

This destructive survival principle—the Court permits only those measures implicating survival—applies generally and not only in politics and economics.

For example, it has also been given play in the context of natural resources. When Stewart stated the survival principle in *Montana*, he expressed its wider scope. A tribe can regulate non-Indian conduct on its reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[480] He added a footnote: "As a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservations livable. Arizona v. California, 373 U.S. 546." The analogy to *Arizona v. California* and subsistence levels of water was also drawn by *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*.[481] According to the *Washington* case, tribal shares in fishing are limited by what is

478. *Id.* at 566.
479. *Id.* at 565 n.14.
480. *Id.* at 566.
481. 443 U.S. 658 (1979).

"necessary to provide the Indians with a livelihood—that is to say, a moderate living." Tribes are told that the upper limit to their aspiration for food as for government is a subsistence level.

In *Williams v. Lee*, Justice Black indicated that the more self-governing a tribe was, the worthier it would be for elimination through assimilation. Justice Stewart and the present Court seem to think that the more self-governing a tribe is, the worthier it is to be reduced to mere survival. States will be tempted to assume jurisdiction over tribes only when they may also assume control of valuable tribal assets like hunting and fishing grounds or fossil fuels. The tribes then avoid termination only by permanent impoverishment.

One of the most recent decisions on the subject appears at first glance to be a departure from the destructive survival principle. This impression proves to be mistaken. *New Mexico v. Mescalero Apache Tribe*[482] did hold that a state may not exercise concurrent jurisdiction with tribal hunting and fishing regulations on reservation land owned by the tribe. And it did so because state regulation would "threaten Congress' overriding objective of encouraging tribal self-government and economic development."[483]

As it turns out, however, the Court was protecting not the tribe and its independence but a "comprehensive scheme of federal and tribal management."[484] That scheme

> requires the Secretary to review each of the Tribe's hunting and fishing ordinances. The ordinances are based on recommendations made by a federal range conservationist employed by the Bureau of Indian Affairs. Moreover, the Bureau of Sport Fisheries and Wildlife stocks the reservation's waters based on its own determinations concerning the availability of fish, biological requirements and the . . . pressure created by on-reservation fishing.[485]

What impressed the Court was that "the Federal Government played a substantial role in the development of the tribe's resources."

The decision does not reward or encourage tribal self-government. Instead of protecting the tribe, the Court protects two federal bureaus from

482. 76 L. Ed. 611 (1983).

483. *Id.* at 625.

484. *Id.* at 623.

485. *Id.* at 623–34. Protection of the tribe was not even alleged in the 1985 term's opinion in *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe* (105 S. Ct. 3420 (1985)), which denied off-reservation hunting and fishing to the Klamath. In 1984 the Klamath had ceded aboriginal lands to the United States, reserving 1.9 million acres to themselves. A governmental survey had excluded a third of the reservation land. In a 1901 agreement, Congress paid the tribe for the excluded land. The agreement said nothing about hunting and fishing rights in this area, which had originally been part of the reservation but would now lie outside it.

The Court held that the Klamath had surrendered these rights when they agreed to take payment for the excluded lands. This was so notwithstanding the facts that the subject area was national forest and park land, that the Klamath had never interrupted their ages-old tradition of hunting and fishing there, and that they were dependent upon the practice. In dissent, Justice Marshall noted that the "decision today represents another erroneous deprivation of the Klamath's tribal rights." *Id.* at 3439 (Marshall, J., dissenting). It may also symbolize the Court's willingness to expand state control although tribal subsistence is at stake.

state interference. The Court talks the language of tribal self-government, but its practice gives tribes three choices: permanent impoverishment, assimilation into federal bureaucracy, or assimilation into the states.

b) Taxation

i) Tribal taxing power. Tribes have the power to levy taxes, "an essential attribute of [their] self-government."[486] In *Merrion v. Jicarillo Apache Tribe,* discussed above, the Court held that tribes acting under the Indian Reorganization Act (IRA)[487] must clear "a series of federal checkpoints before a tribal tax can take effect."[488] In its most recent opinion on the subject, the Court upheld a Navajo tax although the tribe had never accepted the IRA and its tax was not enacted under IRA provisions. In the process of approving the Navajo action, however, the Court extracted and repeated from its earlier IRA tax decision the "federal checkpoints" metaphor.

The impression created is that Congress has the power generally to place barriers in the way of a tribal tax whether the tax is enacted under authority of the IRA or is an exercise of inherent tribal authority.[489] That is to say, although the power to tax is admittedly an essential attribute of self-government, this power, too, may be defeated. Justice Thurgood Marshall offered a footnote comment to his statement in *Merrion* about checkpoints for tribal taxes: "In contrast to when Congress acts with respect to the States, when Congress acts with respect to the Indian tribes, it generally does so pursuant to its authority under the Indian Commerce Clause, or by virtue of its superior position over the tribes, not pursuant to its authority under the Interstate Commerce Clause."[490] Congress may erect checkpoints that defeat a tribe's essential right to levy taxes. When it does so "by virtue of its superior position," it acts on the basis of might, not constitutional law. The use of the metaphor "checkpoint" is revealing. It is taken from military terminology (Checkpoint Charley at the Berlin Wall, for example). Checkpoints are a device of force.

ii) Federal taxing power. The Court has never held a federal tax applied to Indians to be unconstitutional. The 1871 case of *The Cherokee Tobacco*[491] allowed a federal tax on Indian tobacco, even though an applicable treaty expressly exempted Indian goods from federal tax. Breach of the treaty was thought to be a nonjusticiable, political question.[492] The General Allotment Act has been held to exempt from tax income derived from In-

486. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 201 (1985). See also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152–54 (1980).

487. 25 U.S.C. §§ 476, 477.

488. 455 U.S. 130, 155.

489. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. at 198-99.

490. 455 U.S. at 155 n.21.

491. 78 U.S. (11 Wall.) 616 (1871).

492. *Id.* at 621.

dian trust allotments.[493] But tribes as employers basically have been subject to FICA,[494] unemployment compensation obligations,[495] and income tax withholding.[496]

iii) State taxing power. Congressionally authorized state taxation has been upheld. *Montana v. Blackfeet Tribe*[497] found that a state could not levy taxes against a tribe's royalty interests in mineral leases. But it also said that, in "keeping with its plenary authority over Indian affairs," Congress can authorize the imposition of state taxes on Indian tribes and individual Indians." The Court offered no explanation of how Congress gained power to tax tribes or how it gained authority to grant taxing power to the states. Congress's assumed power has been exercised to authorize state taxation of mineral production on Indian lands.[498] But in 1938 Congress enacted comprehensive mineral leasing legislation that has governed leasing since its passage and that omits state taxing authority. The Supreme Court has determined that, if state authority to tax mineral leasing in Indian country survives the 1938 act, it reaches only those leases executed under an 1891 act and its 1924 amendment.[499]

The judiciary has also, and independently, come to authorize state taxation within reservations. To be sure, the Court has often turned back state attempts to assert taxing power in Indian country. In 1867, *The Kansas Indians*[500] and *The New York Indians*[501] confirmed the implications of *Worcester* by striking down state attempts to tax Indians. The modern Court has frequently followed this tradition.[502]

However, three of the cases striking down one form of attempted state taxation also upheld another form of state taxation. And statements in sev-

493. Squire v. Capoeman, 351 U.S. 1 (1956).

494. I.R.C. §§ 3101–26.

495. I.R.C. §§ 3301–11.

496. I.R.C. §§ 3401–3406. See Choteau v. Burnet, 283 U.S. 691 (1931).

497. 53 U.S.L.W. 4625, 4627 (1985).

498. Mineral leasing was authorized in 1891. 25 U.S.C. § 397. The act was amended in 1924 to render lease income subject to state tax. 25 U.S.C. § 398. Production on additional lands was provided in 1927. 25 U.S.C. § 398c.

499. Montana v. Blackfeet Tribe, 53 U.S.L.W. 4625, 4628 (1985). On the General Allotment Act as not authorizing state taxation, compare Goudy v. Meath, 203 U.S. 146 (1906), with Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477–79 (1976). On Pub. L. 280 as not authorizing state taxation, see Bryan v. Itasca County, 426 U.S. 373, 392 (1976). On the Buck Act as not authorizing state taxation, see Warren Trading Post Co. v. Arizona Tax Comm's, 380 U.S. 685, 691 (1965). But on the authorization of state taxation, see Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949) (Oklahoma's gross oil production tax on lessees); Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943); West v. Oklahoma Tax Comm'n, 334 U.S. 717 (1948) (Oklahoma inheritance tax).

500. 72 U.S. (5 Wall.) 737 (1867).

501. 72 U.S. (5 Wall.) 761 (1867).

502. See Montana v. Blackfeet Tribe of Indians, 53 U.S.L.W. 4625 (1985); Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982); Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980); Bryan v. Itasca Co., 426 U.S. 373 (1976); Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

eral of the other cases give clear indication of the vulnerability of Indian country to judicially authorized state tax invasion.

According to *The Kansas Indians*, tribes "enjoy the privilege of total immunity from State taxation."[503] The modern revision of that statement takes its origin from the *Williams v. Lee* statement that, "absent governing Acts of Congress, the question has always been whether state action infringed on the right of reservation Indians to make their own laws and be ruled by them." It will be remembered that this statement could not be reconciled with either precedent or the same opinion's affirmation that states have no regulatory power on Indian reservations. Even so, the statement has proved influential in various areas of Indian law and in none more than state taxation.

Williams was decided in 1959. It did not involve a tax. (A non-Indian reservation trader brought a civil suit against an Indian debtor in state court.) The 1965 case of *Warren Trading Post v. Arizona Tax Comm'n*[504] did involve a tax. Justice Black, writing for the Court, upheld a licensed Indian trader's immunity from the state's gross income tax using the preemption idea he had suggested in *Williams*. Congress, he said, "had taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens."[505]

Then in 1973 the Court decided the companion cases of *Mescalero Apache Tribe v. Jones*[506] and *McClanahan v. Arizona Tax Commission*.[507] *Mescalero* approved a state gross receipts tax on a tribe's ski resort. Writing for the Court, Justice White said that activities carried on within the boundaries of a reservation are not subject to state taxation absent congressional authorization. He added that "tribal activities conducted outside the reservation present different considerations."[508] The tribe was operating a ski resort on land that was leased from the National Forest Service and that was contiguous to the reservation. Its property interest in the enterprise was found to be Indian trust property exempt from state taxation under the Indian Reorganization Act.[509] The Court said there was "no reason to hold that income as well as property taxes" were forbidden.[510] So income from the trust property was subject to state tax: "absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax."[511]

503. 72 U.S. 756.
504. 380 U.S. 685 (1965).
505. *Id.* at 690.
506. 411 U.S. 145 (1973).
507. 411 U.S. 164 (1973).
508. 411 U.S. at 148.
509. *Id.* at 155.
510. *Id.* at 157.
511. *Id.* at 156.

White thought it important that the trust property was next to but outside the borders of the reservation. He offered no explanation for making a functional distinction between a tribe's on- and off-reservation trust property, and he did not explain why such a distinction was critical to the question of validity of a state tax imposed on a tribe.

White gave expression to his basic approach with a version of the *Williams* infringement test: "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."[512] This *Mescalero* version constitutes a major revision of *Worcester* and *The Kansas Indians*. His explanatory litany comes as no surprise: "The conceptual clarity of Mr. Chief Justice John 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."[513]

As authority for the difference between the "at one time" of *Worcester* and "today" he offered two cases. One is *Organized Village of Kake v. Egan*.[514] I briefly noted earlier that Justice Frankfurter's *Kake* opinion, seeming to follow *Williams*, opined "that 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."[515] Two Indian law experts observe that *Kake* constituted

> the unsupported extension in dicta of state jurisdiction over Indians on reservations. First of all, Kake was a case involving state jurisdiction where there was no reservation at all. Reservation status is critical in determining the scope of state jurisdiction . . . Second, the final paragraphs of the opinion can be said to have loosely extended such cases as New York ex rel. Ray v. Martin, 326 U.S. 496 (1946). Justice Frankfurter was drawing broad conclusions about the scope of state law from cases dealing with state jurisdiction over non-Indian transactions on the reservation. The Martin case and its fellows, McBratney and Draper, may have themselves been judicial mistakes that now have the legitimacy of long acceptance. But the facile use of them to sanction broad state jurisdiction over reservation Indians is clearly erroneous.[516]

The other case employed by White as support for his view of the states' role and taxing power in Indian country was *McClanahan v. Arizona State*

512. *Id.* at 148.
513. *Id.*
514. 369 U.S. 60 (1962).
515. 369 U.S. at 75. Frankfurter's recitation in that case of the mandatory litany runs: "The general notion drawn from Chief Justice Marshall's opinion in Worcester, The Kansas Indians, and The New York Indians, that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations." *Id.* at 72.
516. Price & Clinton, Law and the American Indian 439 (1983). See also Barsh & Henderson, The Road 155–65 (1980).

Tax Commission,[517] the companion to *Mescalero*. *McLanahan* upheld an individual Indian's exemption from state income taxation of reservation income, but the reasoning of the case highlighted tribal vulnerability to state taxation.

Justice Thurgood Marshall's opinion for the Court in *McClanahan*, after reciting versions of the "at one time . . . today" litany,[518] states that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."[519] The authority Marshall offers for this critical departure from inherent Indian sovereignty is the companion *Mescalero* opinion. The relevant passage in *Mescalero* is the one that cites *McClanahan* for its authority. It is a tight little closed loop.[520]

Justice Marshall concludes the paragraph with the observation that "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." To this restatement of tribal sovereignty Justice Marshall drops a revealing footnote averring that, in the absence of treaties or federal statutes, residual Indian sovereignty has become a moot question. His authorities for this further assault on tribes are the *Kake* opinion and "Federal Indian Law."

"Federal Indian Law" is the 1958 Cohen II. Marshall, it will be remembered, referred to it as "a leading text on Indian problems."[521] Evidence of its notoriously propagandistic nature was easily available well before the time Marshall wrote. Cohen II has a simple test for the validity of state taxes in Indian country: they will be disallowed if they "substantially impede or burden the functioning of the Federal Government."[522] No need to worry about tribal self-government. Perhaps Cohen II was the inspiration for transforming the sovereignty of Indian nations into a "platonic notion." Perhaps, too, it inspired judicial termination of the tribes.[523] *Williams*, *Mescalero*, and *McClanahan* recycle the Bureau's propaganda and offer it as modern law.

Three years after *Mescalero* and *McClanahan*, the Court decided *Moe v. Salish & Kootenai Tribes*[524] and upheld a state cigarette tax on sales by Indians to non-Indians. In his opinion for the Court, Justice Rehnquist described the tax as falling on non-Indian consumers rather than the tribe.[525] This description is questionable and assumes that state taxing

517. 411 U.S. 164 (1973).
518. *Id.* at 171.
519. *Id.* at 171–72.
520. *Id.* at 172.
521. 411 U.S. at 148.
522. 411 U.S. at 170.
523. Federal Indian Law 846 (1958) (Cohen II).
524. Note also the pattern of citations to Cohen II in McClanahan, 411 U.S. at 170–72, and Mescalero, 411 U.S. at 151–53, which refers to the volume as "Felix Cohen's treatise." *Id.* at 153 n.9.
525. 425 U.S. 463 (1976).

power is appropriate on reservations so long as its burden is not borne by the tribes.[526]

Justice Rehnquist's complete explanation of why a state tax may be applied to reservation sales is:

> Since nonpayment of the tax is a misdemeanor as to the retail purchaser, the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked.[527]

Rehnquist pejoratively refers to Indians' competitive advantage as dependent upon the willingness of the purchaser "to flout purchaser's legal obligation to pay the tax." But purchasers had no such obligation unless it was assumed that the state tax was valid in Indian country. If a citizen of Georgia travels to Montana and purchases cigarettes, the Georgian has no obligation to pay Georgia's sales tax on the Montana purchase, and the Montana merchant has no obligation to collect Georgia's sales tax. If Worcester had purchased tobacco in Cherokee territory, he would not have been liable for Georgia's sales tax. Georgia's law was a nullity in Indian territory. Purchasers of cigarettes on the Flathead reservation had no legal obligation to pay Montana's sales tax and were flouting no obligation until Justice Rehnquist created one.

(Rehnquist says nothing about a compensating use tax. His argument does not depend upon hypothesizing an obligation to pay tax on goods used within the state unless a sales tax was already paid to another state where they were purchased. He assumes purchasers were obligated to pay Montana's tax on the reservation sales whether the goods were subsequently imported into the state or not.)

Justice Rehnquist also imposed upon tribal sellers the duty to collect the tax. The essential ground given was: "We see nothing in this burden which frustrates tribal self-government, see Williams v. Lee."[528] Indian sellers must "aid the State's collection and enforcement" of the state's tax.

A state tax in Indian country was allowed to stand, and Indians were made involuntary agents of the state for collection and enforcement of the state's tax. The only legal explanation given is the "see" cite to *Williams*. The citation is to pages 219-220 of the *Williams* opinion.

526. *Id.* at 482. On the questionable basis for this assumption, see Barsh & Henderson, The Road 187–202 (1980); Barsh, Issues in Federal, State and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique, 54 Wash. L. Rev. 531, 537–40, 566–68 (1979).

527. 425 U.S. at 482.

528. *Id.* at 483.

Page 219 features Black's version of the "at one time . . . today" refrain, and the footnotes contain citations to *United States v. Kagama* and Cohen II. Apparently Justice Rehnquist had in mind page 220 and its familiar sentence: "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. Cf. Utah & Northern Railway v. Fisher, 116 U.S. 28."[529]

In Rehnquist's hands, the notion of infringement becomes: "We see nothing" in the burden of collecting taxes "which frustrates tribal self-government." Infringement becomes nonfrustration.

Rehnquist also employed the *Williams*-originated idea of preemption to find impermissible other taxes the state had sought to impose in Indian country. These taxes conflicted "with the congressional statutes which provide the basis for decision with respect to such impositions."[530] He added a footnote: "It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy clause . . . and not any automatic exemptions 'as a matter of constitutional law' either under the Commerce Clause or the intergovernmental-immunity doctrine."[531] That is, inherent Indian sovereignty does not count.

Wholesale state tax assault upon Indian country became possible with the next case, *Washington v. Confederated Tribes of the Colville Indian Reservation*.[532]

Colville followed *Moe* in upholding an involuntary agency for collecting and enforcing the state tax but expanded the intrusion in two ways. On the one hand, the permitted burden was much greater.[533] On the other hand, the Court shifted to the tribes the burden of proving that their involuntary agency was invalid. The standard for this proof is virtually impossible to satisfy, for tribes must show that the state's imposition of the involuntary agency is "not reasonably necessary as a means of preventing fraudulent

529. Since Rehnquist allowed state taxation on a reservation, it is worthwhile noting that the *Williams* cite to Utah is a curiosity. It is a "cf." cite. Indians and Indian interests were not in issue in the case. A railroad ran through an Indian reservation. The railroad argued that its right-of-way lay on an Indian reservation and that the reservation was extraterritorial to Idaho. But the Indians and the United States had entered an agreement, ratified by Congress, according to which the Indians ceded land for the railroad to the United States for a cash consideration. The United States in turn sold the land to the railroad. The land was "withdrawn from the reservation. The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed." Utah & Northern Ry. v. Fisher, 116 U.S. 28, 32 (1885).

530. 425 U.S. at 480–81 (citing *McLanahan* and *Mescalero*).

531. *Id.* at 481 n.17.

532. 447 U.S. 134 (1980).

533. "The state sales tax scheme requires smokeshop operators to keep detailed records of both taxable and non-taxable transactions. The operator must record the number and dollar volume of taxable sales to nonmembers of the Tribe. With respect to nontaxable sales, the operator must record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made, and the dollar amount and dates of sales. In addition, unless the Indian purchaser is personally known to the operator he must present a tribal identification card." *Id.* at 159.

transactions."[534] Apparently a tribe would have to demonstrate that the obligation both interferes with its self-government and is unnecessary for reasons having nothing to do with the tribe.

These are not the only fresh invasions allowed by *Colville*. It also upheld the power of states to tax reservation sales by Indians to Indians!

Under *Colville*, if Indians on the reservation are not formally members of the reservation tribe, sales to them are taxable. This innovation was not only without precedent but contrary to precedent. White approved it on the ground that—his only explanation—federal statutes "cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe."[535] Washington had no such power. No state had such power. If there is a clear thread running through the fabric of Indian law, it is that states may not tax Indian commerce with Indians within Indian country. It is doubtful that Congress has power to levy such a tax. It is more doubtful that, if it had such power, Congress could delegate it to a state. It is certain that Congress had not authorized Washington to impose the tax.

White's opinion allowing taxation of Indian sales to Indians inflicts more than legal injury and legal intrusions. It is a blow to the communal, human reality of the reservation. As one scholar of Indian law has correctly observed,

> Indian communities usually contain many persons, often full-blood Indians, who through marriage or as a result of parentage of different tribes are ineligible for formal enrollment as tribal members. Yet such persons are usually considered part of the tribal community by Indians and non-Indians alike. The Court's awkward line-drawing in Colville leaves such Indians subject to substantial state regulation and taxation despite their long-term, permanent residence in Indian country. Yet a member of the tribe who lives in an urban area and comes back to the reservation only infrequently is exempt from state law while in Indian country.[536]

The wholesale intrusion allowed by *Colville* was given a further doctrinal boost by *White Mountain Apache Tribe v. Bracker*.[537] Just as it was about to become a routinized two-test rule, *Williams v. Lee* was reworked into a one-test rule by *White Mountain Apache Tribe*. Again the opinion was written by Justice Marshall. The two *Williams v. Lee* tests, he said, are related: "The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have

534. *Id.* at 160.

535. *Id.*

536. Clinton, State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine, 26 S.D.L. Rev. 434 (1981). For various other Burger Court examples of the litany of citation to *Worcester* followed by the assertion that things have changed in the meantime, usually long ago, see Three Affiliated Tribes v. Wold Engineering, 407 U.S. 138, 147–48 (1984) (Blackmun version); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (White version); Rice v. Rehner, 463 U.S. 713, 718 (1983) (O'Connor version).

537. 448 U.S. 136 (1980).

provided an important "backdrop" . . . against which vague or ambiguous federal enactments must always be measured."[538] Tribal sovereignty and self-government are effectively removed as real doctrinal factors, and preemption becomes the sole meaningful test of whether state taxes shall be allowed in Indian country. State taxation will be allowed unless federal legislation excludes it.

Dropping tribal self-government as an operative doctrinal factor is symbolic of the factual consequence of the change. The effect is an equivalent in taxation to the destructive survival principle at work in hunting and fishing regulation, as can be discovered by closer examination of *Washington v. Confederated Tribes of Colville Indian Reservation*.[539]

Moe v. Salish & Kootenai Tribes[540] had allowed state taxation of reservation tobacco sales to non-Indians and also permitted the state to make the Indian sellers involuntary agents for collection of the tax. *Colville* then expanded the reach of state taxing power in Indian country by allowing the state to impose a more burdensome involuntary agency upon the Indian sellers and, surprisingly, by allowing state taxation of Indian sales to reservation Indians.

In the critical three paragraphs of *Colville*,[541] Justice White's opinion for the Court basically follows the accepted two-test approach derived from *Williams*. His analysis opens with an unflattering introduction: "It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest."[542] This is a repetition of the pejorative reference in the earlier *Moe* case to Indian sellers profiting from purchasers who were willing to flout their legal obligation. Here the disparaging reference goes further. It accuses Indians of marketing values they have failed to generate "on the reservation."

White continues:

> What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. . . . Tribes could . . . open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas. We do not believe that the principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.[543]

We must ask what the principles of Indian law are, and why they would deny tribes the opportunity to compete in the marketplace by taking advan-

538. *Id.* at 143.
539. 447 U.S. 134 (1980).
540. 425 U.S. 463 (1976).
541. 447 U.S. at 155–57.
542. *Id.* at 155.
543. *Id.* at 155.

tage of favorable tax considerations. Attracting businesses and customers through competitive tax advantages as well as making the most of favorable tax provisions is routine fare for states, municipalities, and private enterprise. There is no reason to deprive tribes of the same opportunity.

The Colville Tribes were charging a tribal tax of their own. The lower court had found that adding on the state tax would reduce tribal revenues substantially.[544] The revenues from the tribal tax funded essential tribal governmental programs. As one commentator has observed: "Capital-poor, thinly populated, and short on transportation and communications infrastructure, tribes can do little to attract new business ventures other than to create local regulatory and tax advantages."[545] The Court's derogatory reference to chains of discount stores at reservation borders suggests that it knew exactly what it was doing in denying to tribes one of the few enterprise options remaining to them.

Moreover, it is also to be wondered why the Court felt free to engage in the kind of economic analysis of tribal undertaking that it has forsworn since 1937 in non-Indian cases. There is some mystery about what the Court meant by "value generated on the reservation." If the enterprise in *Colville* did not constitute value generated on the reservation, we may wonder what the Court thinks of the similar services and market exploitation that are integral to the United States economy. Does the Court think these are values generated on the continental United States?

It is difficult to escape the impression that Justice White, and the Court, had in mind a particular view of what constitutes legitimate Indian business: the only good Indian economy is a primitive one. "Value generated on the reservation" seems to translate: selling blankets, pots, jewelry, and headdresses to non-Indian tourists. Or spearing fish and hunting game with bows and arrows.

After his little introduction on Indian economics, White takes up the two *Williams*-type tests, beginning with preemption. There is an impressive array of federal legislation regulating Indian commerce, supporting tribal economic development, prohibiting Washington from taxing reservation land and income, approving the tribal tax ordinance, and sanctioning tribal self-government. Even so, Justice White found no preemption of the state tax.[546]

The opinion next turns to the state's infringement of tribal self-government. White says it would be wrong to think the state infringed upon tribal government "merely because the result of imposing its taxes will be to deprive the Tribes of revenue."[547] Self-government proves not to be self-government but a compromise: "The principle of tribal self-government . . .

544. 446 F. Supp. 1339, 1360–63 (E.D. Wash. 1978) (three-judge court).
545. Barsh, Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique, 54 Wash. L. Rev. 531, 572 (1979).
546. 447 U.S. at 155–56.
547. *Id.* at 156.

seeks an accommodation between the interests of the Tribe and the Federal Government, on the one hand, and those of the State, on the other."[548] The state came out on top of the compromise because, although the tribal tax revenues funded essential governmental programs, they were not "derived from value generated on the reservation."[549]

White then appends a paragraph for the benefit of anyone who might have missed the point. "It can no longer be seriously argued," he wrote, "that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes."[550] That is, the Commerce Clause now allows states to do to tribes what they cannot do to others.[551]

States are invited to tax tribes to the level of survival and perhaps below. Interpreting and expanding *Moe,* White says: "The State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation. Such a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians."[552] In a footnote, White then reprimands the solicitor, who argued on the side of the tribes, for reading "Moe too parsimoniously in asserting its inapplicability to cases, such as the present ones, in which the economic impact on tribal retailers is particularly severe. Moe makes clear that the Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all."[553] The Court appears impatient with any delay in prosecution of the subtle state tax war on the tribes.

The options for tribal enterprise are severely curtailed by *Colville*. State tax in Indian country may be allowed to eliminate Indian business not only with non-Indians but also with reservation Indians who are not formal members of the reservation tribe.

The destructive survival principle may prove more debilitating in the context of state taxation than in the context of hunting and fishing. State taxes are permitted to displace tribal taxes and to end tribal revenues as well as Indian businesses. As the Court itself has said: "The power to tax members and non-Indians alike is surely an essential attribute of . . . self-government; [Indians] can gain independence from the Federal Government only by financing their own police force, schools, and social programs."[554]

548. *Id.*

549. *Id.* at 156–57.

550. *Id.* at 157 (*citing* Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 481 n.17).

551. As one commentator correctly noted, "the result achieved by the Burger Court leaves the dormant interstate commerce clause doctrine a far more potent limit on the exercise of state power than the negative implications of the Indian commerce clause. As a general rule, states may not impose the burdensome multiple taxation sanctioned in Colville." Clinton, State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine, 26 S.D.L. Rev. 434 (1981).

552. 447 U.S. at 151.

553. *Id.* at 151 n.27.

554. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. at 201. (State taxation was not allowed in Central Machinery, 448 U.S. 160, and White Mountain Apache Tribe, 448 U.S. 136, but there was federal agency involvement, not wholly independent activity.)

The blow of state taxes is directed by the Court to the heart of tribal self-government and independence.

Colville and *Moe* are especially and bitterly ironic since the business taxed and subject to elimination was tobacco. Tobacco and its smoking were the Indians' idea, a "value generated" on their land. Perhaps the Court saw no irony. For Indians, the pipe and its smoking are religious; tobacco is a gift. Originally, Indians gave away tobacco and the technology of its growth and smoking. Because tobacco as a commodity was a non-Indian concept, perhaps the Court thought its value could not have been Indian-generated. (Given non-Indian smoking addictions, the last laugh, or cough, may yet belong to the Indians.)

c) Liquor. The Court's decisions on state taxing power in Indian country developed the potential of *Williams v. Lee* for two tests of the permissibility of state presence. One was preemption. The other was infringement of tribal self-government. The two were eventually reduced to one: preemption. The one was reduced to meaninglessness by *Rice v. Rehner*,[555] which permitted state regulation of liquor on reservations, even though the trade took place on the reservation and involved reservation Indians who were members of the dominant reservation tribe.

The question was whether California could require a reservation trader to secure a liquor license. The trader argued preemption. The facts provided the trader with two classic grounds for the preemption argument: The trader was federally licensed, and there was an acknowledged past and present of comprehensive federal regulation of liquor on reservations. Neither fact deterred Justice O'Connor from finding state regulation permissible.

The operative core of the opinion is set out in four paragraphs.[556] These paragraphs manipulate the *Williams* idea of infringement so as to undermine preemption. Read as the exposition of an idea, they resist sensible interpretation. Analysis shows why. This section of the opinion is a collection of sentences and phrases clipped from Cohen II, Cohen III, and ten cases. The connecting material does not expose logical relationships among the clippings.[557]

O'Connor seems to mean that tribal sovereignty has little weight and that preemption is a weak argument against state jurisdiction in Indian country.

555. 463 U.S. 713 (1983).

556. *Id.* at 718–20.

557. The first paragraph is, for the most part, Justice O'Connor's version of the mandatory "at one time . . . today" *Worcester* litany. *Id.* at 718. The paragraph is composed of four sentences. The first is written by Justice O'Connor. The other three are largely or exclusively taken from three cases.

The second paragraph is composed of six sentences. *Id.* at 718–19. The third sentence is written by O'Connor. The others are sentences and pieces of sentences from Cohen III and four cases. Included is one quote within a quote. The subject of the paragraph is preemption. It seems to say that, where Indians are concerned, the normal standards of preemption do not apply, and state regulatory interests will be specially weighted.

The five sentences of the third paragraph are taken from three cases. *Id.* at 719. In one sentence, the connective phraseology supplied fails to link it with the preceding sentence. (The "however" at the beginning of the third sentence does not fit grammatically or logically.) Tribal sovereignty is the subject

The following pages proceed on the idea that a twofold analysis has been set up by her introduction. She looks at the tradition of tribes' sovereign power over liquor trade and then at preemption.

O'Connor first finds that the tribes have been divested of inherent authority to regulate liquor.[558] (We are apparently not to be confused by the fact that the power, reputedly divested, was then returned to the tribes.[559] *United States v. Mazurie*[560] held that Congress delegated to tribes authority over liquor transactions.)[561] Since the tribes had been divested of inherent liquor regulation authority (which was then returned to them), there was, according to O'Connor, no tradition of self-government over liquor transactions. Tribal sovereignty has no weight.

Then the opinion turns to the second issue, preemption. Its conclusion seems to be that state authority is not preempted. But the conclusion confuses two entirely different things. It proceeds this way: Generally state law does not apply on reservations unless Congress expressly so provides.[562] However, failing a tradition of self-government in liquor regulation, "it is not necessary that Congress indicate expressly that the State has jurisdiction."[563] Therefore, presumably, state jurisdiction is not preempted.

But why? Defeating the requirement of express congressional provision for state jurisdiction does not answer the question whether state law has been preempted. State law is presumed not to apply in Indian country. We can discard that presumption. We can say that state law may apply in Indian country without the express approval of Congress. We still do not know whether Congress has preempted state law. O'Connor apparently confuses express preemption with express approval of state jurisdiction.

The opinion holds another surprise. After all the confused pages on preemption, preemption is finally irrelevant to the decision. O'Connor finds

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of this paragraph, which says that the Court has not taken it too seriously. O'Connor italicizes the saying of *Wheeler* that tribal sovereignty "is subject to complete defeasance."

The fourth paragraph includes a statement of one case and a quote within a quote from another. *Id.* at 719–20 (*McClanahan* quoting Cohen II; the same quote within a quote reappears at the end of the opinion.) The paragraph links preemption and tribal sovereignty. It says that, where the Court does "not find . . . a tradition [of tribal sovereignty], or if we determine that the balance of state, federal, and tribal interests so requires, our preemption analysis may accord less weight to the 'backdrop' of tribal sovereignty." *Id.* at 720 (citations omitted).

558. 463 U.S. at 724, 726.

559. *Id.* at 730–31.

560. 419 U.S. 544 (1975).

561. The statute at issue in both *Mazurie* and *Rice* is 18 U.S.C. § 1161 (1984). Federal law had curtailed liquor sales to Indians. It was racially discriminatory. Section 1161 was designed to remove the discrimination. As Justice Blackmun explained in dissent, borrowing from *Mazurie*, § 1161 is a form of local option legislation, allowing tribes to regulate liquor in conformity with state law standards. If "a State is altogether 'dry,' Indian country within that State must be 'dry' as well. If a State bans liquor sales to minors or liquor sales on Sundays, sales to minors and Sunday sales also are forbidden in Indian country." 463 U.S. at 741.

562. *Id.* at 731, 719–20.

563. *Id.* at 731.

that Congress has expressly—or at least "clearly"—delegated to states the authority to regulate liquor on reservations.[564]

With what appears to me as a string of non sequiturs, the opinion concludes:

> Congress did not intend to make tribal members "super citizens" who could not trade in a traditionally regulated substance free from all but self-imposed regulations. Rather, we believe that . . . Congress intended to recognize that Native Americans are not "weak and defenseless," and are capable of making personal decisions about alcohol consumption without special assistance from the Federal Government. Application of the state licensing scheme does not "impair a right granted or reserved by federal law." On the contrary, such application of state law is "specifically authorized by . . . Congress . . . and [does] not interfere with federal policies concerning the reservations."[565]

Among other things, *Rice* is the first opinion explicitly to adopt Cohen II as the law of the land. At several critical points, O'Connor relied upon Cohen II, which she refers to as "Indian Law." With respect to the ultimately dispositive issue of congressional delegation to the states, O'Connor places predominant reliance upon Cohen II: "In that . . . volume, the Solicitor of the Interior assumed that 18 U.S.C. § 1161 would result in state prosecutions for failing to have a state [liquor] license. Whatever Congress had to do to provide 'expressly' for the application of state law, the Solicitor obviously believed that Congress had done it."[566] The Solicitor's "assumption" in Cohen II is the position that O'Connor wrote into law. Cohen II assumed many things, most of them inimical to the tribes. It happens that this particular assumption was subsequently repudiated by Cohen III, two federal courts, and the Solicitor.[567] O'Connor resurrected and enthroned the repudiated Cohen II.

Once again the abuse of logic and doctrine within an Indian law opinion reflect its external effects. The state was allowed to protect its monopoly at the expense of Indians. The real question was money, not liquor. As Justice Blackmun noted in a dissent, the application fee for a license was $6,000, with annual fees of $409.[568] The state granted a limited number of liquor franchises, but they were transferrable. The estimated going price for a franchise at the time of *Rice* was $55,000. The reservation was not an alcohol haven. The tribe wished to control its own people and to raise revenue. The Court's decision allowed the state and non-Indians to profit from an artificial market in which the value was not generated on the reservation or in the state.

564. *Id.* at 732–33.
565. *Id.* at 734–35 (citations omitted).
566. *Id.* at 732.
567. See Strickland et al., Felix S. Cohen's Handbook of Federal Indian Law 307–8 (1982) (Cohen III).
568. 463 U.S. 735, 737 n.1.

In *United States v. Mazurie*,[569] non-Indians had been convicted for selling liquor without the permission of the tribe. The Court took note of the tribes' independent regulatory authority apart from congressional delegations. The Court said it need not decide "whether this independent authority is itself sufficient to" uphold the challenged liquor ordinance.[570] It noted that the Court had "consistently guarded the authority of Indian governments over their reservations. . . . 'If this power is to be taken away from them, it is for Congress to do it.' "[571] In *Rice* the power was taken away by the Court without congressional authorization.

C. Bill of Rights

Neither the trust doctrine nor federalism is an effective limit upon federal power over Indian nations. Indeed, both have served as bases for the exercise and extension of that power. I turn next to the Bill of Rights to discover whether it protects the tribes and limits federal power.

The Citizenship Act of 1924 naturalized "Indians born within the territorial limits of the United States."[572] It ended law and doubts to the contrary.[573] Insofar as they are citizens, individual Indians have as much protection under the Bill of Rights as other individuals in the United States.

Moreover, the Bill of Rights has proved beneficial for tribes in certain circumstances. Nevertheless, the general rule is validated also in this context: rather than shielding tribes, the Bill of Rights has at times been a sword used against them. The Court has never found that a congressional exercise of power over tribes violated the Bill of Rights. But the Bill of Rights has provided reasons for dismantling and intruding upon the tribes.

Independent explanations for such an outcome are available. For example, it may inhere in the nature of rights as unstable, indeterminate, and inutile.[574] Or it may be a function of the individualistic theory and practice of rights peculiar to the United States.[575] It is not necessary to disagree with these other explanations in order to describe employment of the Bill of Rights against Indians as belonging to the general phenomenon of the juris-

569. 419 U.S. 544 (1975).
570. *Id.* at 557.
571. *Id.* at 558.
572. 43 Stat. 253, 8 U.S.C. § 1401 (a) (2).
573. Cf. Elk v. Wilkins, 112 U.S. 94 (1884) (Indian not made a citizen by Fourteenth Amendment).
574. On the critique of rights, see, e.g., Tushnet, An Essay on Rights, 62 Tex. L. Rev. 1363 (1984); Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis. L. Rev. 975.
575. Staughton Lynd argues for restatement of rights "in a manner congruent with a community founded upon love and mutual respect." Lynd, Communal Rights, 62 Tex. L. Rev. 1417, 1417-18 (1984). Lynd concludes by noting that individuals can surrender individual rights but that individuals cannot alien rights of the community. He adds: "One is reminded of the United States soldiers seeking an Indian spokesperson who could be induced to give up the land belonging to the tribe. The Indians typically replied: 'It is not ours to give.' " *Id.* at 1441. The kinds of separate, collective existence sought by some tribes is opposed by liberal non-Indians arguing equality and assimilation. Conservative non-Indians oppose the communal nature of the tribes. See V. Deloria, Behind the Trail of Broken Treaties 25–25 (1985); Barsh & Henderson, The Road 241–43 (1980).

prudential campaign waged against the tribes by Congress and, more recently, by the Court.

1. Fifth Amendment Protection of Property

The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

a) Taking. Cohen III says cases have held "that if Congress takes Indian property for non-Indian use, the United States is liable under the fifth amendment of the Constitution for payment of compensation and an uncompensated taking may be enjoined."[576] On the other hand, as Professor Newton notes: "Cases involving the fifth amendment takings clause most clearly illustrate the failure of the Court to offer constitutional protection to Indian interests."[577]

Choate v. Trapp[578] found that the Fifth Amendment prevented abrogation of statutory tax immunity of allotted Indian land without just compensation. However, the right vindicated was a private, individual right and one created by statute. In *United States v. Shoshone Tribe of Indians*,[579] the taking of tribal timber and mineral resources was held to be compensable; the United States "did not have power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would be, not the exercise of guardianship or management, but confiscation."[580]

The Court has allowed two major exceptions to Fifth Amendment protection of tribal property.

First, *Tee-Hit-Ton Indians v. United States*[581] said the original lands of the Indians, the lands on which they still live as they have from time immemorial (and to which it is said they have "aboriginal title"), are not property for Fifth Amendment purposes! The United States had sold timber on Alaskan lands of the Tlingit Tribe. As distinguished from the taking of property belonging to any other Americans, this taking was found not to be compensable under the Fifth Amendment. The Court said original lands of the Indians may be "fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."[582]

576. Strickland et al., Felix S. Cohen's Handbook of Federal Indian Law 217 (1982) (Cohen III).

577. Newton, Federal Power 247 (cited in note 202). Both are true.

578. 224 U.S. 665 (1912).

579. 304 U.S. 111 (1938).

580. *Id.* at 115–16. See also Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919) ("That would not be an exercise of guardianship, but an act of confiscation"). See also Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); United States v. Creek Nation, 295 U.S. 103 (1935). But compare United States v. Jim, 409 U.S. 80 (1972), with Sioux Tribe v. United States, 316 U.S. 317 (1942).

581. 348 U.S. 272 (1955). See Newton, At the Whim of the Sovereign: Aboriginal Title Reconsidered, 31 Hastings L.J. 1215 (1980).

582. 348 U.S. at 279.

The offered explanation was that, "after conquest," Indians had merely a right of occupancy that was not a property right.[583] The Court added that the "position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of lands thus obtained."[584] It cited and quoted *Johnson v. McIntosh*.[585] It said "the rule derived from Johnson v. McIntosh" is: "the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment"![586]

The Court nailed down the point: "Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."[587]

The Court had once again attributed to the past its own present view of and assault upon the tribes. In this case, the fiction of conquest was particularly preposterous.

No American schoolboy—not even a modern one using mind-expanding drugs—knows the Tlingit of Alaska were deprived of their ancestral ranges by force. The peace-loving Tlingit have never been conquered. No one has made the attempt except the Supreme Court. As Newton says: "The only sovereign act that can be said to have conquered the Alaskan natives was the Tee-Hit-Ton opinion itself."[588]

Doctrinally, *Tee-Hit-Ton* created a new class of "recognized" title. The taking of Indian land may be constitutionally compensable, but only if Indian title is "specifically recognized as ownership by action authorized by Congress."[589]

So aboriginal Indian title is not protected by the taking clause but will be protected if it is "recognized." However, even recognized title will not be protected if it is converted by the federal government acting in the role of trustee. The government will be found to have been acting in its role as trustee if it made a good faith effort to furnish the Indians with a value equivalent to their land.[590]

Notwithstanding what the Supreme Court has said about the absence of a constitutional duty to compensate, Congress has nonetheless established a

583. *Id.* at 279. See also *id.* at 284.

584. *Id.* at 279.

585. *Id.* at 279–80.

586. *Id.* at 284–85.

587. *Id.* at 289–90.

588. Newton, At the Whim of the Sovereign: Aboriginal Title Reconsidered, 31 Hastings L.J. 1215, 1244 (1980).

589. 348 U.S. at 289.

590. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). See Newton, The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule, 61 Or. L. Rev. 245 (1982) (criticizing the *Sioux* opinion).

tradition of compensating Indians for their property rights.[591] It has done so through treaties or agreements or by providing for subsequent claims to be filed.

Prior to 1946, there was no mechanism of general applicability by which Indian tribes could litigate claims against the United States. Although the Court of Claims was created in 1855, Indian claims based on treaty violations were expressly excluded from its jurisdiction.[592] As the dissent to the recent *Oneida* decision noted, President Washington promised the Chief of the Senecas that federal law would protect Seneca lands and that federal courts would be open to them for the redress of grievances. George Washington lied, for

> Before 1875, when "Congress conferred upon the lower federal courts, for but the second time in their nearly century-old history, general federal-question jurisdiction," . . . an Indian tribe could only raise its federal land claims in [the Supreme Court] by appealing a state-court judgment. . . . Until Congress made Indians U.S. citizens in the Act of June 2, 1924, they were not generally considered "citizens" for the purposes of diversity jurisdiction in the lower federal courts. Nor were the tribes "foreign states" entitled to apply for original jurisdiction in the Supreme Court.[593]

In a word, tribes could not sue the United States for damages unless Congress passed special jurisdictional legislation. From time to time Congress did pass such ad hoc acts authorizing particular tribes to bring cases in the Court of Claims. Then in 1946 Congress created the Indian Claims Commission as the mechanism for hearing claims for compensation for wrongs done by the government to Indians.[594] Originally the Commission was to terminate in ten years. Its life was several times extended.

The Attorney General warned Congress about the Commission. He said it would be "virtually a court with the power to determine claims based both upon legal and moral grounds rather than a fact finding body as an aid to Congress." He went on to observe that, "[i]n view of the vague basis upon which many of the claims presented to the Commission would be predicated, and the extremely novel character of the functions delegated to the Commission, the question is raised whether or not the recognition of the claims should not rest finally with Congress."[595]

The Attorney General's misgivings proved to have been well founded. The Indian Claims Commission eventually went out of existence in 1978, transferring to the Court of Claims 102 cases remaining from the 370 filed.

591. See, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). See generally Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947).

592. Section 9 of the Act of March 3, 1863, 12 Stat. 767. See United States v. Sioux Nation of Indians, 448 U.S. 371, 384 (1980).

593. 470 U.S. at 255 n.1 (Stevens, J., dissenting).

594. 25 U.S.C. § 70 et seq.

595. *Cited in* United States v. Dann, 53 U.S.L.W. 4169, 4171 (1985) (quoting Attorney General Clark).

Tribal claims before the Commission confronted substantive as well as procedural complications and limitations. Many claims were dismissed. Compensation on successful claims was figured at 19th-century values. Interest might or might not be paid. Ten percent of awards went for attorney fees, an encouragement to lawyers to pursue remedies that their clients may not have understood and may not have approved.[596]

It is noteworthy that the Oneidas, who won, had withdrawn their claims from the Commission, while the Danns, who lost, had tried to withdraw from the Claims Commission but were not allowed to do so.[597] The Danns have never received compensation for the land taken. The Commission failed to satisfy the tribes and failed to satisfy Congress's desire for finality.

The case of the Black Hills is illustrative.[598] The 1868 Fort Laramie Treaty with the Sioux was "a complete victory for Red Cloud and the Sioux,"[599] the only time the United States has "gone to war and afterwards negotiated a peace conceding everything demanded by the enemy and exacting nothing in return."[600] The Black Hills were Indian country. Subsequently, however, George Custer's "florid descriptions" of gold and other resources in the Black Hills attracted prospectors.[601] The Army was sent to keep prospectors out. President Grant soon acquiesced in the invasion by the prospectors, a clear and direct violation of the treaty. The Army then turned upon the Sioux. In the course of that campaign Sitting Bull defeated Custer at the Little Big Horn. The Sioux won the battle but lost the war to protect themselves, their treaty rights, and their Black Hills.[602] The loss was inflicted by illegal trickery. The Fort Laramie treaty had specified that any subsequent cession of land to the United States would require consent of three-fourths of the adult males of the tribe.[603] The United States took the Black Hills by extracting from the Sioux a treaty ceding the land; no more than 10% of the Sioux nation's males consented, and there is doubt about the authenticity of the agreement of those few.

The Sioux have always maintained their right to the Black Hills.[604] Until Congress passed a special jurisdictional act in 1920,[605] there was no legal forum in which they could seek vindication of their right. With the passage of the special act, they filed a claim for the United States's violation of the

596. For accounts of the debacle, see, e.g., Pueblo of Santo Domingo v. United States, 647 F.2d 1087 (Ct. Cl. 1981) (Nichols, J., dissenting); United States Indian Claims Commission, Final Report (1978); V. Deloria, Behind the Trail of Broken Treaties 221–28 (1985); Coulter, The Denial of Legal Remedies to Indian Nations Under U.S. Law, *in* Rethinking Indian Law at 103, 106-7 (cited in note 35); Danforth, Repaying Historical Debts: The Indian Claims Commission, 49 N.D.L. Rev. 359 (1973)).

597. County of Oneida v. Oneida Indian Nation, 470 U.S. 250 n.25.

598. See generally F. Prucha, The Great Father 540–41, 631–40 (1984); P. Matthiessen, Indian Country 201–20 (1984); R. Slotkin, The Fatal Environment 325-476 (1984).

599. United States v. Sioux Nation, 448 U.S. 371, 376 n.4 (1980).

600. *Id.*

601. *Id.* at 377.

602. *Id.* at 377–80.

603. *Id.* at 381.

604. *Id.* at 383–84.

605. Act of June 3, 1920, ch. 222, 42 Stat. 738.

Fifth Amendment in the taking of the Black Hills. In 1942 the Court of Claims dismissed the action.

The Indian Claims Commission was created in 1946,[606] and the Sioux claim was submitted to that body in 1950. A couple of decades later, the Commission found that the Fifth Amendment had indeed been violated.[607] That judgment was upheld by the Court of Claims.[608] Compensation was set at $17.5 million, the value of the 7.3 million acres determined at the time of their taking in 1877. Five percent interest was allowed, bringing the total to over $100 million.[609] The Supreme Court upheld the decision.[610] Most of the Sioux have refused to accept the money, which they view as no substitute for the return of their land.[611]

The Commission produced long delays and questionable valuation of land but could produce no result satisfactory to the Sioux. Commission remedies were limited; the only available award was money. Moreover the Sioux were subject to such representation as they could obtain. Inexplicably, the attorney for the Sioux conceded that the United States could legally abrogate the Fort Laramie treaty and that the United States held title to the Sioux and all other Indian land. Counsel focused on money damages. The lawyers have received their 10% of the recovery that their clients have refused.[612]

Barsh and Henderson note:

> A question may yet arise whether the Indian Claims Act itself was in violation of the Fifth Amendment, by reason of its valuation formula, leading to a second round of compensatory litigation. That would, however, do little to advance the political future of tribes. It is in the nature of claims to settle past accounts, rather than validate future relationships. Indeed, the fact that termination legislation followed the Indian Claims Act by just seven years is suggestive. Moreover, tribes in their governmental capacity today have access to far greater sums through federal assistance, both general and Indian-related, than the prosecution of claims ever produced. Finally, claims awards have always been expended only for such purposes as the United States directs or approves. . . . Secretary of the Interior Krug boasted to Congress in 1971 that the application of judgment funds to existing federal programs should obviate any concern that the claims policy would result in a net loss to

606. 60 Stat. 1049, 25 U.S.C. §§ 70 et seq.

607. 33 Ind. Cl. Comm'n 151 (1974).

608. 601 F.2d 1157 (Ct. Cl. 1979).

609. 448 U.S. 371 (1980).

610. *Id.*

611. See Oglala Sioux Tribe Indian Reservation v. United States, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). See, e.g., The Aggressions of Civilization 204–5 (Cadwalader & Deloria eds. 1984).

612. See United States v. Sioux Nation. 448 U.S. at 411 n.27, 413 n.28; Tullberg and Coulter, The Failure of Indian Rights Advocacy: Are Lawyers to Blame? *in* Rethinking Indian Law 51, 53 (cited in note 35).

the United States, and pointed out that the total judgment funds expended have little exceeded the Bureau of Indian Affairs' annual budget.[613]

In sum, the Fifth Amendment's provision for compensation upon a taking of property does not apply to aboriginal title. Only "recognized" property qualifies. "Recognized" property will not qualify if it has been taken by the government acting as trustee. Not until the creation of the Indian Claims Commission was there a means of general applicability by which Indians could present claims for such compensation as might be due them. The process and results of the Commission were unsatisfactory, and it has expired. The money it did award to tribes has been refused by them in some instances both because money is viewed as no substitute for land and because it forecloses tribal rights to the land, a result that the Indians often did not anticipate or understand.

b) Due process. In the course of representing the Passamaquoddy and Penobscot Tribes in their claims against the state of Maine, Professor Archibald Cox argued that tribal property is protected by the Fifth Amendment. His argument was premised upon the due process rather than the taking clause.[614]

Cox argued that *Tee-Hit-Ton* was limited to the questions whether a taking had occurred and whether taking of Indian property required just compensation. *Tee-Hit-Ton*, he said, did not involve "the question whether a particular exercise of plenary control over Indian property was so derelict in respect to Congress' obligations to the Indians and so fundamentally unfair to them as to violate the Due Process Clause."[615] For support of this interpretation, he called upon Congress's tradition of paying compensation and the case of *Delaware Tribal Business Committee v. Weeks*.[616]

Cox's argument was good advocacy. It was not necessarily a statement of the law.

In *Cherokee Nation v. Hitchcock*,[617] the Cherokee Nation argued that its property had been deprived without due process.[618] Over the tribe's opposition, the Secretary of Interior sought to lease their lands for mining. Since the Secretary was acting pursuant to the Act of June 28, 1898,[619] the challenge was to the constitutionality of that legislation. The Court noted that Congress's power was plenary and that the manner of its exercise was a political question.[620] Nevertheless, the Court did review the action and found no question of taking (or presumably of deprivation without due process). The statute, explained the Court, related "merely to the control or

613. Barsh & Henderson, The Road 94 n.40 (1980).
614. Portions of the memorandum are printed in Getches, Rosenfelt, & Wilkinson, Federal Indian Law 249–52 (1979).
615. *Id.* at 250.
616. 430 U.S. 73 (1977).
617. 187 U.S. 294 (1902).
618. *Id.* at 299.
619. 30 Stat. 495.
620. 187 U.S. at 306–8.

development of the tribal property."[621] There was to be administrative control of the property notwithstanding tribal opposition and "even though the members of the tribe have been invested with the status of citizenship."[622]

Later the same term, the Court decided *Lone Wolf v. Hitchcock*.[623] Again due process was argued as a bar to the forced sale of reservation land.[624] Again the Court invoked the notions of congressional plenary power and political questions. And again it considered the facts anyway and found only "a mere change in the form of investment of Indian tribal property."[625] The "mere change in form" was the conversion of land for half its value over strenuous tribal opposition and in clear violation of treaty. The Due Process Clause was of no avail to the tribes.

Delaware Tribal Business Committee v. Weeks, cited by Professor Cox, has not effectively altered the toothlessness of due process. *Weeks* discarded the political question doctrine as a bar to judicial scrutiny of legislation.[626] But in *Cherokee Nation v. Hitchcock* and *Lone Wolf*, the political question doctrine had not prevented the Court from scrutinizing Congress's action. In those cases when the Court took a look, it reported seeing no violation of the Fifth Amendment. Since the *Weeks* disavowal of the political question doctrine, the Court has still not imposed any limit on Congress's power over the tribes.

Weeks may actually constitute precedent for a further expansion of congressional power.[627] It certainly opened the way for an expansion of the Court's power over the tribes. In fact, we may wonder just how far the political question veil was raised. Although it expressed hesitancy about invoking the political question doctrine, the Court reaffirmed its readiness "to defer to congressional determination of what is the best or most efficient use for which tribal funds should be employed."[628]

Not long after *Weeks*, the Court decided *Rosebud Sioux Tribe v. Kneip*.[629] Congress had taken three-quarters of the Rosebud reservation and retracted its boundaries. In doing so, it violated the United States treaty promises. The Supreme Court, with several citations to *Lone Wolf* and Congress's reliance upon it, could find no constitutional violation. Although compensation was eventually paid, there had been no guarantee at the time of the taking, as a dissent pointed out.[630] There was no compensation for the diminishment of the tribe's governmental boundaries.

621. *Id.* at 307–8.
622. *Id.* at 308.
623. 187 U.S. 553 (1903).
624. *Id.* at 564.
625. *Id.* at 568.
626. Delaware Tibal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977).
627. See Newton, Federal Power 275–78 (cited in note 202).
628. 430 U.S. at 84. The same point was subsequently repeated in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978), with a citation to *Lone Wolf*.
629. 430 U.S. 584 (1977).
630. *Id.* at 616 (Marshall J dissenting).

Professor Cox constructed a fine advocate's argument on behalf of the Passamaquoddy and Penobscot Tribes. The fact remains that *Lone Wolf* is alive and well. The Court has decided no case in which due process has provided substantive grounds for protecting a tribe.[631]

When *Delaware Tribal Business Committee v. Weeks* raised the veil of the political question doctrine, it proposed that the Court would not disturb legislative action tied rationally to Congress's obligation to Indians.[632] This seemed to constitute a rational basis test.[633] In *Washington v. Yakima Indian Nation*,[634] however, the Court upheld a crazy-quilt pattern of jurisdiction that had been forced upon a reservation and that a three-judge panel had found to lack any rational foundation.[635] Notwithstanding the injury done to the tribal government and to reason, the Court said it was "well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes."[636] No mention was made of the need to demonstrate a reasonable tie to Congress's obligation to Indians.

Neither the Congress nor the Court has been restrained in fact by any due process requirement of rationality.

2. Equal Protection

Equal protection of the law, required of states by the Fourteenth Amendment, is an obligation of the federal government under the Due Process Clause of the Fifth.[637]

Although equal protection jurisprudence might be made to benefit tribes,[638] it has generally become something of a threat to them.[639] Assimilationist policy feeds upon egalitarian sentiment. Recently, objection to Indian fishing rights and land claims has been framed in egalitarian terms. For example, "[n]on-Indians in Minnesota, Wisconsin, North Dakota and other states have even begun to form national lobbying organizations, complete with newsletters, arguing that they are being denied equal rights at the expense of Indian rights."[640] As one non-Indian farmer of disputed lands put it: "We are supposedly all citizens of the United States, but the govern-

631. Solem v. Bartlett, 465 U.S. 463, 470 n.11 (1984): "At one time, it was thought that Indian consent was needed to diminish a reservation, but in Lone Wolf v. Hitchcock . . . this Court decided that Congress could diminish reservations unilaterally." (Marshall, J.)

632. 430 U.S. 73, 85.

633. See also United States v. Sioux Nation, 448 U.S. 371, 413 n.28.

634. 439 U.S. 463 (1979).

635. *Id.* at 468.

636. *Id.* at 501.

637. Buckley v. Valeo, 424 U.S. 1, 93 (1976); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

638. See Ball, Diversity in a Peaceable Kingdom: A Future for American Law and Indian Tribes, Church & Soc'y, Jan./Feb. 1985, at 33.

639. See generally Johnson & Crystal, Indians and Equal Protection, 54 Wash. L. Rev. 587 (1979).

640. Schmidt, Many Victims, No Villains in Indian Land Dispute, N.Y. Times, July 15, 1985, at 7, col 2. See also B. Lowman, 220 Million Custers (1978).

ment wants to treat Indian reservations as separate, sovereign nations. Where does that leave us?"[641]

Appeals to equality may be heartfelt and instinctive. Or they may not be. Design and cynicism may also lie at the base of the appeals to equality implicit in a bill submitted to Congress in 1978, the Native Americans Equal Opportunity Act.[642] The bill was scarcely calculated to advance equal protection for Indians. Among other things, it would have abrogated all treaties with Indians, terminated federal supervision of Indian property, subjected Indians to state law, and provided no compensation for lost Indian rights. As Professor Clinton rightly notes, such a measure with its appeal to equality is "only a stalking horse for the assimilationists' real demand—wholesale abrogation and appropriation of Indian property rights."[643]

The Supreme Court has turned back particular equal protection assaults upon tribal integrity and upon tribal means of survival. It has done so in two circumstances: where tribal treatment of an individual was challenged as discrimination by Indians; and where preferential federal treatment of tribes was challenged as discrimination for Indians against non-Indians. Although the tribes have been protected in this way in certain cases, the cases do not represent unequivocal victories for Indians, and they have been subsequently employed against tribes.

a) Discrimination by Indians. One of the more complex examples of appeals to civil rights—including equality—is the Indian Civil Rights Act of 1968.[644]

Beginning with *Talton v. Mayes*,[645] the Supreme Court has held that the Bill of Rights and Fourteenth Amendment do not apply to tribal government. Out of expressed concern for the rights of Indians, Congress enacted the Indian Civil Rights Act to "protect individual Indians from arbitrary and unjust actions of tribal governments."[646] This act ended Public Law 280's extension of state law over Indian country absent tribal consent. But

641. Schmidt, cited note 640. For thoughtful response to the egalitarian critique of tribalism see Barsh & Henderson, The Road 243–49. To the degree that it has been subsumed under individualism, equality is a foreign concept in tribalism. This is not because tribes deny equality to their members but because individualism is not a relevant category. In the Western tradition, perhaps the closest analogy to the tribe is the *polis* of Greece or the *koinonia* of the New Testament or the people of the Old Testament. Where the body politic is a body, concern for equality yields to concern for the collective reality and therefore to greater honor for the least parts, a kind of reverse hierarchy in which the first are last and the last first. For effective extended presentations of tribalism—its nature as an expression of humanity more integrative and protective of the person than Western models of government—see, e.g., V. Deloria & C. Lytle, The Nations Within (1984); V. Deloria, Behind the Trail of Broken Treaties (1974).

642. H.R. 13329, 95th Cong., 2d Sess. (1978) (introduced at 124 Cong. Rec. H6189 (daily ed. June 28, 1978)).

643. Clinton, Indian Autonomy, 33 Stan. L. Rev. 979, 1018 (1981).

644. 25 U.S.C. §§ 1301-1341 (1976). See generally Burnett, An Historical Analysis of the 1968 "Indian Civil Rights" Act, 9 Harv. J. Legis. 557 (1972).

645. 163 U.S. 376 (1896).

646. S. Rep. No. 841, 90th Cong., 1st Sess., 5 (1967).

it also made a selection and modification of the Bill of Rights applicable to tribal government. Omitted, among other rights provisions, are the prohibition upon establishment of religion and the requirement of jury trials in civil cases. The Equal Protection Clause is modified to read: "No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws."[647]

An equal protection challenge under the statute was brought in *Santa Clara Pueblo v. Martinez*.[648] Reflecting its commitment to traditional values, the Pueblo granted tribal membership to the children of male but not of female members who married outside the tribe. The Supreme Court upheld the Pueblo's practice. The Court noted that, while one purpose of the act was to strengthen the position of individual Indians, another purpose was to promote tribal self-government.[649] Martinez had sought federal declaratory and injunctive relief from the Pueblo's denial of membership to her child.

The Court noted that the Indian Civil Rights Act did not expressly provide any federal remedy except that of habeas corpus.[650] To infer a federal remedy other than habeas corpus, said the Court, would undermine tribal self-government.[651] Moreover, implication of additional remedies would be unnecessary for realization of the other purpose of the statute, protection of individual rights, since tribal forums are available for vindication of the statutorily created rights.[652]

The act and the Court thereby upheld tribal independence against an equal protection challenge. But the case illustrates both the use of equal protection against tribes and the difficulties tribes confront in attempting to plead their case to civil rights advocates. (The ACLU filed an amicus brief against the tribal position.)[653] The Court did not allow use of the Indian Civil Rights Act against the tribe. However, the act itself, although supported by many Indians, is regarded by others as an act of aggression against the tribes. It is a further example of Good Samaritan non-Indians believing they know what is best for Indians.

In this instance, it is assumed that individual Indians are in need of help against their tribes and that rights legislation is the help they need. On these assumptions Congress imposed the law of selected rights upon the tribes. The Court used *Martinez* to underline once again the plenary power of Congress. It endorsed the Indian Civil Rights Act as an exercise of congressional authority to "eliminate the powers of local self-government which the tribes otherwise possess."[654] Once again the Court based this authority upon *Kagama*, which found a congressional action unconstitu-

647. 25 U.S.C. § 1302.
648. 436 U.S. 49 (1978).
649. *Id.* at 61–62.
650. *Id.* at 57–58.
651. *Id.* at 64.
652. *Id.* at 65.
653. *Id.* at 50n.
654. *Id.* at 56.

tional but supportable out of necessity. Rights, like trusteeship, can furnish unlimited power with a language of morality.

The serious, complex damage inflicted upon tribes by the liberally motivated Indian Civil Rights Act is described by Vine Deloria:

> The real impact of the Indian Civil Rights Act . . . was to require one aspect of tribal government—the tribal court—to become a formal institution more completely resembling the federal judiciary than the tribal government itself resembled either the state or federal governments. The informality of Indian life that had been the repository of cultural traditions and customs was suddenly abolished, and in its place came the rigid requirements that were necessary to identify those instances in which the actions of the tribal government impinged upon the rights of tribal members. The ICRA basically distorted reservation life because it meant the imposition of certain rules and procedures with respect to the tribal courts that did not exist and could not exist in any of the other reservation institutions—the tribal government, tribal schools, and tribal economic enterprises.
>
> In philosophical terms it is much easier to describe the impact of the Indian Civil Rights Act. Traditional Indian society understood itself as a complex of responsibilities and duties. The ICRA merely transposed this belief into a society based on rights against government and eliminated any sense of responsibility that the people might have felt for one another. Granted that many of the customs that made duties and responsibilities a serious matter of individual action had eroded badly in the decades since the tribes had agreed to move onto the reservations, the impact of the ICRA was to make these responsibilities impossible to perform because the act inserted the tribal court as an institution between the people and their responsibilities. People did not have to confront one another before their community and resolve their problems; they had only to file suit in tribal court.[655]

Barsh and Henderson also point out that civil rights lawyers who supported the Indian Civil Rights Act from the belief that individual citizens need protection from government "failed to realize that tribal government is too weak to serve the basic welfare of Indians, much less to abuse their rights on the scale of state and national government."[656] They also note that federally financed legal services provided lawyers for tribal members who sued tribes but did not provide them for the tribes. As a consequence, "tribes were beset with litigation they often could not afford to defend, and were compelled by judgment or settlement to move rapidly in the direction of non-Indian institutions."[657]

Notwithstanding the intrusion of the Indian Civil Rights Act and its Americanization of Indian institutions, the measure did not go far enough to suit the Supreme Court. The act merely imposed rights law on the

655. V. Deloria & C. Lytle, The Nations Within 213 (1984).
656. Barsh & Henderson, The Road 254 (1980).
657. *Id.* at 254 n.26.

courts. The Supreme Court went further. It divested tribal courts of jurisdiction—and it did so in the name of rights.

Oliphant v. Suquamish Indian Tribe[658] was the case in which Justice Rehnquist invented the "incorporation" of Indian tribes and its implied divestment of tribal authority. The loss inflicted by that case was the removal of jurisdiction to try non-Indians for crimes committed on reservations. According to Justice Rehnquist, with the passage of the Indian Civil Rights Act, "many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared."[659] Evidently too many "dangers" remain. The notion that Indian tribes cannot be allowed to try non-Indians "would have been obvious a century ago when most Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.' [Citing an 1834 report.] It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents."[660]

The Court intervened where Congress had not and divested tribal government of the authority to try non-Indians. Non-Indians had to be saved by the Court from Indian assault upon their rights: "[F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."[661] The Bill of Rights had sounded the call to action.

One is reminded of Richard Slotkin's observation that the mythology of rescuing whites from their Indian captors was a recurrent pretext for making war upon Indians and a means of gaining public support for it. Custer, for example, was represented "as the rescuer and avenger of captive white women, the hero who stands between white civilization and the exterminating fury of the savages."[662]

b) Discrimination for Indians. Equal protection in particular and rights in general have been argued against tribes in their dealings with individuals. The Supreme Court rejected such arguments in *Martinez*. Even so, that opinion endorsed the Indian Civil Rights Act's intrusion upon tribal government and did so by reverting to the plenary power doctrine of *Kagama*. In *Oliphant* the Court divested the tribes of criminal jurisdiction over non-Indians and so accomplished an even more telling direct intrusion upon the tribes. It did so under the aegis of rights.

Rights arguments have also been made against tribes in those circumstances where Indians have been accorded preferential treatment. In its first encounters with these measures of preference—benign discrimination

658. 435 U.S. 191 (1978).
659. *Id.* at 212.
660. *Id.*
661. *Id.* at 210.
662. R. Slotkin, The Fatal Environment 401 (1985).

or affirmative action in favor of Indians—the Court rejected the arguments from equality made by non-Indian objectors. But when the Court upheld this special treatment of Indians to their advantage, it laid the groundwork for later approval of special treatment of Indians to their disadvantage. If Congress was free to favor Indians without legal restraint, it was equally free to disfavor Indians without legal restraint.

The Indian Reorganization Act of 1934[663] accorded an employment preference to Indians in the Bureau of Indian Affairs. The preference was challenged in *Morton v. Mancari*[664] as a violation of equal protection. The Court recited many of the shibboleths of Indian law: the plenary power of Congress, the guardian-ward relationship, conquest, and trust.[665] It concluded that as "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."[666]

Two years later, *Mancari* was given as the explanation for turning back another equal protection challenge to an Indian preference. In *Moe v. Salish & Kootenai Tribes*,[667] Montana argued that reservation tax immunity was an invidious discrimination against the state's non-Indians. The Court disposed of the argument summarily and simply quoted from *Mancari* to say that the equal protection challenge was foreclosed.[668] This protection of an Indian preference against an equal protection challenge did not play a major role in the case. As noted in an earlier section, a major thrust of the case was to extend state taxation onto the reservation. Justice Rehnquist held that the state could tax sales to non-Indians and require the Indian seller to collect the tax. The rejection of the state's advances under the Equal Protection Clause was severely compromised by this allowance of the state's advances made without constitutional cover.

Mancari was offered as the reason for brushing aside another equal protection challenge in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*.[669] There the Court upheld preferential fishing rights for Indians. The state supreme court had found that treaty allocation of a 50% share to Indians, a minority of the population, violated the equal protection guaranteed to non-Indians. The Court relegated its dismissal of this holding to a footnote where it referred to *Morton v. Mancari* and remarked that "the peculiar semisovereign and constitutionally recognized

663. 25 U.S.C. § 461 et seq.
664. 417 U.S. 535 (1974).
665. *Id.* at 551–53.
666. *Id.* at 555. State legislation specially directed to Indians would not receive like treatment since "States do not enjoy this same unique relationship with Indians." Washington v. Confederated Bands, 439 U.S. 463, 467 (1979).
667. 425 U.S. 463 (1976).
668. *Id.* at 480.
669. 443 U.S. 658 (1979).

status of Indians justifies special treatment on their behalves when rationally tied to the Government's unique obligation toward the Indians."[670]

Notwithstanding these defenses of tax immunity and fishing preference, the potential of *Mancari* as a shield for Indian tribes "was transformed into a judicial sword used to support conclusions that legislation unfavorable to tribes or Indian interests is . . . not suspect. The only consistent application of *Mancari* . . . has been to uphold the exercise of congressional power and to justify judicial deference to Congress."[671]

That *Mancari*'s subsequent history would turn out this way was already anticipated in its reasoning. It offered several grounds for upholding an Indian preference in the Bureau of Indian Affairs as permissible under constitutional equal protection. Each ground bore potential for becoming a reason to uphold action discriminatory against Indians.

First, the Court identified the Bureau's Indian preference as political rather than racial in nature.[672] This approach could have developed into recognition of tribes as collective political realities warranting equality of political treatment. However, it could also—and did—develop in service to a different logic. By classifying Congress's special treatment of Indians as political rather than racial, equal protection arguments were disabled. Consequently, if Congress's differential treatment of Indians is detrimental and provides them with less than equality mandates, Indians do not have recourse to equal protection law. The discrimination is political, not racial, and so is insulated from equal protection scrutiny.

Second, the Indian preference upheld in *Mancari* was said to advance Indian self-government.[673] But the Court's argument reduces the notion of Indian self-determination to a question of bureaucratic management. The Court drew an analogy between the preference for Indians in the Bureau and the requirement that senators inhabit the states they are elected to represent.[674] A job in the Bureau is thought to be somehow similar to a seat in the Senate, and influence at the Bureau somehow equivalent to government of, by, and for the people. Participation by the people in their government becomes "participation by the governed in the governing agency."[675]

The Court seemed unaware of the fact that treaties promised Indians that they might send representatives to Congress. Instead of having a voice in government at the Capitol, they can try to assert their interests at the Bureau. And presumably, the Congress and the Court can claim that they advance Indian self-government by advancing the Bureau.

Third, the Court expressed the fear that, if special treatment of Indians were to be found a violation of equal protection, an entire title of the United

670. *Id.* at 673 n.20.
671. Newton, Federal Power 284 (cited in note 202).
672. 417 U.S. at 553–54 & n.24.
673. *Id.* at 554.
674. *Id.*
675. *Id.*

States Code (25 U.S.C.) would be erased.[676] That is to say, if wrong done tribes is well entrenched, if it is really wrong and systemically unjust, then its very gravity is a ground for continuing it.

The magnitude of an unconstitutional abuse of power is no justification of its continuance. The Court's use of an argument "from long usage" is reminiscent of Chief Justice Marshall's argument that the doctrine of aboriginal title, albeit pretentious, could not be judicially abrogated on account of its pervasiveness and historical precedence.[677]

Fourth, *Mancari* concluded that, as "long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgments will not be disturbed."[678] That is, the judiciary will defer to the legislature. Given the content of the Indian trusteeship and given what can be said to be rationally related to it, there is little chance that any action of Congress will fail the test when it is used.

The negative potential of these four *Mancari* grounds was realized in subsequent cases.

In *Fisher v. District Court*,[679] members of a tribe were denied access to state courts in connection with an adoption proceeding arising on their reservation. The case can be read as a defense of the tribe: the tribal court's jurisdiction was held to be exclusive. The case can also be read as approving congressional action denying to Indians rights that could not be denied to non-Indians. Moreover, the vindicated tribal jurisdiction was viewed as conferred by Congress rather than by the tribe's inherent sovereignty.

Montana's highest court had found that denying Indians access to state courts was a denial of equal protection. The Supreme Court dealt with this issue summarily: political and not racial discrimination was involved. Tribal jurisdiction derived "from the quasi-sovereign status" of the tribe conferred by Congress.[680] The difference in treatment whereby an Indian plaintiff is denied a forum to which a non-Indian has access is justified, said the Court, citing *Morton v. Mancari*, "because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government."[681]

Fisher is a confused per curiam opinion. Before arriving at the equal protection analysis, the Court engaged in a discussion of whether state jurisdiction in adoptions would "infringe" on tribal self-government (the idea originated by *Williams v. Lee*). It said infringement analysis is undertaken

676. *Id.* at 552.

677. Barsh and Henderson in *The Road* 242 (1980) draw the connection to Marshall's opinion in *Johnson v. McIntosh*.

678. 417 U.S. at 555.

679. 424 U.S. 382 (1976).

680. *Id.* at 390, 387.

681. *Id.* at 391.

only where there is no governing federal legislation.[682] However, after presenting its analysis of potential infringement, the Court briefly noted that there is governing federal legislation, that it "is clearly adequate to defeat state jurisdiction," and that state jurisdiction "has now been preempted."[683] The discussion of infringement is gratuitous—and doubly so because the Court also found that the tribe's sovereignty had been consistently protected by federal statute and was unaffected by the state's enabling act.[684]

Furthermore, in its discussion of the enabling act, the Court cited cases that were either inapposite or that contradicted the proposition for which they were cited, a circumstance that prompted Barsh and Henderson to observe: "This confirms the impression that the Court never fully appreciated the interaction of its various Indian decisions and took little time to reread them."[685] After examining other aspects of the opinion, they add: "The Court acquired the power to reach any result it wanted, since it had any number of different, inconsistent rules of varying scope to choose from, all of which could be traced to precedent. Fisher rendered the uncertainty perfect by applying inconsistent rules in the same case and offering no explanation for their relationship to one another."[686]

The year following *Fisher*, *Delaware Tribal Business Committee v. Weeks*[687] contested a congressional action distributing funds from a Court of Claims award for breach of a treaty. Congress had excluded a group within the tribe that had signed the treaty. Following the *Morton v. Mancari* standard, the Court found the exclusion to be rationally tied to fulfillment of Congress's obligation to the Indians. It deferred to Congress's judgment on "the most efficient use" for tribal funds.[688] Discrimination was rational because the excluded group was no longer a recognized tribe but "simply individual Indians."[689] Administrative difficulties would attend any attempt to take account of such groups.[690]

The real shift to use of equal protection against Indians came later the same term with *United States v. Antelope*.[691] In the course of committing a felony, Indians murdered a non-Indian. The crime took place on a reservation. The Indians were tried under the federal Major Crimes Act and were convicted of felony-murder. Had they been non-Indians, they would have been tried under state law, which had no felony-murder provision and which would have required proof of premeditation and deliberation.

682. *Id.* at 386.
683. *Id.* at 390.
684. *Id.* at 386.
685. Barsh & Henderson, The Road 184 (1980).
686. *Id.* at 186.
687. 430 U.S. 73 (1977).
688. *Id.* at 84.
689. *Id.* at 85.
690. *Id.* at 87–89.
691. 430 U.S. 641 (1977).

The Indians argued they had been denied equal protection. The Court responded with the *Mancari* notion that discrimination against Indians was political, not racial.[692] It added that "Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country."[693] The authority cited for this proposition is *United States v. Kagama*,[694] which, it will be remembered, said Congress had no constitutional grounds for prescribing a criminal code for Indian country but upheld the code on the nonconstitutional ground of necessity arising from the "weakness" of the Indians. *Antelope* went on to say that, having power to enact an Indian criminal code, the Congress did not violate equal protection inasmuch as "its own body of law is evenhanded."[695]

Antelope uses *Fisher* as precedent for saying equal protection is not offended when Indians are denied a benefit available to non-Indians: "federal regulation of Indian affairs is not based upon impermissible classifications."[696] The original proposition that equal protection allows a positive preference for Indians is now read as supporting congressional action discriminatory against Indians.

"After *Antelope*," Professor Newton correctly concludes, "it is difficult to conceive of a federal statute regarding Indian tribes, not motivated by racial discrimination, that could be found to violate the requirements of equal protection."[697]

This use of equal protection against tribes was repeated in *Washington v. Yakima Indian Nation*,[698] the case discussed above which upheld crazy-quilt tribal, state, and federal jurisdiction on a reservation. The state had extended its jurisdiction according to a selective scheme tied to the nature of ownership of the land in question. The Ninth Circuit held such a "title-based classification fails to meet any formulation of the rational basis test."[699]

The Supreme Court, citing *Mancari*, determined that the state had acted pursuant to Public Law 280 and that, under federal law, it was permissible to single out Indians in ways, "that might otherwise be constitutionally offensive."[700] The Court said special legislative classification of Indians is not suspect and tribal sovereignty is not a fundamental right. Accordingly it applied the standards of conventional equal protection analysis—irrationality and arbitrariness. It found the standards were satisfied. "In short, checkerboard jurisdiction is not novel in Indian law, and does not, as such,

692. *Id.* at 645–47.
693. *Id.* at 648.
694. 118 U.S. 375 (1886).
695. 430 U.S. at 649.
696. 430 U.S. at 646.
697. Newton, Federal Power 280 (cited in note 202).
698. 439 U.S. 463 (1979).
699. Confederated Bands and Tribes of the Yakima Indian Nation v. Washington, 552 F.2d 1332, 1335 (9th Cir. 1978), *rev'd* 439 U.S. 463 (1979).
700. 430 U.S. 501.

violate the Constitution."[701] The Court thereby upheld a racially discriminatory classification. The state extended its jurisdiction on nonfee land depending upon whether the person was Indian or non-Indian.[702] The Court could not pretend the special treatment was for the benefit of the Indians. It acknowledged that the classification would have violated equal protection had non-Indians rather than Indians been the object of the discrimination.

The Court's most recent foray offers no hope that equal protection law will protect tribes. Equal protection jurisprudence will continue to be used against them. In *Three Affiliated Tribes v. Wold Engineering*,[703] discussed above, a tribe brought a state court action against a non-Indian party for negligence and breach of contract. North Dakota's supreme court denied the tribe access to its state's courts. In rejecting the tribe's equal protection argument, the state court relied on *Washington v. Yakima Indian Nation*. It found that Indians might be treated in ways that would be unconstitutional if non-Indians were involved and that the questioned discrimination against Indians was therefore permissible.

On appeal, the Supreme Court did not reach the equal protection issue. It concluded that the state opinion may have rested on a faulty interpretation of federal statutory law. The Court remanded the case for reconsideration. The majority believed that it was not "required to decide whether North Dakota has denied petitioner equal protection under the Fourteenth Amendment by excluding it from state courts in a circumstance in which a non-Indian would be allowed to maintain a suit."[704]

In dissent, however, Justice Rehnquist did reach the question "whether North Dakota's failure to permit Indians to sue non-Indians in circumstances under which non-Indians could not sue Indians violates the Equal Protection Clause." Phrased in this way, the question, according to Justice Rehnquist, is "not a substantial one" after *Washington v. Yakima Indian Nation*.[705] That is, the North Dakota court's statement of the equal protection issue is correct, and tribes may be treated in unconstitutional fashion because they are tribes.

3. Free Exercise of Religion

Tribes have been subjected to seizure of their land, destruction of their means of subsistence, and dismantling of their sovereignty. And their religion has been assaulted. Indeed, one of the express purposes for European expeditions was conversion of the natives. Subsequently, the Christianizing of Indians, indistinguishable from Americanizing them, became a national policy carried out through governmentally supported sectarian missiona-

701. *Id.* at 502. In the process of allowing this assault upon tribal integrity and its attendant confusion of jurisdiction, the Court also allowed the abrogation of a specific treaty provision guaranteeing the tribe a right of self-government. *Id.* at 478 n.22.

702. See *id.* at 500–501, 498. See generally Newton, Federal Power, 281–84 (cited in note 202).

703. 467 U.S. 138 (1984).

704. *Id.* at 2279.

705. *Id.* at 2284.

ries.[706] Opposition to governmental suppression of Indian religious practices and support for full Indian religious freedom was not mounted until John Collier's attempts to initiate reform in the 1920s.[707] Since then Indian religions have received some protection but remain embattled.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." The Free Exercise Clause has been of some aid to Indians. It is possible that the Establishment Clause might work to the disadvantage of tribal religion.

The Supreme Court has decided none of the First Amendment claims brought by the tribes. Instead it has denied *certiorari* and let stand lower court denials of the religious claims. One denial of *certiorari* did produce a dissent, discussed below, written by Justice Douglas and joined by Justice Marshall.[708]

a) Individual religious practice. In *People v. Woody*,[709] the California supreme court found the First Amendment prevented prosecution of Indians for using peyote, a hallucinogen whose possession was proscribed under state law. The court found that peyote played a central role in the worship and practice of the Native American Church. *Woody* has been followed in some jurisdictions and rejected in others.[710]

As with peyote, so with animals. In *Frank v. Alaska*[711] Alaska's supreme court held that the Free Exercise Clause protected an Indian from prosecution for the out-of-season killing of a moose for use in a potlatch. However, in *United States v. Top Sky*,[712] a federal court upheld the conviction of an Indian craftsman for selling eagle parts to non-Indians; he used eagle feathers to make Indian religious ceremonial objects. The Bald Eagle Protection Act[713] prohibits possession or sale of eagle parts, but it expressly authorizes Indian taking of bald and golden eagles for religious purposes.[714]

As with peyote and animals, so with hair. The practice of wearing long hair for religious reasons has been protected against hair-length regulations

706. See generally F. Prucha, The Great Father 9–11, 30–33, 145–48, 283–92, 394–98, 952, 1126 (1984).

707. See *id.* at 800–805, 1126.

708. New Rider v. Board of Education, 414 U.S. 1097 (1973).

709. 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).

710. Compare State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 946, (1974), with State v. Soto, 21 Ore. App. 794, 537 P.2d 142 (1975). See also Peyote Way Church of God v. Smith, 556 F. Supp. 632 (1983) (upholding exemption of Indians from prosecution for peyote possession).

711. 604 P.2d 1068 (Alaska 1979).

712. 547 F.2d 483 (9th Cir. 1976).

713. 16 U.S.C. § 668.

714. 16 U.S.C. § 668a. (On the issue of whether, absent religious purpose, Indians may take eagles in violation of the act, compare United States v. White, 508 F.2d 453 (8th Cir. 1974) with United States v. Fryberg, 622 F.2d 1010 (9th Cir.), *cert. denied*, 449 U.S. 1004 (1980). See also United States v. Dion, 752 F.2d 1261, *cert. granted*, 54 U.S.L.W. 3252 (1985).

in some instances.[715] In others it has not, as *New Rider v. Board of Education*[716] demonstrates. It was *New Rider* that provoked Justice Douglas's dissent from the denial of *certiorari*.

Douglas's remarks and the lower court opinion are illustrative of the difficulties facing Indian religious claims. Public school administrators forbade an Indian student to wear long hair. The school regulation was upheld. Justice Douglas would have invalidated the hair-length code but on free speech and not free exercise of religion grounds. For the Indian, to wear long hair, he said, was "to broadcast a clear and specific message . . . pride in being an Indian."[717] Justice Douglas would allow Indians to wear long hair as a secular, cultural statement. For the Indian, long hair is a religious practice.[718]

In a concurring opinion in the Circuit Court, Judge Lewis agreed with *New Rider* that Indians regard their long hair as a religious act, but for that very reason he would not protect it: "The Pawnee are near-pantheists, their every act having religious significance in their basic desire to live in harmony with the Universe."[719] The more genuinely and thoroughly religious Indians are, the less protection can be accorded them on the Lewis theory. Moreover, religious diversity, which would seem to be a primary purpose of the religion clauses, is not tolerable when Indians take it seriously and bureaucratic conformity is challenged: "the integrated school system cannot countenance different groups and remain one organization."[720]

b) Religious sites. There are places that Indians have long held sacred. Outside of reservations, these sites generally lie within federal lands. Development of these sites or their surroundings for energy, natural resource, or recreation purposes extinguishes their religious power, their potential for spirit communication, and their supply of sacred plants. The gods are killed, and the source of tribal vitality is destroyed.

Indians unsuccessfully sought to stop one water project because the dammed waters not only denied access to prayer spots but also constituted "the drowning of the Navajo gods."[721] Another tribe sought to stop development of a ski resort that would destroy its "religion's most sacred shrine" and that would cause the nation's people in the future to reject "the view that this is the sacred Home of the Kachinas. The basis of our existence as a society will become a mere fairy tale to our people."[722] The resort proceeded.

715. Gallahan v. Hollyfield, 670 F.2d 1345 (4th Cir. 1982); Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975).
716. 480 F.2d 693 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973).
717. *Id.* at 1099.
718. See, e.g., Teterud v. Burns, 522 F.2d at 360 & nn.4–6.
719. 480 F.2d at 700 (Lewis, J., concurring).
720. *Id.* at 698.
721. Badoni v. Higginson, 638 F.2d 172,177 (10th Cir. 1980).
722. Wilson v. Block, 708 F.2d 735, 741, 740 n.2 (D.C. Cir. 1983).

Tribes have sometimes succeeded in gaining legislative protection of religious sites. For example, in 1970 after a fifty-year struggle, the Taos Pueblo recovered the sacred Blue Lake for religious purposes.[723] And in 1978 Congress passed the American Indian Religious Freedom Act whose purpose was to preserve religious sites from development.[724]

Since 1978 tribes have also sought judicial remedies to protect sites and Indian access to them. Five of the six decisions on the subject allowed destruction of tribal religious sites and thereby "hastened the demise of Indian religious practices that have been kept alive for the past century."[725]

The Supreme Court law followed in these cases was established by *Wisconsin v. Yoder*[726] and *Sherbert v. Verner*.[727] The lower courts typically read the law as prohibiting governmental actions that burden an individual's free exercise of religion unless those actions are necessary to fulfill a governmental interest of the highest order that cannot be met in a less restrictive manner.

Indians have been required by lower courts to show that the sites they wish to protect are within (and not just affected by) the areas about to be developed[728] and that the development will destroy the natural conditions necessary for performance of religious ceremonies.[729] They have also been required to show that the sites are central and indispensable to the Indian religion[730] and, where the project serves a compelling governmental interest, that there is a less restrictive means to its accomplishment.[731]

In general, the courts balance Indian claims for protected use against other user and governmental interests. Only in *Northwest Cemetery Protective Association v. Peterson* has the balance fallen on the side of Indian religion. There the circuit court upheld the district court's conclusion that proposed Forest Service road construction and timbering "would seriously damage the salient visual, aural, and environmental qualities of the high

723. 84 Stat. 1437 (1970).

724. 42 U.S.C. § 1996 (1978).

725. Petoskey, Indians and Religious Freedom, *in* Church & Soc'y, Jan.–Feb. 1985, at 68, 70. The five are Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984); Fools Crow v. Gullet, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); and Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska 1982). The one is Northwest Indian Cemetery Protective Ass'n v. Peterson, 15 E.L.R. 20682 (9th Cir. June 24, 1985). In New Mexico Navajo Ranchers Ass'n v. ICC, 702 F.2d 227 (D.C. Cir. 1983), the Navajo challenged the Interstate Commerce Commission's grant of authority to construct a rail line, and the court found that the agency was only required, prior to construction approval, to enforce railroad consultation with religious leaders. See generally Note, Indian Religious Freedom and Governmental Development of Public Lands, 94 Yale L.J. 1447 (1985); Note, Native American Free Exercise Rights to the Use of Public Lands, 63 B.U.L. Rev. 141 (1983).

726. 406 U.S. 205 (1972).

727. 374 U.S. 398 (1963).

728. Fools Crow v. Gullett, 706 F.2d 856 (8th Cir. 1983).

729. Wilson v. Block, 708 F.2d 735.

730. Sequoyah v. TVA, 620 F2d 1159.

731. Badoni v. Higginson, 638 F.2d 172.

country" of Six Rivers National Forest in California.[732] The high country was integral to tribal religion since tribes traveled there to communicate with the Creator, to perform rituals, and to prepare for religious and medicinal ceremonies.[733] The governmental interests were found insufficient to justify such infringement of religion.

The American Indian Religious Freedom Act has proved of little or no aid because the courts have viewed it as offering no more protection by statute than is provided by the Constitution. Proponents of the act had predicated that it would suffice to stop development of resorts upon Indian religious sites located in public lands. They said a proposed ski resort in the San Francisco Peaks was an example of the kind of development that would be prohibited.[734] This ski resort was allowed to proceed as planned, however; *Wilson v. Block*[735] held that the act only insured constitutional free exercise protection for Indian religion and that free exercise was not impermissibly burdened by the resort.

From the beginning of European presence, a primary purpose has been to extinguish Indian religion. There is no reason to assume a major change in this impulse.

Vine Deloria observes that the works of the Black Elk theological tradition "now bid fair to become the canon or at least the central core of a North American Indian theological canon which will some day challenge the Eastern and Western traditions as a way of looking at the world."[736] It is a singular universe of the pipe, the sacred circle, the hoop, the dance, visions, and dreams. The religion clauses provide no effective protection for this universe.

Among other things, Indian religion embraces the tribal way. To destroy tribes is to destroy Indian religion. But the tribe is not protected by free exercise jurisprudence, and tribal government as religion may be forbidden by the Establishment Clause.[737]

V. Conclusion

Spain was the first European power to colonize Georgia. The coming of the Spaniards was hard enough on the Indians, but these first foreigners were unable to extract wealth from the new colony, and their ponderous bureaucracy was unable to establish more than a toehold on the coast.[738]

732. *Quoted in* Northwest Indian Cemetery Protective Ass'n v. Peterson, 15 E.L.R. at 20684.

733. *Id.*

734. Harris, The American Indian Religious Freedom Act and Its Promise, 5 Am. Indian J. 7, 9 (1979).

735. 708 F.2d 735 (D.C. Cir. 1983). This circumstance is remarked upon in Note, Indian Religious Freedom, 94 Yale L.J. 1447, 1458 n.50 (1985).

736. Introduction, Black Elk Speaks xiv (Neihardt ed. 1982).

737. "[A]ny argument that the existence of tribal government is protected by the first amendment is sure to fail, since western culture so clearly distinguishes between church and state." Clinton, Indian Autonomy, 33 Stan. L. Rev. 979, 995 n.88 (1981).

738. See Hudson, The Genesis of Georgia's Indians, *in* Forty Years of Diversity 25 (Jackson & Spalding eds. 1984).

The English were different. Their slaving and economic system overwhelmed the native inhabitants. The Indians of the Georgia territory were "decimated by a series of Old World diseases beginning in the sixteenth century . . . . The survivors of this germ-and-virus caused holocaust were shattered by yet another holocaust beginning in the late seventeenth century, when they collided with traders, soldiers, herdsmen, and frontiersmen of the oncoming modern world system."[739]

The only hope for Indians was to live deep in the woods of the southern interior. But even there life was uncertain for them. "In all the land there was no safe place. A mere walk to fetch a jug of water could expose one to capture and a lifetime of slavery."[740] The coming of the Spanish and especially of the English rendered the woods also hazardous for Indians.

In one of those revealing reversals by which our imaginations and ideologies turn one reality into an opposite one, the woods came to symbolize to southern white men not their own savagery but that of Indians. There is a patch of woods in Memphis, Tennessee, familiar to lawyers because it was the subject of a famous administrative environmental law case, *Citizens to Preserve Overton Park v. Volpe*.[741] The park has gained wider familiarity as the central image in "The Old Forest," a story by Peter Taylor. About that "immemorial grove of snow-laden oaks and yellow poplars and hickory trees," Taylor's story says:

> It is a grove, I believe, that men in Memphis have feared and wanted to destroy for a long time and whose destruction they are still working at even in this latter day. It has only recently been saved by a very narrow margin from a great highway that men wished to put through there—saved by groups of women determined to save this last bit of the old forest from the axes of modern men. Perhaps in old pioneer days, before the plantation and the neoclassic towns were made, the great forests seemed women's last refuge from the brute she lived alone with in the wilderness. Perhaps all men in Memphis who had any sense of their past felt this, though they felt more keenly (or perhaps it amounts to the same feeling) that the forest was women's greatest danger. Men remembered mad pioneer women, driven mad by their loneliness and isolation, who ran off into the forest, never to be seen again, or incautious women who allowed themselves to be captured by Indians and return at last so mutilated that they were unrecognizable to their husbands or who at their own wish lived out their lives among their savage captors.[742]

The non-Indian majority keeps trying to bury Indians and the wrongs done them in the past. However, even where, as in Tennessee and Georgia, the tribes have been eliminated, modern men cannot forget. They turn victims into aggressors and hack away at the woods and their history.

739. *Id.* at 40–41.
740. *Id.* at 38.
741. 401 U.S. 402 (1971).
742. P. Taylor, The Old Forest, *in* The Old Forest and Other Stories 31, 53–54 (1985).

Not only memory suffers. In fact Indian tribes survive, as do the assaults upon them, mounted now by law and by the Court. Either there are no juridical forms, theories, and strategies for redress or cessation of the cultural wrongs done to Indians, or the judicially cognizable words that can be made to express their grievances are turned against them.

As I have said, bad as this is for tribes, it is worse for the non-Indian majority. The issue for non-Indians is not so much the injury to Indians as it is the non-Indians' own self-inflicted wound—the damage done American law.

The Indians' greatest recent victory in the Supreme Court, *Oneida v. Oneida Indian Nation*, helps to illustrate the point. The Oneida Nation's right to land in New York was vindicated. But the opinion ends on a sad if ominous note. It invites Congress to extinguish the tribe's title.[743] It darkly adds that, failing congressional action, "other considerations may be relevant to the final disposition of this case."[744] All the Oneida recouped was $16,694 plus interest representing rent for use of their land during 1968 and 1969. The Court says "other considerations" may lead it to limit further relief unless Congress acts first and extinguishes the tribe's title; these "other considerations" are equitable considerations."[745]

Equity has long been thought to be aligned with justice, a connection that was modernly revived by the use of equity in the pursuit of justice for blacks, beginning with *Brown v. Board of Education*. Now the Court threatens to move against Indians when Congress refuses to do so and to employ equity, one of the great heads of the law, as its weapon. If the Court makes good on this threat, it will conform to the argument of the story as I have told it. The tribe will suffer injury, but the Court, the non-Indian majority, and the law will suffer debasement. We shall have submitted once again to a repetition of the past.

At the beginning of federal Indian law, Chief Justice John Marshall said American law in its relation to Indians is "opposed to natural right, and the usages of civilized nations."[746] That much has not changed. To the present day, the Court's law is that might is the basis of federal power over Indian nations.

Tribes offer the majority an important insight. Injustice is not peripheral or aberrational. It is built into the legal system. To recognize the validity of the insight would help to save us from idolatry. Tribes clarify for us how

743. 470 U.S. 226, 253 (1985).

744. *Id.* at 253 n.27.

745. *Id.* I should note that during Rex Lee's tenure the office of Solicitor General sometimes actively supported the cause of the tribes, as it did in Oneida. See County of Oneida v. Oneida Indian Nation, 470 U.S. at 253, 243–44 n.15. See also Montana v. Blackfeet Tribe. 53 U.S.L.W. at 4627. But see United States v. Dann, 470 U.S. 39 (1985). Where the government attempted to play the dual role of government and trustee for Indians and where the government was the alleged wrongdoer, then the roles were in conflict, and the government came down on the side of the government.

746. Johnson v. McIntosh, 21 U.S. (8 Wheat) 543, 591 (1823).

one of our great achievements—the constitutional legal system—is a fallen institution. It is a timely bicentennial reminder.

Tribes also offer us hope. The history of the majority's relation to Indians is replete with metaphors of impotence: an oncoming modern world system that could not be altered, manifest destiny that could not be denied, an overpowering wave of non-Indian population inundating Indian country, an irresistible march of civilization. These are the metaphors of people who think events, systems, and institutions are beyond their control and therefore beyond their responsibility.

Tribalism offers the hope of empowerment. Non-Indians have consistently resisted acknowledging the validity of the way Indians live together and govern themselves. Tribalism is typically viewed as a lower form of Western society, and Indians are perceived as aspiring, or needing to aspire, to the higher life of non-Indians. The tribe, however, is not a lower evolutionary form of our society. It took root in this land long before the coming of the Europeans. Remarkably, it has adapted, survived, grown, been renewed. It is a different reality.

I do not mean to romanticize the tribe. That would be to trivialize it. I do mean to say tribes demonstrate that the political structures designed by 18th-century newcomers and the society that has followed are not the only way to live in this land.

Tribes teach us that the non-Indian system is not the only American way, that the dominant structures are contingent, an invention that can be reinvented. Just the fact of the tribes' continuing existence presses a range of fundamental questions, including these: Where are Indian nations to fit in our federal system? Should they be made states? Should they be related to the United States by treaty? What of the possibility of treaty federalism?

Such questions prompt us to explore new realities. We are challenged to revise our fundamental institutions. We are given opportunity to overcome our belittlement.

By not recognizing and accepting the different Indian reality, we deny ourselves its gifts and a wider horizon.

Self-inflicted loss is one of the themes of Peter Taylor's "The Old Forest." The narrator remembers himself, years earlier, on the verge of marriage and coming of age, about to follow the expected social and professional path. He remembers a series of awakenings and events that brought him to confront the meaning of his marrying the appointed bride and his giving up another girlfriend who was not of his background or class or expectation. The girl he would lose—she fled into the old forest—inhabited a different world. About that other girl, he says: "I had never looked at her really or had a conception of what sort of person she was or what her experience in life was like. Now it seemed I would never know. I suddenly realized . . . that there was experience to be had in life that I might never know anything about except through hearsay and through books. I felt that

this was my last moment to reach out and understand something of the world that was other than my own narrow circumstances and my own narrow nature . . . . I had failed somehow . . . to reach out and grasp direct experience of a larger life which no amount of intellectualizing could compensate for."[747]

The loss we inflict upon ourselves by failing to reach out to the Indian world so different from our own is not merely a foregone opportunity. It is an essential default. James Dickey made an observation that is as revealing of politics as it is of poetry. He said that poetry is the adventure of making metaphors, "the deliberate conjunction of disparate items." He gave as an example D.H. Lawrence's reference to a fish as a "gray, monotonous soul in the water." Dickey then went on to point out: " 'Insofar as the juxtaposition of entities be separated by the greater distance, and yet be just, the metaphor will be thereby stronger.' "[748]

In our life together, the greater the differences we embrace, and yet be just, the stronger we are. James Madison talked about these things in terms of diversity: the greater the number of religious and political sects comprehended by the constitutional reality, the stronger the body politic. Correspondingly, the less diverse we are, the weaker and more vulnerable we grow. The less our capacity for strangers, the more impoverished we become.

The failure of an opening to others is most often evident as—or is caused by—a kind of fear. The President's Commission on Law Enforcement and Administration of Justice, probing the causes and fears of crime in a free society, identified a fear of strangers. The Commission observed that this fear of strangers rends the fabric of society. It "implies that the moral and social order of society are of doubtful trustworthiness and stability."[749] We lose faith in our society. We lose confidence in ourselves. We more readily yield up our own freedom and more willingly allow the oppression of others. Fearing others, we destroy ourselves.

The original, continuing wrong committed upon Indians has complex roots deep in the Western tradition. This crime of—and not only in—a free society is associated with a constitutive fear of strangers. In order to transcend this fear, we need something more than the rhetoric of the *Aeneid* or a modern American equivalent. We certainly need something better than the shabby tales composed by the Supreme Court.[750]

747. P. Taylor, The Old Forest 80 (1985).

748. J. Dickey, Metaphor as Pure Adventure 4 (1967) (*quoting* Reverdy).

749. President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society 167 (1967).

750. Nor will it be sufficient to develop a new legal rhetoric employing the language of the Coase theorem, as suggested by B. Ackerman, Reconstructing American Law (1984).

Perhaps the first order of new business is to develop a capacity to hear the voiceless. See Soifer, Listening and the Voiceless, 4 Miss. Coll. L. Rev. 319, 322–26 (1984). In working through these matters, I have depended upon the fruitful, suggestive work of Professor Soifer and upon conversations with him. In addition, I must also happily acknowledge dependence upon the exceptional work of Professor

Robert Cover in writing this essay. I have had especially in mind his creative Nomos and Narrative, 97 Harv. L. Rev. 4 (1983), and related subjects we have talked about. Federal Indian law may be grasped as an extended example of the judicial-constitutional violence to which he has directed our attention.