NEW YORK LAW SCHOOL

NYLS Journal of International and Comparative Law

Volume 4
Number 3 *Volume 4, Number 3, 1983 (Symposium: Acid Rain and International Environmental Law)*

Article 8

1983

Sovereignty Under Reservation: American Indian Tribal Sovereignty in Law and Practice

James H. Gianninoto

SOVEREIGNTY UNDER RESERVATION: AMERICAN INDIAN TRIBAL SOVEREIGNTY IN LAW AND PRACTICE*

INTRODUCTION

For anyone unfamiliar with the field of Indian law, the notion of tribal sovereignty probably suggests a subject of arcane historical interest with limited relevance to contemporary conditions. In fact, however, the subject of Indian tribal sovereignty continues to be a focal point for heated debate and litigation with profound ramifications extending far beyond the Indian community.[1] Under the banner of tribal sovereignty, some American Indian tribes have recently won multi-million dollar settlements for the illegal appropriation of aboriginal lands,[2] while other tribes have sought to achieve a greater degree of self-determination by asserting control over the development of reservation resources for the benefit of tribal members.[3]

Sovereignty has traditionally been defined as the power and authority which a government may exercise over the persons and property within its domain.[4] In the contemporary world, where nation-states assert exclusive but often conflicting claims of sovereign authority, sovereignty is often used as a synonym for state power.[5] In this context, sovereignty signifies not only the supremacy of the state in its internal or domestic structure of authority, but also the independence of the state in its external relations with other sovereign entities.[6] Al-

---

* The author of this Note received the 1984 Dr. Ernst Stiefel Award.

1. *See generally* Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 HASTINGS L.J. 89 (1978).

2. *See, e.g.*, Maine Indian Settlement Act of 1980, 94 Stat. 1785 (codified at 25 U.S.C. §§ 1721-35 (Supp. V 1982)).

3. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 LAW & CONTEMP. PROBS. 166, at n.2 (1976); N.Y. Times, Nov. 4, 1982, at A16, col. 1.

4. J. FAWCETT, THE LAW OF NATIONS 31 (1969). The sovereignty of a state has more recently been defined as "the residuum of power which it possesses within the confines laid down by international law." J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 113 (8th ed. 1977).

5. D. NINCIĆ, THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS 5 (1970).

6. *Id. See also* M. POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 4 (1982), where the author discusses the problems involved in preserving sovereign equality while

though sovereign powers are often described as unlimited or absolute,[7] the powers of all sovereign governments are always subject to the countervailing claims asserted by all other sovereignties in a continuously shifting balance of economic, political and military power.[8] Thus, while all sovereign governments claim the right to absolute independence within their respective spheres of jurisdiction,[9] the actual exercise of sovereign power in any specific case is invariably limited by the domestic and international context in which such powers are asserted.[10]

Prior to the emergence of an independent American nation, the Indian tribes were considered to be sovereign political entities.[11] Tribal governments were regarded as fully independent, both internally with regard to their exclusive authority over tribal members and tribal property, as well as externally with regard to their competence to maintain the relations of peace and war with other sovereign governments.[12] Over the course of the last two hundred years, however, American Indian tribes have relinquished the external incidents of sovereignty to the United States,[13] while retaining many of the domestic attributes of sovereignty over tribal members and resources.[14] Thus, although tribal governments are not currently recognized as independent sovereigns in the international arena, American Indian tribes have continued, nevertheless, to exercise limited sovereign powers as the rightful heirs to the historic legacy of the first sovereign governments in America.

In contrast to the traditional view that the internal relations of a sovereign state are beyond the scope of international law,[15] there is an

---

simultaneously recognizing or promoting the right of self-determination under international law.

7. D. NINCIĆ, *supra* note 5, at 6-8. The author cites the German Third Reich as the most extreme example of absolute sovereignty. *Id.* at 8.

8. *Id.* at 12-13. *See also* M. POMERANCE, *supra* note 6, at 2.

9. D. NINCIĆ, *supra* note 5, at 12-13. The principle that all states have the right to protect their territorial integrity and political independence is also enshrined in the Charter of the United Nations. *See* U.N. CHARTER art. 2, para. 4.

10. D. NINCIĆ, *supra* note 5, at 9-13.

11. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 530 (1832).

12. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 515, 530 (1831).

13. *Id.* at 17. The external incidents of sovereignty include the power to negotiate international agreements and establish alliances with foreign nations. *Id.*

14. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 46, 122-50 (1942). The Supreme Court in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), analogized the position of the Indian tribes to that of the feudal states of Europe which were considered to be sovereign despite their alliances with more powerful nations. *Id.* at 561.

15. *See, e.g.*, H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 242 (1952). According to Kelsen "international law does not impose upon the state any obligations concerning the treatment of its own nationals." *Id.*

emerging trend toward recognition that a state's domestic policies are no longer considered completely immune from international scrutiny.[16] In recent years, the principle of self-determination has gained considerable international support[17] as the number of independent states recognized as sovereign by the international community has grown at an increasingly rapid rate.[18] Although the American Indian peoples are not, at present, seeking to achieve international recognition as independent from the United States,[19] many tribes are asserting claims of tribal sovereignty in support of their demands for self-determination and a greater degree of control over their internal affairs.[20]

At present, there are over two hundred Indian reservations located within twenty-six states, which comprise a total land area of approximately fifty million acres.[21] Recent estimates of the mineral resources on Indian lands indicate that there are substantial deposits on at least forty reservations which may account for as much as three percent of the total United States reserves of oil and gas (4.2 billion barrels of oil

---

16. *See* I. DELUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE 6 (1974). The War Crimes Trials at Nuremberg provide the most vivid example of this trend. *Id.* International recognition of the right of colonial peoples to self-determination has also been cited in support of the view that sovereign powers are increasingly subject to both internal and external constraints. *Id.* at 14-18.

17. *Id.* at 13. The right to self-government is emerging as a rule of international law. *Id.* at 14. *See also* M. POMERANCE, *supra* note 6.

18. I. DELUPIS, *supra* note 16, at 10. The number of independent states recognized by the United Nations has tripled since 1945. *Id.* Recognition of the right of self-determination requires a continuing realignment of the relations between existing and emerging states because "every demand for self-determination involves some countervailing claim or claims." M. POMERANCE, *supra* note 6, at 2. *See also* N.Y. Times, Feb. 13, 1983, at A15, col. 1. The people of the Palau islands, who live under a United Nations Trusteeship administered by the United States, recently voted on a Compact of Free Association with the United States. The Compact proposed to return home rule to the Palauan people while reserving nearly one third of the main island to the United States for long term use as a military training ground and permitting the limited use or transport of radioactive materials as a waiver of the Palauan constitutional provision that declares the area to be a nuclear free zone. The people of Palau rejected the nuclear waiver portion of the Compact, and though the remainder of the Compact passed, under Palauan law the whole Compact failed. *Id.*

19. *See* R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 275 (1980). *But see* V. DELORIA, CUSTER DIED FOR YOUR SINS (1969), where the author, a well-known Indian leader, warns of potential violence unless the Federal Government supports Indian efforts at self-determination. *Id.* at 266.

20. *See* N.Y. Times, Nov. 4, 1982, at A16, col. 3. *See also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). Recently, Canadian Indians have asserted claims to land and other rights of self-government under the banner of tribal sovereignty. *See* N.Y. Times, Mar. 17, 1983, at A3, col. 3.

21. 1 AMERICAN INDIAN POLICY REVIEW COMM'N, 95th Cong., 1st Sess., FINAL REPORT 7 (Comm. Print 1977) [hereinafter cited as REPORT].

and 17.5 trillion cubic feet of gas) and between seven and thirteen percent of the total United States coal reserves (100-200 billion tons).[22] Although some Indian tribes have leased communal lands for mineral exploitation in the past, increasing demand for non-renewable energy resources and declining domestic production have combined to spur a renewed interest in the exploitation of tribal mineral resources.[23] In response to the rising demand for domestic energy and the need to generate jobs and income on the reservation, some tribal governments have recently begun to assert control over the development of reservation resources under the claim of Indian tribal sovereignty.[24]

This note will examine the history, scope and contemporary relevance of the doctrine of Indian tribal sovereignty with particular emphasis upon the decisions of the United States Supreme Court which address the problems and policies behind the continuing controversy over Indian self-determination. Section I of this paper will trace the historical development of the doctrine of tribal sovereignty through a discussion of Indian treaties, acts of Congress and constitutional limitations upon the exercise of tribal sovereign powers. In section II, recent cases will be examined to determine the present scope of tribal self-government and the limits upon tribal, state and federal powers. Section III will conclude with a discussion of the future prospects for tribal self-government in America.

I

The origins of the present controversy over Indian sovereignty may be traced back to the early period of colonization when the native peoples were regarded as "numerous, powerful and truly independent."[25] In their quest for control over the New World, colonial powers, principally England, France and Spain, claimed sovereignty over their respective colonies by virtue of the priority of discovery.[26] Although

22. *Id.* at 338-39. Other reservation resources include large phosphate and uranium deposits, stands of commercially saleable timber and substantial acreage in range and cropland. *Id.* at 314, 324, 339.

23. *See* Note, *Merrion v. Jicarilla Apache Tribe: Tribal Power to Tax Non-Indian Lessees Who Exploit Reservation Natural Resources*, 26 S.D.L. REV. 595 (1981).

24. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), where the Supreme Court upheld the tribal power to tax mineral production on the reservation. On the Navajo reservation, where unemployment was recently estimated at 80%, the newly elected Chairman of the tribe has vowed to renegotiate outdated energy contracts and to use tribal resources first for the benefit of tribal members. *See* N.Y. Times, Nov. 4, 1982, at A16, col. 1.

25. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

26. M. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 29 (1969). *See also* F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 140 (1970).

these European nations claimed absolute dominion over their colonial territory as against their European rivals, each colonial power also recognized that the natives possessed the aboriginal right of occupancy which could not be divested by the mere act of discovery.[27] Consequently, despite each nation's claim of absolute title to all of the territory within its respective domain, the European nations also recognized that the transfer of actual possession of occupied land sought for colonization could only be achieved through conquest or the negotiation of an agreement of cession with the native inhabitants.[28]

Contrary to the popular notion that most of the land acquired from native peoples was gained by conquest,[29] the historical fact is that the acquisition of possessory rights to native property in America occurred primarily through cession agreements negotiated with the tribes.[30] While the validity of these cessions may be challenged on the basis that the natives were unfamiliar with European languages and property concepts,[31] it is, nevertheless, apparent that in negotiating these agreements, the European powers implicitly recognized the aboriginal tribes as possessing the sovereign right to cede the territory which the Europeans sought to acquire.[32] In order to gain cessions of tribal property, colonial governments offered the natives access to trade goods[33] and protection from interference by colonists and rival colonial powers.[34] Among the British colonies, local authorities were charged with enforcement of the Crown's generally conciliatory Indian

---

27. M. LINDLEY, *supra* note 26. *See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, where Justice Marshall stated:

> It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied, or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

Id. at 543.

28. M. LINDLEY, *supra* note 26, at 44.

29. *See* M. WAX, INDIAN AMERICANS: UNITY AND DIVERSITY 43 (1971).

30. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 35-37 (1947).

31. *See* P. JACOBS & S. LANDSAY, TO SERVE THE DEVIL: NATIVES AND SLAVES 21 (1971). Land was communally owned in most native societies, and was not considered to be a commodity which could be given away or sold. *Id.*

32. *See* M. LINDLEY, *supra* note 26, at 44. The author states that the "power of making an agreement . . . implies the ability to refuse to make such an agreement, and is a mark and test of independence." *Id.*

33. *See* F. PRUCHA, *supra* note 26, at 7. The British tried to regulate the sale of alcohol and firearms, but due to the widely scattered frontiers and the lack of cooperation by local officials, trade with the natives was practically unrestricted. *Id.* at 9-10.

34. *Id.* at 6-10. *See also* C. PHILLIPSON, WHEATON'S ELEMENTS OF INTERNATIONAL LAW 66-67 (1916).

policy,[35] but competition between the colonies over the acquisition of land and trade with the natives often prevented effective enforcement of these measures at the local level.[36] Consequently, native complaints over the continuing encroachment on tribal lands and the notoriously unscrupulous dealings of the traders often went unanswered. They were a major source of hostility among the natives throughout the colonial period.[37]

The European nations also sought the support of the tribes as military allies in conflicts with rival colonial powers.[38] To the dismay of British colonial authorities, many Indian tribes had thrown their support to the French in the 1754 war against England.[39] In an attempt to remedy this situation, Britain completely revised its Indian policy in the famous Proclamation of 1763,[40] which established the first official boundary line between Indian land and that of the colonies.[41] The new British policy of providing more aggressive protection of Indian lands and tribal autonomy eventually won the support of many tribes which, in response, joined with the British against France, Spain and even the United States.[42]

By the time the American colonies declared themselves independent from Great Britain, the broad contours of the colonial Indian policy were well established.[43] The Indian tribes were considered by the colonial powers as fully capable of maintaining the relations of peace and war and governing themselves under the protection of their colonial allies.[44] The acquisition of native territory was customarily accomplished through negotiation with the tribes.[45] Provisions were often included in treaties between the colonial powers which specified that prior agreements with the tribes were to be enforced by the successor

---

35. *See* F. PRUCHA, *supra* note 26, at 9.

36. *Id.* at 8-11.

37. *Id.*

38. *See* Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 19-20 (1942).

39. F. PRUCHA, *supra* note 26, at 11.

40. DOCUMENTS RELATING TO THE CONSTITUTIONAL HISTORY OF CANADA, 119-23 (A. Short & A. Doughty eds. 1907). For a discussion of the Proclamation of 1763, *see* CUMMING & MICKENBERG, NATIVE RIGHTS IN CANADA 27-31 (2d ed. 1972). *See also* F. PRUCHA, *supra* note 26, at 13-17.

41. F. PRUCHA, *supra* note 26, at 13. The official boundary was set at the Appalachian Mountains, and the settlement or purchase of land within Indian territory was prohibited. *Id.* at 14.

42. *See* Cohen, *supra* note 38.

43. *See* F. PRUCHA, *supra* note 26, at 5.

44. *See, e.g.*, C. PHILLIPSON, *supra* note 34, at 66-67.

45. *Id.* at 66.

state.[46] Thus, despite the absence of highly developed socio-political hierarchies within most aboriginal societies at the point of contact,[47] the Indian peoples were almost uniformly regarded by the European powers as possessing many of the attributes that are customarily associated with sovereignty.[48]

In the aftermath of the American Revolutionary War, the United States succeeded to the claims of Great Britain,[49] and continued to regard the friendly Indian tribes as dependent allies whose right to occupy aboriginal lands was to be protected.[50] The Northwest Ordinance of 1789, for example, stated that Indian "land and property shall never be taken from them without their consent . . . unless in just and lawful wars authorized by Congress."[51] In order to preserve peaceful relations with the native population and to ensure the orderly transfer of aboriginal lands to the government, Congress enacted the first of many Indian Non-Intercourse Acts in 1790, which declared that any acquisition of Indian lands would be invalid unless accomplished by treaty entered into pursuant to the Constitution.[52]

Federal authority over Indian affairs has traditionally rested on two separate provisions of the United States Constitution.[53] Under the express terms of the Commerce Clause, Congress is vested with the exclusive power to "regulate Commerce with foreign nations, and among the several States, and with the Indian tribes."[54] Of equal importance to the exercise of federal control over Indian affairs is the

---

46. *See, e.g.*, Treaty for the Cession of Louisiana, Apr. 30, 1803, United States–France, 8 Stat. 200, T.I.A.S. No. 86. Under one provision of this agreement, the United States promised to execute all treaties which had been agreed upon between Spain and the tribes. *Id.* art. VI.

47. *See* M. WAX, *supra* note 29 at 3-6. The Maya, Aztec and Inca cultures, with their comparatively complex socio-political hierarchies, were considered the most highly developed native states, and as such, exceptions to the general pattern of tribal organization found among most aboriginal societies. *Id.*

48. *Id.* at 45.

49. Preliminary Articles of Peace, Nov. 30, 1782, United States–Britain, 8 Stat. 54, T.I.A.S. No. 102.

50. *See* C. PHILLIPSON, *supra* note 34, at 67; F. PRUCHA, *supra* note 26, at 142.

51. Act of Aug. 7, 1789, art. III, 1 Stat. 50.

52. Act of July 22, 1790, 1 Stat. 137 (codified at 25 U.S.C. § 177 (1976)). By preempting the right of the states as well as individuals in the drive to acquire land from the tribes, Congress sought to minimize conflict while promoting westward settlement. *See* Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Congressional License?*, 51 NOTRE DAME LAW. 600, 608-09 (1976).

53. U.S. CONST. art. I, § 8, cl. 2; U.S. CONST. art. II, § 2, cl. 2. Indians are also expressly mentioned in two less important provisions, which exclude "Indians not taxed" in calculating the number of United States Representatives, U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

54. U.S. CONST. art. I, § 8, cl. 2.

treaty power which vests the authority to make treaties in the President, and empowers the Senate to ratify all treaties by a two-thirds vote.[55] Federal authority over the Indians has been exercised under these two provisions in an extensive and largely exclusive manner to the present day. It should be noted that the Constitution does not expressly delineate or guarantee the right of self-government to the Indians.[56] Hence, the constitutional authority of Congress over Indian affairs has traditionally been regarded by the courts as plenary.[57]

During the early years of interaction with the Indian tribes, the United States continued the longstanding European practice of entering into treaties with Indian nations.[58] Between 1778 and 1868, the United States ratified a total of 370 treaties with various Indian tribes.[59] Indian treaties typically established the existence of peaceful relations between the tribe and the Federal Government, restricted the external powers of the tribe to deal independently with foreign nations, acknowledged the semi-autonomous but dependent position of the tribe, and promised federal protection in exchange for a promise by the tribe to abide by the laws and Constitution of the United States.[60] Although the Constitution does not distinguish between Indian and other treaties,[61] Indian treaties have been viewed by some as being of an inferior validity.[62] One of the earliest proponents of this view was Andrew Jackson, who wrote in 1817, "I have long viewed treaties with the Indians an absurdity not to be reconciled with the principles of our government."[63] Despite this contention, the Supreme Court has historically found Indian treaties to be of equal rank with other treaties.[64]

One of the main objectives of Indian treaties was to provide a vehicle for the peaceful acquisition of territory held by the natives in order to obtain lands for settlement of the ever-growing population of

---

55. U.S. CONST. art. II, § 2, cl. 2.

56. *See* Martone, *supra* note 52, at 603.

57. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978).

58. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 529-30 (1831). The first Indian treaty ratified by the Senate was with the Delaware Nation in 1778. Treaty with the Delawares, Sept. 17, 1778, United States–Delaware Nation, 7 Stat. 13. The terms of this treaty call for perpetual peace and establish the parties as allies in case of war. *Id.* art. II. As a sign of the liberal spirit prevailing at the time, one provision invited the Delawares to join with other tribes to form a state with representation in Congress. *Id.* art. VI.

59. Martone, *supra* note 52, at 605. A complete compilation of the treaties concluded between the United States and the American Indian tribes may be found in C. KAPPLER, LAWS AND TREATIES (1902).

60. *See* F. COHEN, *supra* note 14, at 38-43.

61. U.S. CONST. art. VI, § 2.

62. *See* F. COHEN, *supra* note 14, at 33.

63. 2 J. BASSETT, CORRESPONDENCE OF ANDREW JACKSON 279 (1955).

64. Worcester v. Georgia, 31 U.S. 559 (1832).

the states.[65] The term reservation arose from the tribal practice of reserving tracts of land for exclusive Indian use often as part of a treaty agreement.[66] Typically, Indian treaties guaranteed the tribe perpetual control over reservation lands, which as a rule, was respected only until more land was needed and a new treaty was negotiated.[67] In 1830, Congress enacted the Indian Removal Act[68] which empowered President Jackson to negotiate treaties to relocate the tribes east of the Mississippi to "permanent" sites in Kansas and Nebraska in order to open more land for settlement.[69] In order to effectuate the policies of removal, government officials employed many questionable means to secure the agreement of the tribes to leave their territory.[70] Officials of the War Department bribed tribal leaders to obtain their approval, and in some cases, removal treaties were negotiated with members of the tribe who possessed no standing or authority to speak for the group.[71] By the use of such tactics, the process of westward expansion continued to pick up momentum, and the Indian tribes, especially in the east, eventually ceded or surrendered most, if not all of their original territory.[72] By the middle of the 19th century, the Indian tribes on the whole no longer posed a serious military threat to the United States.[73]

In recognition of the change in the balance of power, Congress in 1871 declared that henceforth "[n]o 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."[74] Although this declaration marks a clear termination of the treaty-making period, Congress specifically provided that this act would in no way invalidate or impair any obligation of any treaty ratified with any Indian tribe prior to the effective date of the Act.[75]

Forty years before Congress declared an end to future treaties with the Indian tribes, the Supreme Court addressed the sovereignty

---

65. *See* F. COHEN, *supra* note 14, at 43.

66. Cohen, *supra* note 30, at 35 n.17.

67. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

68. Act of May 28, 1830, 4 Stat. 411.

69. *Id. See also* REPORT, *supra* note 21, at 53-55.

70. REPORT, *supra* note 21, at 53-55. *See also* Cohen, *supra* note 38. There are also reports of bounties offered for native scalps and the sale of blankets infected with smallpox to various tribes. *Id.* at 6.

71. REPORT, *supra* note 21, at 54-55.

72. *Id.* at 55.

73. *Id.* at 56. In 1849 Congress shifted control over Indian affairs from the War Department to the newly created Home Department. *Id.*

74. Act of March 3, 1871, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1982)).

75. *Id.*

issue in the case of *Cherokee Nation v. Georgia.*[76] In this case, the tribe brought suit as a "foreign" nation to enjoin the State of Georgia from enforcing state law within Cherokee territory.[77] Without reaching the merits of the case, the Court dismissed the complaint and held that Indian tribes may not be considered as foreign nations for the purposes of the original jurisdiction of the Supreme Court.[78] The Court noted that despite the status of tribal members as aliens[79] and the history of government recognition of the tribe as a state, the tribe, nevertheless, could not be considered a foreign nation as it was located within the jurisdictional limits of the United States and had acknowledged itself to be under the protection of the Federal Government.[80] The Court concluded that the American Indian tribes would be more correctly termed "domestic dependent nations."[81]

One year after the decision in *Cherokee Nation,* the Supreme Court was confronted once again with the question of tribal versus state sovereignty in the case of *Worcester v. Georgia.*[82] In this case, an American missionary was tried, convicted and sentenced for violating Georgia law by remaining as a resident of Cherokee territory without a permit issued by the State.[83] Chief Justice Marshall, writing for the majority, began his analysis by examining the various treaties entered into between the tribe and the Federal Government which established that the tribe had never relinquished its original right to self-government.[84] In reaching the conclusion that the state law at issue was repugnant to the Constitution, treaties and laws of the United States, the Chief Justice cited the now familiar doctrine of Indian law that "a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection."[85] Although the State of Georgia subsequently refused to abide by the decision of the Court[86] with the aid and indeed encouragement

---

76. 30 U.S. (5 Pet.) 1 (1831).

77. *Id.* at 16.

78. *Id.* at 20. The Court reasoned that if the Framers had intended the Indian tribes to be treated as foreign nations, there would have been no need to distinguish them from foreign nations within the Commerce Clause. *Id.* at 18-19.

79. *Id.* at 16. Indians as a class were not accorded United States citizenship until the Act of June 2, 1924, 43 Stat. 253 (repealed and replaced 1940).

80. *Cherokee Nation,* 30 U.S. at 17.

81. *Id.*

82. 31 U.S. (6 Pet.) 515 (1832).

83. *Id.*

84. *Id.* at 560-61.

85. *Id.*

86. *See* REPORT, *supra* note 21, at 54. Georgia courts refused to register the writ of the Surpeme Court in the *Worcester* case. *Id.*

of President Jackson,[87] the decision in *Worcester v. Georgia*, nevertheless, remains a classic statement of the unique and problematic status of the American Indian tribes.[88]

In the years following the Supreme Court decisions in *Cherokee Nation* and *Worcester*, it became increasingly apparent that these two cases raised many more difficult issues than were resolved at the time.[89] Although it was determined that Indian tribes were "distinct political communities"[90] possessing the "right to self-government,"[91] the tribes were also found to be subject to the overriding sovereignty of the United States.[92] In attempting to define the relationship of the tribes to the Federal Government, the Court analogized this relationship to that existing between a ward and his guardian.[93] However, the extent and future of this trust responsibility remained undefined.[94] While the Court did clearly decide that the power of the states over the Indian tribes was preempted,[95] the Court did not clearly establish whether state action was preempted by the powers of the Federal Government or of the tribe.[96] In sum, in the aftermath of these decisions, the position of the tribes within the federal system remained a difficult conceptual and practical problem which, even 150 years later, has not yet been conclusively determined.

During the latter half of the 19th century, attempts by the individual states to assert jurisdiction over the tribes were rejected uniformly by the Supreme Court under a preemption analysis,[97] while federal leg-

---

87. *See* REPORT, *supra* note 21, at 54. President Jackson is reported to have said in response to the decision in *Worcester:* "John Marshall has made his decision, *now let him enforce it!*" 1 H. GREELEY, THE AMERICAN CONFLICT 106 (1865) (emphasis in original).

88. *See* F. COHEN, *supra* note 14, at 116.

89. *See* R. BARSH & J. HENDERSON, *supra* note 19, at 54.

90. *Worcester*, 31 U.S. at 557.

91. *Id.* at 560.

92. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

93. *Id. See also* Ex Parte Crow Dog, 109 U.S. 556 (1883), where the Court defined the Indians as a "dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governing society." *Id.* at 569.

94. *See* R. BARSH & J. HENDERSON, *supra* note 19, at 55. Under the trust system as it is presently constituted, the Federal Government holds legal title to Indian property in trust for the benefit of the tribe. *See* REPORT, *supra* note 21, at 104. In its role as trustee, the government is responsible for the prudent management of Indian property, and may be held accountable for mismanagement of tribal resources. *Id.* at 105.

95. *Worcester*, 31 U.S. at 561.

96. *Id.*

97. *See, e.g.*, The Kansas Indians, 72 U.S. 737 (1866).

islation restricting the sovereign powers of the tribe was upheld.[98] In 1885, for example, Congress expanded federal criminal jurisdiction to encompass certain enumerated major crimes committed by Indians on reservation land.[99] In rejecting a challenge to the validity of this statute on the grounds of tribal sovereignty, the Supreme Court, in *United States v. Kagama,* upheld the extension of federal power over the Indian tribes as "necessary to their protection."[100] The Court concluded that the duty owed by the Federal Government to protect the Indians, which arose under various treaties,[101] required that the Federal Government possess the power to fulfill these obligations.[102] The Court found that this was especially true in light of the fact that the tribes "owe no allegiance to the States and receive from them no protection."[103]

In 1887, Congress initiated a new policy toward the Indian tribes by enacting legislation which provided for the dissolution and distribution of all communally owned Indian land.[104] The General Allotment Act of 1887[105] authorized the President to divide tribal lands by allotting separate tracts to families or individual Indians.[106] Title to the allotted land was to be held in federal trust for twenty-five years or longer at the discretion of the President.[107] At the end of the trust period, the Indians were to acquire the property in fee, and the allottees were to have the benefit of and be subject to all of the civil and criminal laws of the individual states.[108] This Act also provided that the allottees were to gain American citizenship, and that all surplus

---

98. *Id.* at 757.

99. Act of March 3, 1885, 23 Stat. 385 (codified at 18 U.S.C. § 1153 (1982)). This Act expanded federal jurisdiction to cover the following seven felonies committed between Indians: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. *Id.* Prior to this law, crimes committed by Indians against Indians on tribal land were considered within the exclusive jurisdiction of the tribe. Ex Parte Crow Dog, 109 U.S. 556 (1883).

100. 118 U.S. 375, 384 (1886).

101. *Id.*

102. *Id. But see* Talton v. Mayes, 163 U.S. 376 (1896), where it was held that the fifth amendment of the United States Constitution is not applicable to tribal court proceedings. *Id.* This rule was later limited by the Indian Civil Rights Act of 1968, 82 Stat. 77-78 (codified at 25 U.S.C. §§ 1301-03 (1982)).

103. United States v. Kagama, 118 U.S. at 384.

104. Indian General Allotment Act of 1887, 24 Stat. 388 (codified at 25 U.S.C. §§ 331-358 (1982)).

105. 25 U.S.C. § 331 (1976).

106. *Id.*

107. *Id.* § 348.

108. *Id.* § 349.

lands remaining after allotment were to be sold to the United States.[109] As a direct result of these allotment policies, the total amount of land collectively owned by American Indian tribes decreased from approximately 140 million acres in 1887 to fifty million acres some forty years later.[110] Moreover, because many of the allottees were not well-versed in American property concepts, they were easy prey for unscrupulous creditors, and by the 1920's there were estimated to be over 100,000 landless Indians.[111]

Throughout the Allotment period, the Supreme Court continued to reject attempts by the states to assert jurisdiction over the tribes which still were subject to the trust relationship.[112] In *The Kansas Indians*,[113] for example, the Supreme Court employed a preemption analysis to invalidate a state property tax on Indian land held in common where the State had alleged that the Indians should be subject to State law because they had abandoned many tribal customs.[114] The preemption doctrine was applied again in *United States v. Celestine*[115] to bar a state criminal prosecution against an Indian allottee even though his land was held in fee and the allottee had become a United States citizen under the Allotment Act.[116] The Court reasoned that because Congress had extended the expiration date of the trust period,[117] the Federal Government did not intend to yield jurisdiction over the Indians to the states by virtue of a grant of citizenship.[118] Similarly, in *United States v. Nice*,[119] the Court held that American citizenship "is not incompatible with tribal existence."[120]

In addition to defending the sovereignty of the tribes against encroachment by the states, the Supreme Court also consistently rejected challenges to tribal sovereignty brought by citizens who claimed to be aggrieved by tribal action.[121] In *Roff v. Burney*,[122] for example, the

---

109. *Id.* *See also* United States v. Celestine, 215 U.S. 278 (1909), where it was held that even though citizenship was granted to an allottee before the end of the trust period, a state may not exercise jurisdiction over that allottee until the trust period is actually terminated. *Id.* at 290-91.

110. REPORT, *supra* note 21, at 67.

111. *Id.* at 72.

112. *See* The Kansas Indians, 72 U.S. 737 (1866); United States v. Celestine, 215 U.S. 278 (1909).

113. 72 U.S. 737 (1866).

114. *Id.*

115. 215 U.S. 278 (1909).

116. *Id.*

117. Act of May 8, 1906, 34 Stat. 182 (codified at 25 U.S.C. § 349 (1982)).

118. *Celestine*, 215 U.S. 278, 281 (1909).

119. 241 U.S. 591 (1916).

120. *Id.* at 598.

121. *See, e.g.*, Jones v. Meehan, 175 U.S. 1 (1899), where it was held that inheritance

Court upheld the inherent power of the tribe to confer or withdraw tribal citizenship privileges.[123] The Court decided that the only limits on the exercise of tribal power over internal affairs are those imposed by the Constitution or the laws of the United States.[124] In *Morris v. Hitchcock*,[125] the Court validated a tribal permit tax imposed on non-Indians who were granted the privilege of using tribal lands to graze cattle.[126] In this case, the tribal power to tax was upheld on the basis of the tribe's inherent right to exclude non-Indians from tribal lands and the sovereign right of the tribal government to impose taxes in order to raise revenue.[127] In *Buster v. Wright*,[128] the Eighth Circuit upheld the tribal power to tax nonmembers even though the persons taxed had a legal right as property owners to remain on the reservation.[129] The Court concluded that the tribe possessed the authority to tax based upon its inherent power to govern all of the people within its borders.[130] Finally, in *Turner v. United States*,[131] the Court held that an Indian tribe possesses sovereign immunity and may not be sued in any court without specific congressional authorization or tribal consent.[132]

During the first three decades of the 20th century, Congress continued the federal policies of assimilation initiated under the Allotment Act.[133] In 1924, Congress extended American citizenship to all non-citizen Indians born within the territorial limits of the United States.[134] In the same year, Congress authorized the Secretary of the Interior to lease unallotted lands for oil and gas mining purposes, and for the first time, permitted the states to tax mineral production on Indian lands as long as the tax was not employed as a lien against tribal property.[135] In 1929, Congress delegated even greater authority to the states over Indian affairs, by enacting measures to permit the

---

rights of tribal members are controlled by tribal law, rather than by federal regulations or state law. *Id.*

122. 168 U.S. 218 (1897).
123. *Id.*
124. *Id.* at 222.
125. 194 U.S. 384 (1904).
126. *Id.*
127. *Id.* at 389.
128. 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 384 (1905).
129. *Id.*
130. *Id.* at 952.
131. 248 U.S. 354 (1919).
132. *Id.* at 358.
133. Indian General Allotment Act, 25 U.S.C. §§ 331-358 (1982).
134. Act of June 2, 1924, ch. 233, 43 Stat. 253 (repealed 1940).
135. Act of May 29, 1924, 25 U.S.C. § 398 (1982).

states to enter tribal lands to enforce state health and sanitation standards as well as compulsory school attendance of Indian children.[136]

After forty years of assimilation policies, Congress inaugurated a new federal Indian policy in the Indian Reorganization Act of 1934.[137] The major features of this Act were the termination of the prior allotment policies and the extension of federal recognition and support for tribal self-government.[138] This Act provided for the preservation of all existing tribal powers and conferred additional powers of self-government upon all tribes which adopted a constitution and bylaws pursuant to the Act.[139] While the tribes were also given the option to exclude themselves from the provisions of the Act,[140] whether the tribes decided to organize themselves under its provisions or not, all treaty and statutory rights vested in the tribe were to remain intact.[141]

For the next twenty years after the passage of the Indian Reorganization Act, national policy toward the Indians reaffirmed this new federal commitment to supporting efforts at Indian self-determination and redressing many longstanding grievances of the tribes. The Mineral Leasing Act of 1938,[142] for example, authorized the Indians to make the initial decision to lease tribal lands, unlike earlier statutes which vested such authority in the Federal Government.[143] Special jurisdictional statutes were enacted by Congress to permit certain tribes to sue the Federal Government for tribal treaty violations.[144] In one such case decided by the Supreme Court in 1938, the Shoshone tribe recovered an award of 4.4 million dollars in compensation for the government's conveyance of a portion of tribal property to another tribe without Shoshone consent.[145] While the Supreme Court did acknowledge that the Federal Government could appropriate Indian lands,[146] the Court emphasized that the taking of congressionally recognized tribal land required that just compensation be paid to the tribe.[147] In 1946, Congress decided to resolve all outstanding Indian claims against

136. Act of Feb. 15, 1929, 25 U.S.C. § 231 (1982).

137. 25 U.S.C. § 461 (1982).

138. 25 U.S.C. § 476 (1982).

139. *Id.*

140. *Id.* § 478.

141. *Id.* § 478b.

142. Act of May 11, 1938, 25 U.S.C. § 396(a) (1982).

143. *See, e.g.*, Act of May 29, 1924, 25 U.S.C. § 398 (1982). It should be noted that claims based on the abolition of executive order (as opposed to congressionally authorized) reservations are not compensable under the fifth amendment. *See* Sioux Tribe of Indians v. United States, 316 U.S. 317, 330 (1942).

144. *See, e.g.*, Act of March 3, 1927, ch. 302, 44 Stat. 1349.

145. United States v. Shoshone Tribe, 304 U.S. 111 (1938).

146. *Id.* at 115.

147. Shoshone Tribe v. United States, 299 U.S. 476, 479 (1937).

the government by establishing the Indian Claims Commission.[148] This Commission was authorized to review any Indian claim whether arising under treaty, contract or otherwise, notwithstanding any statute of limitations or laches, as long as the claim had accrued prior to the effective date of the Act.[149]

During the 1950's, federal Indian policy began to shift again. In 1953, Congress delegated to the respective states criminal jurisdiction over most of the Indians living within their boundaries and the territory of Alaska.[150] Congress also provided a general authorization to any state to extend its criminal jurisdiction over the Indians living within state boundaries.[151] In 1954, Congress went even further toward reviving the once discarded assimilation policies by authorizing the Secretary of the Interior to terminate the federal trust responsibility over certain named tribes determined by Congress to no longer be in need of federal protection.[152] Although these termination policies were abandoned soon thereafter,[153] federal protection of a significant number of Indian tribes was withdrawn during this period.[154] It should be noted, however, that the termination acts did not affect any of the powers vested in the tribes to take any action which did not previously require federal authorization.[155]

Federal Indian policy shifted back toward the support of tribal self-government, or at least acquiescence to its continued existence, when Congress enacted the Indian Civil Rights Act of 1968.[156] The major provisions of this Act acknowledge the tribes' power of self-government, but impose upon the tribal governments restraints similar, but not identical, to the Bill of Rights in the United States Constitution.[157] Consequently, tribal governments are required to extend to anyone

---

148. Act of Aug. 13, 1946, 60 Stat. 1049 (codified at 25 U.S.C. § 70 (1982)).

149. 25 U.S.C. § 70(a) (1976). The Commission was limited to resolving only those claims which had accrued prior to Aug. 13, 1946. *Id.*

150. Act of Aug. 15, 1953, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (1982)).

151. *Id. See also* REPORT, *supra* note 21, at 200-02.

152. Act of Aug. 13, 1954, 68 Stat. 722 (codified at 25 U.S.C. § 564(q) (1982)).

153. *See* REPORT, *supra* note 21, at 151.

154. *Id.* at 451. *See also* Menominee Tribe v. United States, 391 U.S. 404 (1968). In the aftermath of termination, some tribes like the Menominee formed native corporations to manage the property of the tribe. *Id.* at 408. *But see* Act of Dec. 22, 1973, 25 U.S.C. §§ 903a-903f (1982), where federal supervision over the Menominee tribe was restored by Congress.

155. Act of Aug. 13, 1954, 25 U.S.C. § 564(q) (1982). *See also* Kimball v. Callahan, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974), where tribal fishing and hunting rights which arose under treaty survived termination among the Klamath tribe. 493 F.2d at 569.

156. Act of Apr. 11, 1968, 82 Stat. 78 (codified at 25 U.S.C. § 1301 (1982)).

157. 25 U.S.C. § 1302 (1982).

within their jurisdiction the equal protection of tribal law.[158] Further, persons subject to detention by the tribe are accorded the privilege of the writ of habeas corpus in the federal courts.[159] Other provisions of the Act limit the authority of tribal courts to impose penalties. For example, punishment may not exceed 500 dollars and six months imprisonment for any single offense.[160] Although this Act also contains provisions whereby the Federal Government gives its consent to any state to assert civil or criminal jurisdiction over the Indians located within its borders, the Act provides that any state which has not asserted jurisdiction over the Indians may not assume such jurisdiction without the consent of the tribe.[161] This Act also provides for trust property to continue as exempt from state taxation.[162] The states are expressly directed to give full force and effect to tribal civil laws which are not inconsistent with state law.[163]

Federal legislation since 1968 has continued to recognize the right of the Indian tribes to exercise the powers of self-government as consistent with the current national policy of promoting Indian self-determination.[164] Although the shifting national policies toward Indian affairs during the past two hundred years certainly offer no guarantee for the future of tribal self-government,[165] it is clear, nonetheless, that Indian tribes have retained a significant degree of control over their internal affairs. They are unlikely to willingly relinquish this control in the near future.[166]

II

In the 150 years that have transpired since the landmark case of *Worcester v. Georgia*,[167] the notion that states are preempted from exercising jurisdiction over the Indians within their borders has undergone considerable change. In the area of criminal law, for example,

158. *Id.* § 1302(8).
159. *Id.* § 1303.
160. *Id.* § 1302(7).
161. *Id.* §§ 1321-1322.
162. *Id.* § 1322(b).
163. *Id.* § 1322(c).
164. *See, e.g.*, Indian Self-Determination and Education Assistance Act of Jan. 4, 1975, 88 Stat. 2203 (codified at 25 U.S.C. § 450 (1982)).
165. *See, e.g.*, the statement of former Interior Secretary Watt, where the reservations were described as "an example of the failure of socialism." N.Y. Times, Jan. 19, 1983, at A19, col. 3.
166. *See, e.g.*, statements by the newly elected Navajo Chairman to the effect that the tribe will no longer allow reservation resources to be exploited by others. N.Y. Times, Nov. 4, 1982, at A16, col. 1.
167. 31 U.S. 515.

many states have assumed jurisdiction over the Indians within their state by virtue of congressional delegation of that authority.[168] In a recent decision by the Supreme Court,[169] the majority decided that even in the absence of an express assumption of criminal jurisdiction by the state, Indian tribes no longer possess "inherent jurisdiction to try and punish non-Indians" in tribal courts.[170] It should be noted, however, that tribal courts have retained the power to enforce tribal criminal laws against members of the tribe,[171] and the Double Jeopardy Clause has been held not to bar both tribal and federal prosecutions since they are brought by different sovereigns.[172] Tribal courts also have retained exclusive jurisdiction over contract suits by nonmembers against members of the tribe when such suits arise from on-reservation transactions.[173] Tribal courts also possess exclusive jurisdiction over adoption proceedings which arise on the reservation and involve only tribal members who reside on reservation lands.[174] Moreover, the Supreme Court stated recently that where Congress specifically has delegated authority to the tribe, the tribe may enforce its regulations against Indians and non-Indians alike.[175]

Despite the trend toward permitting the states to assume criminal jurisdiction, especially where non-Indians are involved, the preemption doctrine continues to be relevant in many civil matters.[176] In *McClanahan v. Arizona State Tax Commission*,[177] for example, the Supreme Court held that a state may not impose its personal income tax on a reservation Indian whose entire income derives from reservation

---

168. *See* REPORT, *supra* note 21, at 201-02. The delegation of authority to the states for the assumption of jurisdiction over Indian lands has been criticized by Indians and non-Indians alike. *Id.* at 204-08. In its report to Congress, the Commission recommended that legislation be enacted to provide for retrocession of jurisdiction to the tribes at the option of the tribal governments. *Id.* at 208.

169. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

170. *Id.* at 212.

171. United States v. Wheeler, 435 U.S. 313, 322 (1978).

172. *Id.* at 329-30. The Court stated that because "tribal and federal prosecutions are brought by separate sovereigns, they are not 'for the same offence' and the Double Jeopardy Clause thus does not bar one when the other has occurred." *Id.*

173. Williams v. Lee, 358 U.S. 217, 223 (1959).

174. Fisher v. District Court, 424 U.S. 382, 389 (1976).

175. United States v. Mazurie, 419 U.S. 544, 557 (1975).

176. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 590 (1832). The preemption doctrine, as applied to Indian law, refers to the general rule that the states are precluded from exercising jurisdiction within Indian territory unless that power is expressly delegated by Congress or the matter at issue involves non-Indians under a law of general application. F. COHEN, *supra* note 14, at 117.

177. 411 U.S. 164 (1973).

sources.[178] In an even more recent case, *Moe v. Salish and Koatenai Tribes*,[179] the Court held that a state may not impose its personal property tax, sales tax or vendor license fees on Indians who conduct business with other Indians on the reservation.[180] It is significant, however, that the Court did uphold the power of the state to require an Indian vendor to collect a state sales tax on reservation sales to non-Indians. Such a requirement was found not to impose a "burden which frustrates tribal self-government."[181] Where the state tax is applied to an area of traditional federal involvement, however, state action is preempted, even where the activity involves non-Indians.[182]

In the most recent case to arise in the area of state taxation, *Washington v. Confederated Tribes of Colville*,[183] the Supreme Court decided that although a state sales tax could not be levied on reservation sales to tribal members, the same tax was valid when applied to on-reservation sales to Indians who were not members of the tribe.[184] The Court found that there was no conflict between the state and tribal taxing schemes, "since each government is free to impose its taxes without ousting the other."[185] In assessing the validity of the tribal tax, the Court stated "While the tribes do have an interest in raising revenue for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services."[186]

The tribal power to impose taxes upon nonmembers has consistently been upheld by the courts despite the argument that the tribes may not tax those who are precluded from representation in tribal government.[187] In most cases of tribal taxation arising in the past, the tax imposed has invariably been one of the sales, license or permit type, which generally involve minimal fees.[188] Recently, however, at least one tribe has gone beyond the traditional permit tax to impose a severance tax on the production of non-Indian mineral lessees which reportedly

178. *Id.* at 165.
179. 425 U.S. 463 (1976).
180. *Id.* at 480.
181. *Id.* at 483.
182. White Mountain Apache v. Bracker, 448 U.S. 136, 151 (1980).
183. 447 U.S. 134 (1980).
184. *Id.* at 159.
185. *Id.* at 158.
186. *Id.* at 156-57.
187. *See, e.g.*, Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958).
188. *Id.* at 554. The license tax imposed here was three cents per year for grazing land and fifteen cents per year for farm land. *Id. See also* Morris v. Hitchcock, 194 U.S. 384 (1904), where the permit tax upheld by the Court was $25 per year. *Id.* at 389.

will generate in excess of two million dollars in annual revenue for the tribe.[189] In *Merrion v. Jicarilla Apache Tribe*,[190] the lessees are twenty-one oil and gas production companies that challenged the power of the tribe to impose such a tax.[191] On their appeal to the Supreme Court, the lessees urged that a tribe's power to tax nonmembers is based solely on the power to exclude nonmembers from tribal land. Because the tax was not imposed until after the leases were executed, and because the power to tax was not reserved in those leases, the lessees argued that the tribe could not impose such a tax.[192] The lessees further urged, in the alternative, that even if the tribe possessed the power to impose the tax after executing the leases, the tax at issue here violated the Commerce Clause by imposing a multiple burden on interstate commerce in view of the pre-existing state severance tax on mineral production.[193]

After examining each of the arguments advanced by the lessees, the majority of the Court held that the severance tax imposed by the tribe was valid.[194] The Court concluded that the tribal power to tax nonmembers is derived not only from the power to exclude nonmembers from tribal land, but also from the "inherent power necessary to tribal self-government and territorial management."[195] While the Court did acknowledge that Congress could eliminate the tribal power to tax, the majority stressed the fact that the tax ordinance at issue had been approved through a congressionally authorized procedure, and thus, was consistent with federal policies.[196] The Court also concluded that a tribe may lease communal property in its role as partner in a commercial venture without relinquishing any of its power as a sovereign to impose a tax at a later date.[197] The majority emphasized that a "nonmember's presence and conduct on Indian lands is conditioned by the

---

189. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 539-40 (10th Cir. 1980).

190. *Id.*

191. *Id.* at 539. The Court of Appeals held the tax to be valid. *Id.*

192. 455 U.S. 130 (1982).

193. *Id.* at 158 n.26.

194. *Id.* at 159. The Court concluded that the tribe never yielded its authority to tax, whether this power is deemed to arise from the inherent power of the tribe to exclude nonmembers or the inherent power of tribal self-government. *Id.*

195. *Id.* at 141. The Court noted that although the power to exclude nonmembers from tribal land is considered to be the hallmark of tribal sovereignty, it is not the sole basis on which the tribe may assert its power to tax. *Id.* at 141-42.

196. *Id.*

197. *Id.* at 145-46. The Court stressed that to hold otherwise would impose a serious financial burden on the tribe to provide governmental services without permitting the tribe to generate the income necessary to pay for essential services. *Id.* at 145 n.10.

limitations the Tribe may choose to impose,"[198] and a waiver of tribal sovereignty may not be inferred from silence in a commercial agreement with a sovereign.[199] The Court also pointed out that the tribe's power to impose its own severance tax is not preempted by a similar state tax in view of the fact that different sovereigns may tax the same transaction.[200] Although the Court found it unnecessary to review the tax under the Commerce Clause, in light of the congressional procedures established for approval of tribal ordinances, the Court concluded that this tax would be upheld if subjected to such scrutiny.[201]

III

Although the Federal Government continues to hold the exclusive right to terminate aboriginal title,[202] it is evident from the decision in *Merrion*[203] that Indian tribes have retained the fundamentally important sovereign right to exercise control over the use and management of tribal property.[204] In view of the vast natural resources which remain within tribal control,[205] it is not unreasonable to assume that Indian tribes will be encouraged to assert their sovereign rights over the future development of reservation resources in the aftermath of the *Merrion* decision.[206]

In recent years, a number of tribes have brought suit to recover tribal lands which were ceded or taken unlawfully.[207] In recognition of

198. *Id.* at 147.

199. *Id.* at 148. The Court recognized that "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Id.*

200. *Id.* at 151. According to the majority, "each government is free to impose its taxes without ousting the other." *Id.*

201. *Id.* at 156.

202. *See, e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1973); United States v. Celestine, 215 U.S. 278, 285 (1909); Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); Cherokee Nation v. Kansas Railway, 135 U.S. 641, 657 (1890).

203. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

204. *Id.*

205. *See* REPORT, *supra* note 21, at 308-39.

206. *See, e.g.*, N.Y. Times, Nov. 4, 1982, at A16, col. 1. The newly elected Navajo Chairman, who presides over the tribe's 24,000 square-mile reservation, has vowed to renegotiate the terms of old mineral leasing agreements and to devote reservation resources to the benefit of the tribe. *Id.*

207. *See, e.g.*, Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir.), *cert. denied*, 452 U.S. 968 (1981); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); United States v. Oneida Nation, 576 F.2d 870 (Ct. Cl. 1978); Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F. Supp. 798 (D.R.I. 1976). *See also* Note, *Indian Sovereignty and Eastern Indian Land Claims*, 27 N.Y.L. SCH. L. REV. 921 (1982).

the serious threat posed to the title of current landowners by suits of this type, Congress has responded by enacting legislation to resolve the claims of various tribes. Under the Alaska Native Claims Settlement Act,[208] for example, Congress set out to resolve all present and potential claims of some two hundred Alaskan Indian groups.[209] The major features of this Act provide for the extinguishment of all aboriginal titles and claims based on use and occupancy,[210] in exchange for the establishment of regional corporations.[211] These corporations are to be entrusted with the responsibility for the management of approximately twenty-two million acres of land granted to the corporations[212] and the distribution of dividends to the native stockholders.[213] Although some tribes have voluntarily incorporated under prior termination acts,[214] the creation of native corporations under the Alaskan Settlement Act marks the first time that Congress has imposed this approach on such a large scale.[215] While it is too soon to judge the success of this approach, it should be noted that Congress did not adopt this strategy in the more recent settlement of claims involving three Maine Indian tribes.[216] Under the terms of the Maine Indian Claims Settlement Act,[217] Congress implicitly reaffirmed the traditional federal commitment to the trust system by appropriating 81.5 million dollars for the purchase of land to be held by the Federal Government in trust for the benefit of the tribes.[218]

Although some Indian claimants may be denied compensation based upon the finding that they no longer engage in tribal relations,[219]

---

208. Act of Dec. 18, 1971, 85 Stat. 688 (codified at 43 U.S.C. §§ 1601-27 (1976)).

209. 43 U.S.C. § 1610(b) (1976).

210. *Id.* § 1603.

211. *Id.* §§ 1606-1607.

212. *Id.* § 1611. *See also* N.Y. Times, July 12, 1983, at D5, col. 4. Another twenty-two million acres is to be distributed to 271 native villages that will also share in the cash settlement. *Id.*

213. 43 U.S.C. § 1606(i)-(m) (1976).

214. *See, e.g.*, Menominee Tribe v. United States, 391 U.S. 404 (1968). A corporation was formed to manage tribal property and the reservation was to be integrated into state government as a county. *Id.* Federal supervision of the Menominee was subsequently restored by the Act of Dec. 22, 1973, 25 U.S.C. § 903(a)-(f) (1982).

215. Act of Dec. 18, 1971, 85 Stat. 688 (codified at 43 U.S.C. § 1601 (1976)). Congress appropriated 462.5 million dollars to establish an Alaskan Native Fund which is to be used to purchase lands to be allotted to the native corporations. *Id.* § 1605.

216. Maine Indian Claims Settlement Act of 1980, 94 Stat. 1885 (codified at 25 U.S.C. § 1721 (1982)).

217. 25 U.S.C. § 1721 (1982).

218. *Id.* § 1721(5).

219. *See, e.g.*, Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979). *See also* Montoya v. United States, 108 U.S. 261 (1901). The

if the settlements of these recent suits are any indication, the potential claims of cognizable tribes are not insubstantial. In a recent settlement with the Sioux Nation, for example,[220] the Supreme Court affirmed an award of 17.1 million dollars plus five percent interest since 1877 for the illegal taking of the Black Hills reservation in violation of treaty obligations with the tribe.[221] Thus, while the Federal Government may have the power to terminate aboriginal title and take full control over Indian lands, there remains a serious question as to whether the government could afford to settle all of the potential claims for just compensation which undoubtedly would arise from such a drastic course of action.

Despite assurances by the Reagan administration that the Federal Government has no plans to terminate the reservation system,[222] it is clear that neither the government nor the tribes are satisfied by the present state of affairs.[223] Economic conditions have forced many reservation businesses to either cut production or cease operations altogether, which in turn has caused unemployment to rise well above fifty percent on some reservations.[224] At the same time, the Federal Government has cut back funding for reservation job training programs, and private investment in reservation enterprises has all but disappeared.[225] While Indian leaders continue to disagree on many other issues,[226] there appears to be a general consensus developing within the Indian community that increased tribal control over reservation re-

---

Montoya Court defined a tribe as a "body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Id.* at 266.

220. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). The Court concluded that although Congress has paramount authority over tribal property, this "power does not extend so far as to enable the Government to give the tribal lands to others, or to appropriate them to its own purposes, without rendering or assuming an obligation to render, just compensation." *Id.* at 408.

221. *Id.* at 424.

222. *See* N.Y. Times, Jan. 31, 1983, at A8, col. 4.

223. *See* N.Y. Times, Jan. 19, 1983, at A19, col. 3; N.Y. Times, Nov. 4, 1982, at A16, col. 1.

224. *See, e.g.*, N.Y. Times, Jan. 31, 1983, at A8, col. 1. Unemployment among the San Carlos Apaches was reported to reach almost 70% during 1982. *Id.* Unemployment on the Spokane reservation was also reported close to 75% at the end of 1982. *See* N.Y. Times, Jan. 6, 1983, at A19, col. 1. In the wake of the recent decision in Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982) (barring enforcement of state gaming laws on Indian reservations), a number of tribes have begun to operate high-stakes bingo games on the reservation in order to raise revenue for the tribe and reduce unemployment on the reservation. *See* N.Y. Times, Mar. 29, 1983, at A1, col. 2.

225. N.Y. Times, Jan. 31, 1983, at A8, col. 1.

226. N.Y. Times, Nov. 4, 1982, at A16, col. 3.

sources is essential to the success of any plan for tribal self-sufficiency.[227]

CONCLUSION

American Indian tribes continue to be recognized as "unique aggregations possessing attributes of sovereignty over both their members and their territory."[228] It appears that as long as the Indians continue to engage in tribal relations and remain as distinct political communities, they will continue to possess a unique, semi-sovereign status within the United States.[229] Treaty rights, which arose at a time when the tribes were truly independent, continue as enforceable vested rights which distinguish the Indian peoples from all other American citizens.[230] The sovereign rights of the Indian tribes clearly are of a limited character and persist at the will of Congress. However, practical considerations make it most unlikely that the tribes will be forced to relinquish these vested rights, at least in the foreseeable future. Meanwhile, the concept of Indian tribal sovereignty will continue to evolve as Indian people strive to preserve tribal relations and tribal governments continue to test the limits of their power as domestic dependent sovereigns.

James H. Gianninoto

---

227. *Id.* at col. 1. *See also* N.Y. Times, June 2, 1983, at A18, col. 4, where the National Tribal Chairmen's Association challenged the Reagan administration to live up to its promise to ease federal restrictions on tribal self-government. *See also* R. BARSH & J. HENDERSON, *supra* note 19, at 280-82, where the authors outline a proposed Constitutional amendment designed to secure political representation for the tribes tantamount to statehood.

228. United States v. Mazurie, 419 U.S. 544, 557 (1975).

229. *See* United States v. Washington, 641 F.2d 1368 (9th Cir. 1981).

230. *Id.* at 1372.