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The Sovereignty of Indian Tribes: A Reaffirmation And Strengthening in the 1970's

*Keith M. Werhan**

I. Introduction

A government exercising sovereignty within the territorial domain of a far more powerful, conquering sovereign is an anomaly;[1] dual citizenship, tribal and American, with quite different rights and duties, is also an anomaly.[2] Yet the map of the United States is flecked with these anomalies.[3] The renewed assertion by Indian tribes of their sovereign powers poses puzzling and unique questions of sociology, political science, and law. The Supreme Court in recent years, and in particular in its 1977 term, reaffirmed the doctrine that Indian tribes possess very real but limited sovereignty.[4]

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1 *See* W. BISHOP, JR., INTERNATIONAL LAW 422 (3d ed. 1971). Chief Justice John Marshall, in one of the major decisions laying the foundation of Federal Indian Law, observed: "Most usually, [citizens of conquered nations] 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." Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 589 (1823). This wholesale assimilation has never occurred with the American Indian tribes, notwithstanding occasional assaults on tribal societies by the various institutions of this nation. *See generally* 1 Am. Indian Pol'y Rev. Comm'n Final Rep. 51-82 (1977); Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445 (1970). The special status of Indian tribes has survived the end of the treaty-making period in 1871, 25 U.S.C. §71 (1976); Board of County Commissioners v. Seber, 318 U.S. 705, 716 (1943); F. COHEN, FEDERAL INDIAN LAW 274 (1971), the admission of the Western territories as states of the Union, *e.g.*, United States v. Ramsey, 271 U.S. 467, 469 (1926), and the conferral of United States citizenship on Indians in 1924, 8 U.S.C. §1401(a)(2)(1976); *e.g.*, McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172-73 (1973). Marshall's insight remains as true today as it was nearly 150 years ago: "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

2 *See* note 1 *supra*. Tribal citizenship is a status that can yield palpable benefits to members. *See e.g.*, Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977).

By virtue of their United States citizenship, tribal members are citizens of the states within whose boundaries they reside. U.S. CONST. amend. XIV, §1.

3 There are 287 tribal governments operating within the United States. Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670, 1681 n.21 (1978).

4 Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978); United States v. Wheeler, 98 S.Ct. 1079 (1978); Oliphant v. Suquamish Indian Tribe, 98 S.Ct. 1011 (1978). The Court also held in the 1977 term that the land designated by the federal government as a reservation for the Choctaw Indians was "Indian country" within the meaning of the Major Crimes Act, 18 U.S.C. §1153 (1976), and, accordingly, that federal courts, but not state courts, had jurisdiction to try those alleged of committing a crime included in the Act. United States v. John, 46 U.S.L.W. 4806 (U.S. 1978).

The concept of sovereignty originated in the sixteenth century,[5] when many Indian nations were thriving.[6] This doctrine was developed in Europe to order the relations of then-emerging, independent and equal states subject to no common, political, superior power.[7] As articulated by Jean Bodin in *De Republica,* published in 1576, each state possesses a power, termed sovereignty, that is the source of law, but which is not bound by law.[8]

The doctrine of sovereignty was applied to the indigenous Indians by the British colonists of America, who dealt with tribes as independent nations with whom formal treaties and agreements could be, and were, executed.[9] This policy coexisted with the Crown's claim of sovereignty in all lands discovered in its name; but that claim was directed against other European powers, not against the tribes.[10]

This confused policy is readily explained, not by theory, but by simple pragmatics. English colonies had to deal with the tribes in their vicinity to solve problems as they arose.[11] The response to this need was a series of agreements that acknowledged the right of Indians to occupy the land claimed by the Crown, but that recognized that these lands could be transferred to colonists as a result of war, sale, or the departure of the original inhabitants.[12]

Similarly, pragmatics in large part explain the manner in which the "much-abused word,"[13] sovereignty, has been applied to America's Indian tribes. Sovereignty is power, pure and simple.[14] Application of the doctrine of sovereignty to Indian tribes acknowledges simply and fundamentally that they are governments with the authority to manage their own affairs within their own territory.[15]

5 *See* W. BISHOP, JR., *supra* note 1, at 12. Certain international rules and institutions resembling our contemporary system of international law, however, are found in ancient China and India, Classical Greece, and in early European history. *Id.*

6 For example, the Santa Clara Pueblo has been in existence for over six hundred years. Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670, 1673 (1978).

7 *See* W. BISHOP, JR., *supra* note 1, at 12. Among the factors contributing to the development of the modern system of International Law were the discovery of America and the later European conquests of the Indian people and overseas settlements. *Id.*

8 *Id.* Although free from domestic law, a state's sovereign power was considered bound by divine law, natural law, and by the law of nations. *Id.*

9 Washburn, *The Historical Context of American Indian Legal Problems,* 40 L. & CONTEMP. PROB. 12, 12 (1976).

10 *Id.* at 12-13. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823). European governments denied each other's assertions of sovereignty over lands casually explored or lightly settled. Washburn, *supra* note 9, at 13. Occupation, not discovery, increasingly became proof of sovereignty, as recognized by the states of Europe. *Id.* European sovereignty was pressed against Indian nations much later, when the Indians had lost much of their power and could not adequately defend against the assertion of European title. *Id.*

11 Washburn, *supra* note 9, at 13-14.

12 *Id. See* United States v. Kagama, 118 U.S. 375, 381 (1886). This has been termed the right of preemption, as articulated by Secretary of State Thomas Jefferson and Secretary of War Henry Knox in the 1790's. Washburn, *supra* note 9, at 13. It has been suggested that purchase was the principal means by which Indians transferred title to the present area of the United States to non-Indians. *Id.* at 14.

13 J. L. BRIERLY, LAW OF NATIONS 142 (4th ed. 1949).

14 *Id.* Mr. Brierly explained:

> At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states. When a state exercises an authority of this kind over a certain territory it is popularly said to have "sovereignty" over the territory. . . .

Id.

15 *Id.;* 1 Am. Indian Pol'y Rev. Comm'n Final Rep. 99-100 (1977).

This surface simplicity yields to ambiguity, however, when one attempts to integrate the sovereignty of Indian tribes, their right of self-government, with the sovereignty of the fifty states and the supreme sovereignty of the United States. This allocation of power among governments, although often discussed and argued in esoteric applications of legal precedent, is, at its core, an attempt to operate the machinery of government by the peaceful coexistence of power centers with different constituencies and often with competing interests. This is why the Supreme Court has been asked, for over 150 years, to delineate the nature and powers of tribal governments and their place within the American system. And this is why the Court repeatedly has obliged.

The Court, in its October Term, 1977, issued three decisions that are important links in the continuing process of defining the powers of tribal governments.[16] This article will discuss the Court's opinions in these cases in the historical context of its decisions on the nature and powers of tribal governments, which extends to the beginning of American jurisprudence.

II. The Marshall Decisions

Early in the nineteenth century, Chief Justice John Marshall laid the foundation upon which the doctrine of Indian tribal sovereignty has been developed. The Chief Justice had little guidance from the Constitution, wherein Indians are mentioned only twice.[17] The commerce clause gives Congress power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,"[18] but this provision hardly settled the precise nature of tribal status or the relations of the tribes with the states or the federal government. Chief Justice Marshall drew on principles of International Law, past dealings of European governments and the English colonies with the tribes, and basic common sense to formulate a judicial approach to relations with Indian tribes and their people that, with modification, thrives to this day.

In *Johnson v. McIntosh,*[19] the Court held that courts of the United States could not recognize transfers of title to land from Indian tribes to private individuals.[20] To reach this result, Chief Justice Marshall equated rights by discovery with rights by conquest, "[h]owever extravagant [this] pretension . . . may appear."[21] Discovery gave title to the Government, to the exclusion of all other European competitors, and provided the discoverer the sole right of acquiring the soil from the Indian inhabitants.[22] Although the tribes were

16 *See* note 4 *supra.*

17 *See* United States v. Kagama, 118 U.S. 375, 378 (1886). It has been suggested that these constitutional provisions are not a conclusive source of Federal Indian Law. *See* Krieger, *Principles of the Indian Law and the Act of June 18, 1934,* 3 GEO. WASH. L. REV. 279, 281 (1935). In Mr. Krieger's view, the legal status of Indian tribes must be considered "not as originating in the Constitution, but as having its roots in international law." *Id.*

18 U.S. CONST. art. II, §2, cl.2. The fourteenth amendment to the Constitution excludes "Indians not taxed" when determining a state's representation in the House of Representatives. U.S. CONST. amend. XIV, cl.2.

19 21 U.S. (8 Wheat.) 543 (1823).

20 *Id.* at 591-92, 604-05. The Court found that the tribal chiefs had authority from their people to execute the conveyance at issue and that the tribes were in rightful possession of the land sold. *Id.* at 572.

21 *Id.* at 591. The Court found that "title by conquest is acquired and maintained by force. The conqueror prescribes its limits." *Id.* at 589.

22 *Id.* at 573.

acknowledged to have a right of occupancy, "their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[23] All European nations recognized the exclusive right of the discoverer to appropriate the lands occupied by the Indians.[24] After the revolution, the American states accepted this European principle, and it had become "the law of the land," which the courts were powerless to question.[25]

Chief Justice Marshall did not hide his distaste for upholding the Europeans' "pompous claims"[26] to discovered territory, but always the pragmatic theoretician, recognized that he had no choice, whatever one's opinion of the "original justice of the claim which has been successfully asserted."[27] The Chief Justice understood that he could not sustain a title incompatible with that upon which the country was settled and later developed.[28] To hold otherwise would have called into question the legal title upon which the United States rested.

In *Cherokee Nation v. Georgia,*[29] Chief Justice Marshall adopted the logical extension of the *Johnson* rationale; the Court dismissed an original action filed by the tribe for lack of jurisdiction, holding that Indian tribes are not foreign nations within the meaning of the Constitution.[30] The Cherokees had sought to enjoin the state from enforcing laws allegedly intended to destroy the tribal

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23 *Id.* at 574. *See* United States v. Kagama, 118 U.S. 375, 381 (1886).

24 21 U.S. (8 Wheat.) at 584.

25 *Id.* at 584-85, 591.

26 *Id.* at 590. The Court did not wish "to engage in the defence of those principles which Europeans have applied to Indian title. . . ." *Id.* at 589.

27 *Id.* at 588. Marshall summarized his approach as follows:

> 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 usage 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.

Id. at 591-92.

28 *Id.* at 588-89. In Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), the Court denied a fifth amendment claim for compensation for a taking of timber from Alaskan lands held under aboriginal Indian title. Relying on *Johnson,* the Court held that Indian title is "not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which . . . may be terminated and such lands fully disposed by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Id.* at 279. A compensable property right is conferred where Congress by treaty or otherwise has declared that thereafter Indians were to hold the lands permanently. *Id.* at 278-79. *Cf.* FPC v. Tuscarora Indian Nation, 362 U.S. 99, 123 (1960) (lands purchased and owned in fee by Indian tribe could be taken by U.S. under power of eminent domain only upon payment of just compensation). The Court in *Tee-Hit-Ton,* however, carefully distinguished between claims of sovereignty and claims of ownership. 348 U.S. at 287. Thus, even though tribes do not "own" their reservation lands, it does not necessarily follow that they cannot assert sovereignty thereon.

29 30 U.S. (5 Pet.) 1 (1831).

30 *Id.* at 19, 20. The Constitution, *inter alia,* extends the "judicial Power . . . to Controversies . . . between a State . . . and foreign States. . . ." U.S. CONST. art III, §2. This clause provides further that the Supreme Court has original jurisdiction to all cases in which "a State shall be Party. . . ." *Id. See* 30 U.S. (5 Pet.) at 15-16.

government and to appropriate tribal lands.[31]

The Chief Justice again wrestled with the nature of Indian tribes and their place in the young Nation's system of government and jurisprudence, premising his discussion on the observation that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."[32] He thought it clear that the Cherokees comprised "a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself."[33] But the tribes could not be considered foreign nations for a simple reason: Indian territory is a part of the United States.[34] As in *Johnson,* the Chief Justice realized that the United States was and must be acknowledged to be the dominant sovereign and that claims by tribes wholly inconsistent with that status could not be sustained.[35]

Since *Cherokee Nation v. Georgia,* tribes have been unable to assert a claim of independent, sovereign status consistent with the Constitution. But also since that decision, the "peculiar relation"[36] between the United States and Indian nations has been recognized; although not independent of the dominant sovereign, tribes have a special status.[37] Chief Justice Marshall's appellation has survived to this day: Indian tribes are aptly described as "domestic dependent nations."[38]

This view of the status of Indian tribes was cemented a year later in *Wor-*

31 30 U.S. (5 Pet.) at 15. The Court observed:

> If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our aims, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made.

Id.

32 *Id.* at 16. *See* note 1 *supra.*

33 30 U.S. (5 Pet.) at 16. This conclusion was buttressed by the prior dealings of the Government with Indian people. The Chief Justice found:

> [The Cherokees] 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. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

Id. See also Higgins, *International Law Consideration of the American Indian Nations by the United States,* 3 ARIZ. L. REV. 74, 85 (1961); Comment, *The Indian Battle For Self-Determination,* 58 CALIF. L. REV. 445 (1970).

34 30 U.S. (5 Pet.) at 17. The Court found additional support for this view from its reading of the commerce clause, which provides Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." U.S. CONST. art. I, §8, cl. 3. The Court concluded that the founders, having distinguished foreign nations from Indian tribes in article I, had not intended to equate the two in article III. 30 U.S. (5 Pet.) at 18-19.

35 30 U.S. (5 Pet.) at 17. Tribes "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 connexion with them, would be considered by all as an invasion of our territory, and an act of hostility." *Id.* at 17-18.

36 *Id.* at 18.

37 *Id.* at 17.

38 *Id.*

cester v. Georgia,[39] in which Marshall's opinion remains the most important articulation of the doctrine of Indian tribal sovereignty. In *Worcester,* the Court granted a petition for a writ of habeas corpus of a non-Indian sentenced by Georgia to four years' hard labor in the state penitentiary for the offense of residing on Cherokee land without a license and without having taken a loyalty oath to the state of Georgia.[40] The Court held that the assertion of jurisdiction by the state over the Cherokee Nation was void.[41] In his classic formulation of the doctrine of Indian tribal sovereignty, Marshall explained the basis for the decision as follows:

> The Cherokee nation . . . 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.[42]

It remains a lively source of argument whether the basis of the *Worcester* decision is the doctrine of inherent tribal sovereignty or the doctrine of federal preemption. But surely, as the above language demonstrates, Marshall treated the two doctrines as intertwined. He found (1) that Indian tribes were independent, self-governing nations before the discovery of America,[43] (2) that, after discovery, Great Britain considered the tribes as nations capable of governing themselves and of entering into treaty obligations,[44] and (3) that, consistent with that policy, the treaties and laws of the United States contemplate a separate status of the tribes whose intercourse is to be handled only by the central government.[45] The federal government did not create the special status of Indian nations; the Government simply acknowledged it.

If Chief Justice Marshall established the doctrine of tribal sovereignty in *Worcester,* he also indicated clearly just how precarious the status of tribes is. Tribes are distinct, independent "states," but not foreign nations. They are self-governing political societies, but are also wards of the central government. The interaction of these seemingly contradictory notions to build a coherent jurisprudence continued during the nineteenth century with another triumvirate of Supreme Court decisions.

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39 31 U.S. (6 Pet.) 515 (1832).
40 *Id.* at 537, 542, 562-63.
41 *Id.* at 562-63.
42 *Id.* at 561.
43 *Id.* at 542-43, 559-60. *See* text accompanying notes 19-28 *supra.*
44 *Id.* at 548-49, 559-60.
45 *Id.* at 556-57, 561-62. The Court found that Congress "assumed the management of Indian affairs" because it was necessary that the central representative assembly, "which could command the confidence of all," handle this sensitive power. *Id.* at 558.

The *Worcester* doctrine was embodied by the disclaimer clauses included in the statehood acts and constitutions of many Western states. Note, *State Civil Jurisdiction Over Tribal Indians—A Re-Examination,* 35 MONT. L. REV. 340, 341 (1974). As a prerequisite to admission to the Union, each state was required to disclaim all right, title, and jurisdiction over lands lying within the boundaries of Indian reservations. *Id.* Authority over Indian lands was to remain exclusively with the federal government. *Id.*

In *Ex Parte Crow Dog,*[46] the Court granted a petition for a writ of habeas corpus of a member of the Brule Sioux band being held by the United States marshall of the Dakota Territory under a death sentence for the murder of another tribal member on the Sioux reservation.[47] The Court necessarily left jurisdiction over such crimes to the tribe.[48]

Although the *Crow Dog* decision has been termed "[a]n extreme application of the doctrine of tribal sovereignty,"[49] the case technically is one of statutory construction. The question presented to the Court was whether there was federal jurisdiction over this crime and, more specifically, whether the federal statutes that precluded jurisdiction over crimes by one Indian against another Indian within Indian Country were repealed by a later treaty with the Sioux tribes and a later act of Congress applicable to some Sioux bands.[50] The Court held that although the Government could have asserted this jurisdiction, it had not.[51]

The significance of the *Crow Dog* decision lies not only in its intimation of the important, inherent powers tribes have retained as sovereigns, but also in its faithfulness to Chief Justice Marshall's theme of recognizing the tribes' competence to govern themselves except to the extent Congress directs or to the extent the dominance of the United States is substantially threatened.

The predictable response to the *Crow Dog* decision was the Major Crimes Act of 1885,[52] which provided federal jurisdiction over seven, now fourteen, crimes committed within Indian Country by one Indian against another.[53] In *United States v. Kagama,*[54] the Court upheld the Major Crimes Act as a lawful exercise of the power of Congress.[55] Congress' power to regulate commerce with Indian tribes, however, was not considered sufficient to justify imposition of a system of criminal laws on the tribes.[56] The Court found the source of this

46 109 U.S. 556 (1883).
47 *Id.* at 557, 572.
48 *See id.* at 568-69; F. COHEN, *supra* note 1, at 124-25.
49 F. COHEN, *supra* note 1, at 124.
50 109 U.S. at 562, 570. Section 2145 of the Revised Statutes extended federal jurisdiction to crimes committed within "Indian country," *id.* at 560, where the Court held the homicide at issue had occurred, *id.* at 562. Section 2146 of the Revised Statutes, however, excepted from section 2145 crimes committed by one Indian against another Indian. *Id.* It was section 2146 that the Court held was not repealed and that, accordingly, barred the jurisdiction asserted by the district court. *Id.* at 572.
51 *Id.* at 567, 570. *See* United States v. Kagama, 118 U.S. 375, 383 (1886).
52 Ch. 341, §9, 23 Stat. 362, 385 (1885) (current version at 18 U.S.C. §1153 (1976)).
53 18 U.S.C. §1153 (1976).
54 118 U.S. 375 (1886).
55 *Id.* at 385.
56 *Id.* at 378-79. The Court summarily rejected the commerce clause as a sufficient basis for the Major Crimes Act: "[I]t would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishment for the common law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes." *Id.* The Court's reading of the commerce power differed substantially, however, from that of Chief Justice Marshall, who had found that this power "comprehend[ed] all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

Almost ninety years later, the Supreme Court found it "generally recognized" that the source of federal authority over Indian affairs derives from the commerce power, U.S. CONST. art. I, §8, cl. 3, and from the treaty-making power, U.S. CONST. art. 11, §2, cl. 2. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 n.7 (1973).

authority not in the Constitution, but in the guardian-ward relation between the United States and the tribes first articulated by Chief Justice Marshall in *Cherokee Nation v. Georgia.*[57]

To justify this conclusion, the Court undertook a wide-ranging discussion of the "anomalous . . . and . . . complex character"[58] of the Government's relation with Indian tribes. The Court found that the tribes had always been "regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."[59] The Court stressed the dependent status of the tribes as "wards of the nation,"[60] with a claim on the Government for protection.[61] With that moral duty, the United States had the power necessary to ensure the protection and safety of the Indian people.[62]

The *Crow Dog* and *Kagama* decisions are not inconsistent, but are properly viewed as opposite sides of the *Worcester* coin. The Court in *Crow Dog* recognized the vast, inherent governmental powers of tribes absent restrictions by treaty or federal statute. In *Kagama,* the Court stressed the power of Congress to limit Indian tribal self-government.[63] The refusal to base this authority in the Constitution further expanded the scope of this power. The federal government has power to do whatever it thinks necessary to protect its Indian-wards.[64]

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57 118 U.S. at 383-85. *See* text accompanying notes 36 and 37 *supra.* This view is no longer favored by the Court. *See* note 56 *supra.*

58 118 U.S. at 381.

59 *Id.* at 381-82. The Court supported this view with a discussion of the Cherokee Nation v. Georgia and *Worcester* decisions, which it termed "[p]erhaps the best statement of [the tribes'] position." *Id.* at 382.

60 *Id.* at 383.

61 *Id.* at 384.

62 *Id.* The Court in *Kagama* made clear that there was no role for the states to play in ensuring the survival of the Indian people. *Id.* at 383-84. The Court realistically noted that the tribes "owe no allegiance to the States, and receive from them no protection." *Id.* at 384. The Court eloquently explained:

> 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, as well as to the safety of those among whom they dwell. 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.

Id. at 384-85.

63 It has been suggested that the Major Crimes Act itself, upheld in *Kagama,* re-affirmed the doctrine of tribal sovereignty. *See* Note, *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 MICH. L. REV. 955, 957 (1972). Congress understood the implication of the *Crow Dog* decision, that unless federal legislation were enacted, tribes would retain complete control over criminal offenses by tribal members against other members committed on the reservation. *Id.* at 958.

64 It is often stated that Congress has "plenary power" over Indian affairs. This power, therefore, is exercised to the exclusion of the powers of state governments. 1 Am. Indian Pol'y Rev. Comm'n Final Rep. 106 (1977). Although the power of Congress over Indian affairs is as broad as the authority of states over non-Indians, it is not absolute. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 84 (1977); F. Cohen, *supra* note 1, at 96. Thus, congressional enactments in the area of Indian affairs are reviewable by the federal courts and are subject to constitutional limitations, such as the Bill of Rights. *Id.;* United States v. Tillamooks, 329 U.S. 40, 54 (1946); United States v. Klamath Indians, 304 U.S. 119, 123 (1938); Chippewa Indians v. United States, 301 U.S. 358, 375 (1937); Wallace v. Adams, 204 U.S. 415, 422 (1907); Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899). In reviewing the action of Congress, however, the Court exercises considerable restraint, generally determining only whether a statute is tied rationally to the fulfillment of Congress's

The reconciliation of these differing emphases on the nature of the federal-Indian relation and the status of tribal governments was reached explicitly by the Court in *Talton v. Mayes*.[65] In *Talton*, the Court held that the right to grand jury indictments protected by the fifth amendment to the Constitution does not apply to the local legislation of the Cherokee Nation.[66] The Cherokee Nation was found to exist as an "autonomous body, subject always to the paramount authority of the United States."[67] Thus, the Court held that the crime at issue was not an offense against the United States, but was an offense against the local laws of the tribe.[68] But this was not sufficient to decide the application of the Bill of Rights to tribal governments. The Court was required to determine whether tribal powers of local self-government are, in effect, federal powers.[69] The Court held that this question long ago was answered in the negative.[70]

The Court in *Talton* had no trouble reconciling its decision affirming the inherent powers of tribal self-government with the rule, as was articulated in *Kagama*, that the exercise of these powers is subject to the supreme authority of the Congress.[71] A tribe's power to govern itself, which predates the Constitution, cannot be said to have been created by that charter or by any act of the government it established.[72]

Thus it was that the unique, anomalous, and complex federal-Indian relation entered the twentieth century. Chief Justice Marshall's basic formulation had survived, although the Court at times shifted its emphasis with the question presented and with the times in which it served.[73] Indian tribes are governments recognized, not created, by the Constitution and by the federal government.

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unique obligation toward the Indians. Morton v. Mancari, 417 U.S. 535, 555 (1974); Delaware Tribal Business Committee, 430 U.S. at 85.

65 163 U.S. 376 (1896).

66 *Id.* at 382-83, 385.

67 *Id.* at 379-80. The Court explained: "And from this fact there has consequently been conceded to exist in that nation power to make laws defining offences and providing for the trial and punishment of those who violate them when the offences are committed by one member of the tribe against another one of its members within the territory of the nation." *Id.* at 380.

68 *Id.* at 381.

69 *Id.* at 382-83. When *Talton* was decided, the Court followed the rule established in Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), that the Bill of Rights limited only the federal government, not state governments. *See* 163 U.S. at 382. The incorporation of the Bill of Rights into the due process clause of the fourteenth amendment, and thus as a limit on state governments, did not affect the *Talton* rule. The *Talton* decision most recently was reaffirmed in Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670, 1676 & n.7 (1978).

70 163 U.S. at 383.

71 *Id.* at 384. The Court reasoned that "the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States." *Id.*

72 *Id.*

73 1 Am. Indian Pol'y Rev. Comm'n Final Rep. 101 (1977). An excellent and exhaustive summary of the historical development of Indian legislation and judicial decisions is found in Comment, *The Indian Battle For Self-Determination*, 58 CALIF. L. REV. 445 (1970). The author chronicles the "continuing fluctuations in [congressional] policy and programs of the sort which have plagued Indians since the 1820's." *See id.* at 485. He finds the Supreme Court's treatment of Indian issues to be far more constant, favoring "separationist and anti-assimilationist results." *Id.* at 486. The author considers Indian tribes to be in a "unique position as a congressionally acknowledged, and judicially and historically confirmed, third unit of government within the nation but not included in the federal system. . . ." *Id.* at 487. *See also* 1 Am. Indian Pol'y Rev. Comm'n Final Rep. 571-612 (1977) (dissenting views of Rep. Lloyd Meeds); Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600 (1976).

Their independence and sovereignty were limited, but not destroyed, by discovery and conquest. The capability and right of Indian people to govern themselves were recognized unless limited by the dominant sovereign, which could exercise plenary power[74] to control Indian affairs when it so chose.

III. The State Infringement Test and the Doctrine of Federal Preemption

From its decisions in *Worcester* to *Kagama,* the Supreme Court had found no role for states in the administration of Indian affairs. In these decisions, the Court made clear that the power to supervise tribal affairs rested solely with Congress and that states could not extend their jurisdiction to tribal lands. Once again, however, tribal sovereignty, as an "evolving doctrine,"[75] yielded to the practical requirements of changing circumstances.

As the country expanded and developed across the continent, pressure for state encroachment on tribal government increased. Many Indian reservations became less isolated with their boundaries less discernible. Largely because of shifts in congressional policy, non-Indians at times were allowed to purchase land and reside on certain reservations. Increasingly, non-Indians conducted business on tribal lands and with tribal members.

In *Williams v. Lee,*[76] the Supreme Court re-examined the question answered decisively in *Worcester:* Whether, and if so, to what extent, states can extend their laws to Indian reservations. In *Williams,* a non-Indian who operated a general store on the Navajo reservation brought an action in state court against a Navajo couple, who resided on the reservation, to collect goods sold them on credit.[77] The Arizona Supreme Court had held that the state court could exercise jurisdiction because no act of Congress had forbidden the state from doing so.[78] The United States Supreme Court reversed.[79]

The Court found that the "broad principles" established by *Worcester* had been modified in cases where essential tribal relations would not be affected and where the rights of Indian people would not be jeopardized.[80] The "basic policy" of *Worcester,* however, was intact.[81] The Court thus constructed the state infringement test: "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."[82] In its dealings with the Navajo Tribe, Congress had not departed from its consistent assumption that states have no power to regulate the affairs of Indians on a reservation.[83] The Court held that to allow the state courts to exercise jurisdiction over an ordinary debt col-

74 *See* note 64 *supra.*
75 *See* McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 171 (1973).
76 358 U.S. 217 (1959).
77 *Id.* at 217-18.
78 *Id.* at 218.
79 *Id.* at 223.
80 *Id.* at 219. The Court found that Indian tribes had given up their complete independence as sovereign nations in exchange for federal protection, aid, and land grants. *Id.* at 218.
81 *Id.* at 218.
82 *Id.* at 220.
83 *Id.* at 220-22. The Court noted that it had "consistently guarded the authority of Indian governments over their reservations." *Id.* at 223.

lection action would undermine the authority of the tribal courts and, thus, would infringe on the right of self-government.[84]

The modification of *Worcester's* absolute ban on state interference is not dramatically changed by the state infringement test because, by definition, a significant intrusion by the state would infringe on the right of tribal self-government and thus be invalid. Further, the Supreme Court has limited the *Williams* test to controversies between Indians and non-Indians; the state has no interest in extending its jurisdiction to on-reservation disputes between reservation Indians.[85]

Perhaps the most important aspect of the *Williams* decision was the Court's approach to the question of state jurisdiction. The state court had looked for an act of Congress that precluded its jurisdiction; however, the Supreme Court looked for an act of Congress that granted the state court jurisdiction. Without such an affirmative grant, the question becomes whether the state's assertion interferes with tribal self-government. If it does, it must give way. As in *Worcester,* the Court intertwined the doctrines of tribal sovereignty and federal preemption to preserve the tribes' right to govern themselves without state interference, except to the extent Congress legislates otherwise.[86]

It was this jurisdictional scheme that appeared threatened by the Court's decision in *McClanahan v. Arizona State Tax Commission.*[87] There the Court held that Arizona did not have power to impose a personal income tax on a reservation Indian whose entire income was derived from reservation sources.[88] The Court's analysis, however, was confusing and the precedential value of *Worcester,* for the first time, was called into question. The Court detected a trend away from the "platonic" idea of inherent Indian sovereignty as a bar to state jurisdiction[89] and toward a reliance on the doctrine of federal preemption.[90] The sovereignty doctrine is relevant, not because it resolves the issue of state jurisdiction, but because it provides a "backdrop" against which the applicable treaties and federal statutes that define the limits of state power must be read.[91]

84 *Id.* at 223.

85 McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 179-80 (1973); Kennerly v. District Court, 400 U.S. 423, 427 (1971). *See also* Fisher v. District Court, 424 U.S. 382, 386 (1976).

86 The Court followed a similar approach in Warren Trading Post v. Arizona State Tax Commission, 380 U.S. 685 (1965). There the Court held that the state sales tax could not be imposed on a company that does business with Indians on the Navajo reservation consistently with federal statutes applicable to the Navajos. *Id.* at 685-86. The Court indicated that the federal government had always permitted Indians "largely to govern themselves" and had exercised control over those who wished to trade with Indians. *Id.* at 686-87. The Court found that "[c]ertain state laws have been permitted to apply to activities on Indian reservations, where those laws are specifically authorized by acts of Congress, or where they clearly do not interfere with federal policies concerning the reservation." *Id.* at 687 n.3. Otherwise, Indian people govern themselves without state interference. *Id.* at 686-87, 690.

87 411 U.S. 164 (1973).

88 *Id.* at 165.

89 *Id.* at 172. The Court viewed the *Worcester* principle to hold that Indian reservations are separate, dependent nations and thus, "that state law could have no role to play within the reservation boundaries." *Id.* at 168.

90 *Id.* at 172. The Court read the "modern cases" to look to applicable treaties and statutes which define the limits of state power. *Id.*

91 *Id.* The Court nonetheless cautioned, "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *Id.*

Under the Navajo treaty and the relevant statutes, the Court found that the state did not have power to collect the tax at bar.[92]

It was not clear from the Court's analysis in *McClanahan* whether the state infringement test of *Williams* had been turned about. Under the *Williams* test, one seeks a specific act of Congress to grant state jurisdiction over the subject matter. The Court's preemption analysis in *McClanahan,* however, could be read to require an act of Congress explicitly to grant the tribe jurisdiction which, in turn, would preclude state infringement.

This confusion was continued in the companion decision to *McClanahan, Mescalero Apache Tribe v. Jones.*[93] In *Mescalero,* the Court indicated that the "conceptual clarity" of the *Worcester* approach had "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."[94] The Court nevertheless read *McClanahan* as settling the proposition that states have no power to tax Indian reservation lands or Indian income derived from on-reservation activity absent congressional consent.[95]

In *Bryan v. Itasca County,*[96] the Court again discussed the *McClanahan* decision as having derived from a general preemption analysis.[97] The Court in *Bryan* made clear, however, that this preemption analysis gives a special effect to "the plenary and exclusive power of the Federal Government to deal with Indian tribes. . . ." and to the power of Congress to protect tribes against state interference.[98] The Court read the *McClanahan* and *Williams* opinions to be in harmony, indicating that state laws generally do not apply to tribal Indians

92 *Id.* at 173.

93 411 U.S. 145 (1973). In *Mescalero,* the Court held that the state of New Mexico had power to impose a tax on the gross receipts of a ski resort operated by the tribe outside its reservation boundaries, but did not have power, under the Indian Reorganization Act of 1934, 25 U.S.C. §465 (1976), to impose a use tax on certain personalty purchased out-of-state and used in connection with the resort, 411 U.S. at 157-58. The Court held, *inter alia,* that the resort was not a federal instrumentality constitutionally immune from state taxes and that Indians going beyond reservation boundaries generally are subject to nondiscriminatory state law, absent express federal law to the contrary. *Id.* at 148-50.

94 411 U.S. at 148. The question addressed by the Court in *Mescalero* was whether "paramount federal law permits these taxes to be levied." *Id.* at 146.

95 *Id.* at 148. This interpretation of *McClanahan* is consistent with the Court's treatment of the question before it, which it articulated to reach beyond the Navajo reservation: "[W]hether a State may tax a reservation Indian for income earned on the reservation." 411 U.S. at 180.

The Court re-asserted this reading of *McClanahan* in Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 475-76 (1976). In *Moe,* the Court held that the state did not have power to impose a personal property tax or a cigarette sales tax on reservation Indians, except that the state did have power to tax the on-reservation sale of cigarettes by tribal members to non-members. *Id.* at 480-81. The sales tax at issue, under state law, was a tax on the buyer; the seller was merely a collector. *Id.* at 482. The Court held that the state requirement that the tribal seller collect a tax on non-Indians was a "minimal burden" that in no way frustrated self-government. *Id.* at 483.

96 426 U.S. 373 (1976). In *Bryan,* the Court held that section 4 of (originally enacted as Act of August 15, 1953, ch. 505, §4, 67 Stat. 588) 28 U.S.C. §1360 (1976) does not provide a county with authority to tax personal property owned by a tribal member and located on the reservation. 426 U.S. at 375.

97 *Id.* at 376 n.2. The Court found support for its preemption analysis from the Indian sovereignty doctrine, the Government's historical policy of leaving Indians free from state jurisdiction, and from the extensive federal regulation of tribes and their reservations. *Id.*

98 *Id.*

on the reservation absent explicit provision by Congress.[99] The Court again intertwined the doctrines of tribal sovereignty and federal preemption, observing that "this preemption model" would necessitate a different conclusion if the Indians are not truly self-governing.[100]

Thus, without admitting it, the Court returned to the *Worcester* principle that the central government only has authority to deal with Indian affairs and that the federal-Indian relation is an exclusive one. States can extend their jurisdiction to Indian reservations only to the extent explicitly allowed by Congress or to the extent they do not infringe on the tribal right of self-government. Although the Court had eschewed the high-sounding tones of sovereignty and had embraced, in its judgment, the more practical application of preemption analysis, the results obtained in *Williams, McClanahan,* and *Bryan* are precisely the same as that which would follow from *Worcester.*[101]

IV. The October, 1977, Supreme Court Term and the Doctrine of Inherent Sovereignty

Although the Court's explication of its preemption analysis in *Bryan* yields identical results with the sovereignty analysis of *Worcester* when resolving issues of state jurisdiction over Indian affairs, this is not so when one considers the inherent powers of self-government resting in tribes. The doctrine of federal pre-emption is grounded on the supremacy clause of the Constitution and, by definition, comes into play only when one must decide whether a state law is inconsistent with paramount federal law.[102] A body of Federal Indian Law based solely on the doctrine of federal preemption, carried to its logical end, would hold that Indian tribes are without inherent powers of self-government, but possess and can exercise only those powers given by Congress.[103] The Court, however, has never gone that far.

If one were to accept the *Worcester* view of tribes as sovereigns, albeit conquered and dependent, and of federal treaties and statutes as recognizing, rather than as creating, this special status, a different result is obtained. This view of the inherent powers of Indian tribes was best articulated by Mr. Felix Cohen, the dean of Federal Indian Law, who found that three basic principles govern

99 *Id.*

100 *Id. See* note 97 *supra.* This is consistent with the preemption analysis of *McClanahan,* where the Court stressed at the outset that it was not "dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government." 411 U.S. at 167-68.

101 Since the *Williams* decision, the Supreme Court has allowed state jurisdiction over activity on Indian reservations only once, the very limited state interference permitted in *Moe. See* 1 Am. Indian Pol'y Rev. Comm'n Final Rep. 119 (1977); note 95 *supra.*

102 U.S. CONST. art VI. The supremacy clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

103 *See e.g.,* 1 Am. Indian Pol'y Rev. Comm'n Final Rep. 573-82 (1977) (dissenting views of Rep. Lloyd Meeds); Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?,* 51 NOTRE DAME LAW. 600, 612-18 (1976); Oliver, *The Legal Status of American Indian Tribes,* 38 ORE. L. REV. 193, 232 (1959).

court decisions on the nature and extent of tribal powers.[104] First, Indian tribes possessed all the powers of any sovereign state until conquered by the United States. Second, this conquest rendered the tribes subject to the power of Congress and terminated the tribes' "external powers of sovereignty,"[105] but not their "internal sovereignty." Third, the tribes' powers of local government, their "internal sovereignty," unless expressly qualified by treaty or by Congress, remain vested in tribal governments. In Mr. Cohen's view, the fundamental concept of Indian law is that "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which have never been extinguished."[106]

The inherent, regulatory power of tribal governments was addressed by the Supreme Court in 1975 in *United States v. Mazurie*,[107] where non-Indians were convicted in federal district court for introducing alcoholic beverages into the Wind River Indian Reservation.[108] Congress had passed local-option legislation allowing tribes to regulate the introduction of liquor into Indian Country.[109] The Wind River tribes adopted such an ordinance, requiring that retail liquor outlets within their jurisdiction obtain tribal as well as state licenses.[110] The Mazuries were convicted of operating such an outlet without a tribal license.[111] The Court held, *inter alia*,[112] that Congress had power under the commerce clause to regulate the distribution of alcoholic beverages by non-Indians on land held in fee by non-Indians but within reservation boundaries,[113] and that Congress could delegate this authority to Indian tribes.[114]

The *Mazurie* decision did not uphold an independent exercise of power by the tribe, but rather the authority of Congress to delegate a power of local self-government to an Indian tribe.[115] The Court's rationale, however, is instructive. The Tenth Circuit had struck down the delegation to what is viewed as an "association of citizens."[116] The Supreme Court reversed, noting that the limits on the authority of Congress to delegate its power are less stringent where the

104 F. COHEN, *supra* note 1, at 123.
105 Mr. Cohen gives as an example the extinguishment of the tribes' power to treat with foreign governments. *Id.* He notes, however, that some external powers were not extinguished by conquest, such as the power to wage war and the power to treaty with the United States. *Id.* at 123 n.8.
106 *Id.* at 122 (emphasis deleted).
107 419 U.S. 544 (1975).
108 *Id.* at 545. *See* 18 U.S.C. §1154 (1976).
109 419 U.S. at 547. Congress required that these tribal ordinances be approved by the Secretary of the Interior and that they not violate state law. *Id.*
110 *Id.* at 548.
111 *Id.* at 549. The Mazuries had applied for a tribal license only after being warned that they would be criminally liable if they continued operations without one. Their application was denied after a public hearing during which witnesses protested the grant of a license, complaining of shootings, disturbances of elderly persons residing nearby, and service to Indian minors. The Mazuries closed their bar for three weeks, then re-opened. Operations continued for approximately one year before federal officials initiated this prosecution. *Id.* at 548.
112 The Court also held that 18 U.S.C. §1154 (1976) is not unconstitutionally vague. In the light of the bar's location, the statute was sufficiently clear to notify the Mazuries that their bar was not excepted from tribal jurisdiction because of location in a "non-Indian community." *Id.* at 553.
113 *Id.* at 553-56.
114 *Id.* at 556-59.
115 *Id.* at 557.
116 *Id.* at 556.

entity exercising the delegated power "itself possesses independent authority over the subject matter."[117] The Court read the *Worcester* line of decisions to establish that tribes within their territory are considerably more than private, voluntary associations.[118] It was the tribe's independent, or inherent, regulatory authority that sustained this congressional delegation of power.[119]

The issue reserved in *Mazurie,* the scope of the independent powers of tribal governments,[120] was addressed this past term in *Oliphant v. Suquamish Indian Tribe,*[121] where the Court held that Indian tribal courts do not have inherent criminal jurisdiction over non-Indians.[122] The tribe's proffered jurisdiction was based not on an affirmative congressional authorization or treaty provision, but rather on the tribe's assertion of its retained, inherent power to govern on its reservation.[123] The Court found that Congress, the Executive, and the Federal Judiciary had shared the view through history that tribal courts have no power to try non-Indians for criminal offenses.[124]

The Court conceded that Indian tribes have retained elements of governmental authority.[125] Tribal governments, however, cannot exercise those powers that are "expressly terminated by Congress and those powers 'inconsistent with their status.' "[126] The Court thus extended Chief Justice Marshall's view of that which was inconsistent with a tribe's dependent status, holding for the first time

117 *Id.* at 556-57.

118 *Id.* at 557. The Court explained:

> Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory [citing *Worcester* (*see* text accompanying notes 39-45 *supra*)]; they are "separate people" possessing "the power of regulating their internal and social relations. . ." [quoting *Kagama* (*see* text accompanying notes 54-64 *supra*)].

419 U.S. at 557.

119 *Id.*

120 *Id.*

121 98 S.Ct. 1011 (1978).

122 *Id.* at 1014.

123 *Id.* at 1014, 1015. The *Oliphant* case did not present the best factual context in which to judge the tribe's asserted powers of criminal jurisdiction. The Court found that the Suquamish Indian Tribe was one of a series of aggregations of small, loosely related, politically autonomous Indian villages in the Pacific Northwest that were formed into tribes with which the federal government could treat. The Court found the Port Madison Reservation, home of the Suquamish, to be a checkerboard of tribal community land, allotted Indian lands, fee land owned by non-Indians, and various county roads and highways. *Id.* at 1013 n.1. Of the 2,928 persons who resided on the reservation, only 50 were tribal members. *Id.* at 1013 n.1. The persons arrested and tried in the present case were non-Indian residents of the reservation. *Id.* at 1013.

124 *Id.* at 1015-19. This conclusion is questionable in the light of the cloudy history surrounding tribal assertion of this power. For example, the Interior Department, at the time of the passage of the Indian Reorganization Act of 1934, 25 U.S.C. §§461-79 (1976), concluded that a tribe "might punish aliens within its jurisdiction according to its own laws and customs. Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government." *Powers of Indian Tribes,* 55 I.D. 14, 57 (1934). The Court in *Oliphant* did not find that the federal government had "expressly limited" the claimed tribal power. The Court did look to the treaty that established the Suquamish reservation, in the Court's view of its historical perspective, and concluded that the Suquamish, by recognizing their dependence on the United States, probably contemplated that the federal government would arrest and try non-Indian intruders. 98 S.Ct. at 1019-20.

125 98 S.Ct. at 1020.

126 *Id.* at 1021. The Court reiterated Chief Justice Marshall's view that "[u]pon 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." *Id.* The Court ruled that the tribal assertion of criminal power over non-Indians ignored that tribes are located within the United States. *Id.* at 1022.

that tribes are limited in the exercise of their local powers of self-government and in their ability to protect their territory.[127] By submitting to the dominant sovereign, the tribes, in the Court's view, necessarily relinquished the power to try non-Indians except in a manner acceptable to Congress.[128]

Any doubts raised by the *Oliphant* decision as to whether the Court still regarded tribes as sovereigns, albeit diminished, were cast aside two weeks later by the striking reaffirmation of the sovereign status of Indian tribes in *United States v. Wheeler*.[129] In *Wheeler,* the Court held that the double jeopardy clause of the fifth amendment does not bar the prosecution of a tribal member in federal court, notwithstanding a previous conviction in a tribal court of a lesser included offense arising from the same incident.[130] The Court applied the rule that prosecutions under the laws of separate sovereigns do not violate the double jeopardy clause.[131] The Ninth Circuit had held that the dual sovereignty rule was inapplicable to successive prosecutions by an Indian tribe and the federal government because tribes are not sovereigns, but derive their power to punish crimes from the United States.[132]

The Supreme Court fundamentally disagreed with the premise of the appellate court and again adopted Mr. Cohen's view that the tribes' powers of internal self-government are inherent, sovereign powers.[133] Although the tribes are not full sovereigns, neither have they fully yielded their sovereignty.[134] The Court found no problem integrating the doctrine of inherent tribal sovereignty with an acceptance of Congress' plenary control over tribal governments:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[135]

Thus, the Court concluded that the tribe's power to punish its members for

127 *Id.*

128 *Id.* The Court equated the importance of a sovereign's right to protect its territory with the protection afforded by the United States to its citizens against "unwarranted intrusions on their personal liberty." The power to punish criminal behavior, the Court maintained, is an important manifestation of a government's power to restrict individual liberty. *Id.*

129 98 S.Ct. 1079 (1978).

130 *Id.* at 1091.

131 *Id.* at 1082-83. The "dual sovereignty" concept holds that a single act can result in the commission of two offenses, that is, the transgression of the laws of separate sovereigns to which the actor owes allegiance. This rule does not apply where successive prosecutions are initiated by entities that only are "nominally different." *Id.* at 1083.

132 *Id.* at 1083-84. This argument was based on the plenary power of Congress over Indian affairs. The logical extension of this power, it was contended, is that tribes are no more than arms of the federal government. The Supreme Court held, however, that the extent of congressional control was not crucial; rather, one must look to the "ultimate source" of the tribe's power. The Court observed that the dual sovereignty rule applies to successive prosecutions by a state and the federal government, although the latter can control the exercise of state governmental powers. *Id.* at 1084. *See also id.* at 1090-91.

133 *Id.* at 1086.

134 *Id.* It is noteworthy that the Court cited its *Oliphant* decision in support of this fundamental concept.

135 *Id.* The Court found that the tribe at issue, the Navajo, had not relinquished its power to punish tribal offenders. *Id.*

tribal offenses is part of its own retained sovereignty.[136]

Although not specifically involving the inherent sovereignty of the tribe, the Court's decision in *Santa Clara Pueblo v. Martinez*[137] demonstrates the commitment of the Supreme Court to the principle that tribes are sovereign entities fully capable of governing themselves. In *Martinez,* suit was brought to enjoin the tribe from enforcing a tribal ordinance denying tribal membership to children of female members who marry non-members, but extending membership to children of male members who marry outside the tribe.[138] The membership ordinance was found by the Tenth Circuit to violate the equal protection provision of the Indian Civil Rights Act of 1968 (ICRA).[139] The Court held, however, that the ICRA does not authorize the bringing of civil actions to enforce its protections against a tribe or tribal officers in the federal courts.[140]

Although the *Martinez* decision is one of statutory construction, the Court's restrictive reading of the statute is based on its recognition of tribes as self-governing, separate sovereigns.[141] The Court acknowledged that the ICRA was a valid exercise of Congress's plenary power to limit the tribes' inherent powers of self-government,[142] but was adamant in refusing to imply any interference with the autonomy of Indian tribes that was not expressed by Congress.[143] The Court refused to sanction such an intrusion into tribal sovereignty as to allow federal judicial review of tribal actions, holding that the failure of Congress to provide remedies other than habeas corpus in the ICRA was intentional.[144] It is for the tribe, with whatever forums they choose, to apply the protections of the ICRA.[145]

Read together, the *Oliphant, Wheeler,* and *Martinez* decisions comprise a

136 *Id.* at 1086-89. The Court supported this position with its earlier decision in Talton v. Mayes, 163 U.S. 376 (1896). *See* text accompanying notes 65-72 *supra.*

137 98 S.Ct. 1670 (1978).

138 *Id.* at 1673.

139 *Id.* The ICRA provides that "[n]o Indian tribe in exercising powers of self-government . . . shall deny to any person within its jurisdiction the equal protection of its laws." 25 U.S.C. §1302(8)(1976).

140 98 S.Ct. at 1673-74.

141 *See id.* at 1675-78. *See also* Bryan v. Itasca County, 426 U.S. 373 (1976); Kennerly v. District Court, 400 U.S. 423 (1971). The Court noted that although tribes early were held not to constitute " 'foreign states' for jurisdictional purposes," they remain "quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments." To subject tribal actions to federal judicial review, in the Court's view, "may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." 98 S.Ct. at 1684.

142 98 S.Ct. at 1676-77, 1684.

143 *Id.* at 1678-79.

144 *Id.* at 1678-79, 1682-83. The Court also reaffirmed the doctrine of tribal sovereign immunity from suit. *Id.* at 1677. *See* Puyallup Tribe, Inc. v. Washington Dep't of Game, 433 U.S. 165, 172-73 (1977); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-13 (1940). The Court held that an ICRA action even for declaratory and injunctive relief could not be maintained against the tribe because the tribe's immunity from suit was not waived expressly by act of Congress. The Court held, however, that the immunity of the tribe did not bar an action against tribal officers. 98 S.Ct. at 1677.

145 98 S.Ct. at 1680-81. The Court in *Martinez* did leave open one possibility of federal jurisdiction to decide an ICRA civil claim. For those many tribes with constitutions requiring that tribal ordinances not be given effect until the Interior Department approves (*see* F. COHEN, *supra* note 1, at 130-31) "persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of Interior," 98 S.Ct. at 1681 n.22 (dictum). The Court did not specify the type of relief available, but one may argue that any "final action" taken by the Interior Department in this regard may be reviewed in federal court under the Administrative Procedure Act, which requires that agency action be in accordance with federal statute (*e.g.,* the ICRA). *See* 5 U.S.C. §706(2)(A)(1976).

strong reaffirmation of the principle of Indian tribal sovereignty as first articulated by Chief Justice Marshall in *Worcester*. The *Oliphant* and *Wheeler* decisions make clear that tribes retain their sovereign status. The application of *Worcester* to cases determining the inherent powers of Indian tribes is similar to that developed in recent cases considering the federal preemption of state powers over tribes; the powers of tribal governments are limited only by express treaty provisions, by act of Congress, or by implication if exercise of the power is wholly inconsistent with the status of tribes as dependent entities located within the territory of the United States.[146]

In *Martinez,* the Court considered the independence of tribal governments in the light of the plenary power of Congress over Indian affairs. The question presented was the power of the federal judiciary to review legislative decisions made by tribal governments. The Court reaffirmed the rule of *Talton v. Mayes*[147] that federal courts do not have this power under the Constitution and held that Congress did not intend to extend them this power when it passed the Indian Civil Rights Act. The Court admitted to reading the Act narrowly because otherwise it would have intruded substantially upon the workings of tribal governments.[148]

Thus, twin concepts emerge from these decisions. The *Oliphant* opinion indicates that, absent express direction from Congress, the powers of tribal governments must yield to those of the dominant sovereign when incompatible with the responsibility of the federal government to discharge its fundamental obligations to the citizenry.[149] The *Martinez* decision establishes just as clearly that the Court, absent express direction from Congress, will not allow the dominant sovereign to interfere with the responsibility of a tribal government to discharge its fundamental obligations to its citizenry.

In a sense, the *Oliphant* and *Wheeler* decisions establish opposite principles: Indian tribes have inherent power to arrest, try, and punish their members for crimes committed on the reservation; they have no such inherent power over non-members. This dichotomy raises a crucial question for tribal governments: whether all tribal powers of self-government are likewise limited to members of the tribe.

The *Oliphant* decision should not be extended to prevent the civil jurisdiction of tribes over non-members. The Court in *Oliphant* did not question that the tribes' sovereignty is territorial in nature, but held that this territorial sovereignty must yield in criminal matters because of the duty of the United States to protect its citizens from "unwarranted intrusions on their personal liberty."[150]

146 *See* text accompanying notes 76-100 *supra.*
147 *See* text accompanying notes 65-71 *supra.*
148 *See* note 141 *supra.*
149 The Court, in fact, found in *Oliphant* that the three branches of the Government considered tribal courts as having no power to try non-Indians for criminal offenses. *See* text accompanying note 124. Although given "considerable weight," this finding was not determinative of the Court's decision. 98 S.Ct. at 1019. The basis of the *Oliphant* decision was the Court's conclusion that the assertion of criminal jurisdiction over non-Indians was inconsistent with the status of tribes as dependent sovereigns located within United States territory. *See id.* at 1021.
150 98 S.Ct. at 1021.

This danger, notwithstanding the protections of the Indian Civil Rights Act,[151] is significantly more acute when the tribe exercises its criminal rather than its civil powers. Further, if the Court had upheld the power of tribes to punish non-Indian criminals, a stream of knotty legal problems would inevitably have flowed through the federal judiciary. The Court alluded to a very special problem present in the *Oliphant* case; non-Indians are excluded from Suquamish tribal court juries.[152]

The Court has been much less sympathetic to the problems of non-Indians in coping with the civil and regulatory jurisdiction of Indian tribes. In *United States v. Mazurie,*[153] the Court upheld the independent regulatory authority of Indian tribes over non-Indians even when the exercise of this power resulted in criminal conviction.[154] The Court held that the claim by the non-Indians that they could not be subject to the laws passed by tribal governments, upheld by the Tenth Circuit,[155] was definitively rejected in *Williams v. Lee.*[156] The Court read *Williams*[157] to settle the authority of tribal courts over non-Indians who transact business on reservations with Indians.[158] Thus, in the language of *Oliphant,* there is no corresponding "unwarranted intrusion"[159] on the rights of non-Indians if tribes subject them to their civil and regulatory laws when they engage in activity on Indian reservations.[160]

This is consistent with the Court's decision in *Martinez,* which stressed the importance of allowing tribes, as distinct societies with separate governments, to erect their own rules to govern their own territory.[161] Such a result is necessary if tribes are to remain, to any practical extent, governments. It is this status which the Court has nurtured, upholding the right of Indian people to govern themselves in such a way that does not threaten the dominant position of the

151 *Id.* at 1022. The ICRA limits the sentences a tribe can impose to a prison term of six months or a fine of five hundred dollars. 25 U.S.C. §1302(7)(1976). The Act also provides criminal defendants a right to seek a petition for a writ of habeas corpus to challenge the legality of a tribe's conviction. 25 U.S.C. §1303(1976).

152 98 S.Ct. at 1013. As another example, the ICRA does not require that tribal courts appoint counsel for indigent defendants, but only that one may be represented by counsel in tribal court at one's own expense. 25 U.S.C. §1302(6)(1976).

The Court realized, although it perhaps underestimated, that its decision restricted the ability of tribes to deal with the serious problem of non-Indian crime on Indian reservations. This, it observed, was a consideration for Congress when deciding whether to extend tribes the power the Court denied. 98 S.Ct. at 1022.

153 419 U.S. 544 (1975). *See* text accompanying notes 107-120.

154 419 U.S. at 557-58. Significantly, however, the defendants were tried and convicted in federal court with the full panoply of constitutional and statutory protections. *Id.* at 548.

155 *Id.* at 556.

156 *Id.* at 558.

157 358 U.S. 217 (1959). *See* text accompanying notes 76-86.

158 419 U.S. at 558.

159 *See* 98 S.Ct. at 1021.

160 This conclusion can be questioned with dicta by the Court in *Wheeler.* There the Court observed that the areas in which "implicit divestiture of sovereignty," because of the tribes' dependent status, had been found were "those involving the relations between an Indian tribe and non-members of the tribe." 98 S.Ct. at 1087. Although the Court explained that tribal powers of self-government, which involve only the relations among members of the tribe, are retained, it did not indicate that all tribal powers that affect non-members are necessarily lost. The Court, in its discussion, questioned neither the *Williams* nor the *Mazurie* decisions. *See id.* at 1088. Dicta in the *Martinez* decision, by contrast, found that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudications of disputes affecting *important personal and property interests of both Indians and non-Indians.*" 98 S.Ct. at 1681 (emphasis added).

161 *See* 98 S.Ct. at 1681.

United States. The exercise of the criminal jurisdiction over non-Indians would create constitutional problems that such an exercise of civil powers would not.

In its trilogy of cases reasserting and refining the principle of tribal sovereignty, the Court acted in a manner consistent with its support in recent years of Indian tribal governments. In *Morton v. Mancari,*[162] for example, the Court upheld the preference of American Indians for employment with the Bureau of Indian Affairs as reasonably designed to further Indian self-government.[163] The *Mancari* decision breathes a philosophy that extends beyond employment preference; the Court was concerned with preserving the "unique legal status of Indian tribes under federal law"[164] and the special relationship between this country and its resident tribes.[165] Similarly, in *Delaware Tribal Business Comm. v. Weeks,*[166] the Court found it quite logical to hold that organized tribal Indians are something different from, and can have rights superior to those of, persons with the same degree of Delaware blood but with no citizenship in the tribe.[167] The Court's reaffirmation of tribal sovereignty is consonant with the collateral strengthening of organized tribal society.

V. Conclusion

Indian tribes are governments. Their powers of self-government are recognized, but not created, by the United States. Although once independent, by discovery and conquest tribes have become nations within a nation. Their location within the territory of the United States makes their status precarious; tribes can exercise no powers that are wholly inconsistent with their position as a dependent sovereign. Tribes are also subject to the plenary authority of the United States to the extent the Government chooses to exercise it. States, except as authorized by Congress, have no power to extend their laws to tribes within their reservations. Unless inhibited by Congress, tribes retain their inherent powers to govern on their territory.

This doctrine of tribal sovereignty, first articulated by Chief Justice Marshall nearly 150 years ago, remains remarkably intact. The Supreme Court in recent years, and especially in its 1977 term, has reaffirmed the right of tribes to pursue a unique society within the territorial United States. The Court in *Wheeler* recognized that the dependent sovereigns predate the dominant sover-

162 417 U.S. 535 (1974).

163 *Id.* at 554. The Court held that the employment preference did not constitute invidious racial discrimination and, indeed, was not even considered a racial preference. *Id.* at 553. The preference, the Court found, was not directed toward a racial group, "Indians," but rather toward members of federally recognized tribes. Thus, the preference was political rather than racial. *Id.* at 553 n.24. This conclusion is consistent with decisions by the Court holding that the special treatment often afforded Indians under federal law is not racially based and, thus, is valid as a legitimate course of dealing with political groups with whom the Government has a special relationship. *See e.g.,* United States v. Antelope, 430 U.S. 641 (1977); Fisher v. District Court, 424 U.S. 382 (1976); F. COHEN, *supra* note 1, at 5.

164 417 U.S. at 551-52.

165 *Id.*

166 430 U.S. 73 (1977).

167 *Id.* at 85-90. The Court in the *Delaware* case upheld as rational an act of Congress that distributed an Indian Claims Commission judgement fund to the tribe and its members but that excluded a group of persons who traced their ancestry to members of the Delaware Tribe as it existed at the time the Government breached its treaty obligation to the tribe. *Id.*

eign and that the tribes' sovereignty, their right to make their own laws and be governed by them, springs from a source other than the Constitution. It is inherent in their status as governments.

Although the *Oliphant* decision can be read to imply that the tribes' powers of internal self-government can reach only tribal members, this interpretation is far too restrictive. It ignores the Court's decisions in *Williams* and in *Mazurie,* which held that non-Indians who transact business on an Indian reservation can be bound by the exercise of tribal civil and regulatory powers. Such a reading of *Oliphant* is also belied by the Court's demonstrated commitment to the sovereignty of Indian tribes apparent in *Wheeler* and in *Martinez.* The *Oliphant* decision is best limited to the sphere of tribal criminal jurisdiction over nonmembers, which raises unique constitutional concerns.

The Court's decisions in the 1977 term, particularly *Martinez,* acknowledge that tribes have great responsibility for their futures. Their legislative and executive decisions will make their policy. Tribal courts will balance the rights of individual tribal members with those of the tribal society. This is as it should be; it is the very nature of self-government.