The Status and Rights of Indigenous Peoples in the United States

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In the United States today, 557 federally recognized Indian tribes (which include 226 Alaska Native villages) maintain a sovereign-to-sovereign relationship with the federal government.[1] The 1990 Census of the United States reports that just under 2 million persons identified themselves as Native Americans – about 0.8 % of the American population. In addition, Native Hawaiians, not included in this figure, are estimated at about 200,000. One hundred sixteen tribes have more than 1,000 members, with the Cherokee (308,132) and Navajo (219,198) the largest ethnic groupings. Tribes have 314 reservations, of which 278 are federal reservations. The size of reservations varies widely: The Navajo reservation consists of more than 15 million acres; the smallest reservation is less than 100 acres. Although some of these lands contain valuable resources, an increasing number of tribes are engaged in business ventures, and a few tribes have developed lucrative gaming enterprises, Indians remain the most economically disadvantaged minority in the United States.[2] Federal policies designed to assimilate Indians into the broader society have generally failed, and today federal policy favors tribal self-determination. As a leading book puts it:

> "There is no such thing as a single picture of the Indian response to assimilation. Indian society today is too multi-faceted for that. Some will raise the image of the oil-rich Indian in Tulsa or the well-heeled Alaska Native corporate executive. Others will see the traditional medicine men and the more than one hundred thousand Indians who still speak their native tongues: Choctaw in Mississippi, Cherokee in the hills of Eastern Oklahoma, Navajo in the Four Corners area, Eskimo on the North Slope of Alaska, or one of many other living native languages. Still others will turn to what may well be the majority of American Indians today: persons born on the reservation, learning from the tribal elders, seeking to gain the best of a white education, and all the while searching with a quiet determination to construct a blended way of life that includes a measure of material improvement, a homeland, and the preservation of the essential tribal ways. This is done for the next generation as much as for this

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[1] These and other facts presented in this paragraph come from David H. Getches/Charles F. Wilkinson/Robert A. Williams, Jr., Cases and Materials on Federal Indian Law ch. 1 (4th ed. 1998).

[2] Getches [et al.] report that in 1991 the Indian unemployment rate was 45 %, a 3 % drop since 1989, but nonetheless more than five times as great as the overall unemployment rate in the United States. According to the 1990 Census, 31 % of Indians live below the poverty level. See id. at 15.

one. It is this way of life, of so many levels and conflicts, from which Indian law emerges."[3]

Yet over five hundred years after the initial recorded contact between Europeans and the indigenous peoples of what became known as North America, the legal status of American Indian tribes and their relation to the national government and the states of the United States are among the most complex questions in American law. In 1886, the Supreme Court of the United States stated that "[t]he relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character."[4] Nothing in the intervening century has altered the accuracy of this generalization.

Part of the difficulty is that the basic U.S. governmental charter, the Constitution, provides little guidance. It mentions Indians only three times: once, to indicate that Congress has the authority to "regulate Commerce ... with the Indian tribes"[5]; and twice more, simply to explain that "Indians not taxed" are not included in the calculation for the apportionment of seats in the House of Representatives.[6] It is unsurprising that other sources of law have been used to fill the gap.

Thus, in the United States, "Indian law ... refers to the body of jurisprudence created by treaties, statutes, executive orders, court decisions, and administrative action defining and implementing the relationship among the United States, Indian tribes and individuals, and the states."[7] Note that, as this essay explains, tribal law continues to control the internal governance of the tribe and sometimes applies to nonmembers as well. "Federal Indian law" is truly the colonial law of the United States that, if you will, sits on top of tribal law and preempts tribal law where inconsistent with it.

In this essay, I will describe the basic legal constructs of American federal Indian law and provide some historical context for them. In highlighting the broad details of the field, I hope to present a coherent overview that will be useful to non-Americans. Within the limits of this project, I cannot provide detailed analysis of the many fascinating topics in the field.[8] It is my hope that this brief overview will stimulate further inquiry concerning this area.

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[3] Id. at 28–29. This source reports that approximately half of today's Indian population lives on or near a reservation, see id. at 14. The other half largely lives in metropolitan areas, as a result of federal policy in the 1950s to encourage Indians to relocate, see id. at 14–15.

[4] *United States* v. *Kagama*, 118 U.S. 375, 381 (1886).

[5] Article I, Section 8, clause 3 of the United States Constitution provides that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As the Supreme Court has recognized, this formulation implies that tribes, like foreign nations and states of the United States, have a kind of sovereignty, but that tribes are neither foreign nations nor states of the Union. See text at notes 40–45, *infra*.

[6] See U.S. Const., art. I, § 2, cl. 3; id. amend. XIV, § 2.

[7] Handbook of Federal Indian Law 1 (Rennard Strickland [et al. eds.], 1982).

[8] For more detailed coverage, see, e.g., id. A manageable overview of the field, written to help American law students, is William Canby, American Indian Law in a Nutshell (3d ed. 1998).

I. Summary of Basic Aspects of Current Law

Much of American federal Indian law follows from the definitions of three key terms. Indian tribe in most contexts means a "federally recognized" tribe. Federal recognition usually arises bilaterally (from having entered into a treaty or agreement with the United States), but sometimes unilateral federal action through a statute or an administrative process[9] constitutes "recognition" as well. Thus, the legal definition of "Indian tribe" differs from any used in ethnological inquiry. In many instances, Indian simply means a member of a federally recognized tribe. In other circumstances, it can mean someone who has descended from the original indigenous population and is recognized as an Indian by an Indian community. Some federal statutes use a combination of ethnicity and federal recognition.[10] Tribes consider themselves empowered to determine their own membership, but the federal government reserves the authority to decide for itself as concerns any issue involving federal policy. Finally, Indian country is defined by federal statute[11] as all lands within an Indian reservation, including nonmember-owned land and public roads; all "dependent Indian communities"; and all lands held in the allotment trust format.[12]

As explained in this essay, current aspects of federal Indian law in the United States represent a compromise of potential organizing principles. Consider, first, the conceptualization of the tribes and their relationship to the federal government. American Indian tribes are not truly sovereign, as foreign nations are sovereign. Yet neither are they merely private, voluntary membership organizations, like a fraternal club. Nor are they merely ethnic groups. American law conceptualizes Indian tribes as "domestic dependent nations" locked into a sovereign-sovereign relationship with the federal government. This relationship is not one of equal partners. The Supreme Court of the United States has determined that Congress has "plenary power" over Indian affairs, and the Court has been quite reluc-

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[9] The administration of Indian affairs is handled by the federal Department of the Interior and its subunit, the Bureau of Indian Affairs. The Department of the Interior is authorized to consider and to grant applications from Indian groups that currently lack "recognition." This process is a cumbersome and difficult one.

[10] For example, in *Morton* v. *Mancari*, 417 U.S. 535 (1974), the Supreme Court upheld the constitutionality of a federal statute that provided an employment preference in the federal Bureau of Indian Affairs for "qualified Indians." "Indian" was in turn defined as someone with "one-fourth or more degree Indian blood and [who is] a member of a Federally-recognized tribe." The Court held that this classification did not violate the implied equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution because "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians", 417 U.S. at 555.

[11] 18 U.S.C. §1151 provides that the term "Indian country" means "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

[12] This form of landholding is described in text at note 58, *infra*.

tant to strike down federal action as unconstitutional. Yet the federal courts have routinely applied canons of interpretation to federal treaties and statutes involving Indians, such that ambiguities in them will be interpreted favorably to the tribal interests. This judicial attitude about interpretation forces Congress, rather than the executive branch or the courts, to direct the ongoing processes of colonization, and Congress's intrusions into tribal affairs must be unambiguous to have legal effect.

The relationship between tribes and the American states has taken several historical turns. Originally, the federal-tribal relationship was understood to be exclusive, such that the American states had no role to play in Indian affairs. Over the years, however, the Supreme Court has relaxed this rule to allow states to regulate in "Indian country" when no federal law preempts state power and the state has a significant interest at stake. Before the influx of non-Indians onto Indian reservations, tribal authority over their reservations was plenary. Because tribal power is rooted in inherent, precolonial sovereignty, not in delegations of federal or state authority, it was beyond the limitations of the federal Constitution, which generally only circumscribe federal and state action. In effect, the Supreme Court has relaxed this rule as well, to some extent accommodating the interests of non-Indians found in Indian country in being free from regulation by a sovereign in which they have no right of political participation (voting, jury service, and so on). Tribal authority over its own members remains essentially plenary, subject only to limitations found in tribal law and in the Indian Civil Rights Act of 1968,[13] a federal statute that imposes upon tribes some of the limitations upon governmental action found in the United States Constitution.

These basic principles are in a state of flux. Indian law cases represent a surprisingly large share of the docket of the Supreme Court of the United States. During its 1997 Term, for example, in which it decided eighty-nine cases by signed opinion,[14] the Court resolved five Indian law cases.[15] Many factors help explain why, this half-millennium after the American colonial process began, the legal details of it remain contentious. Rather than fading away, as nineteenth-century non-Indian notions suggested, tribes have asserted their prerogatives aggressively in recent years, exercising their right to engage in commerce, including sometimes-lucrative gaming operations, and vigorously asserting their sovereign authority over Indian country and all persons found within it. Tribes and states face innumerable conflicts over their potentially overlapping and competing jurisdiction. In particular, at the behest of non-Indians who live or have significant interests in Indian country, states have challenged tribal claims to regulatory power. In addition, activities

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[13] See Pub. L. No. 90–284, 82 Stat. 77, codified as amended at 25 U.S.C. §§1301–03; see note 79, *infra*.

[14] See The Supreme Court, 1997 Term, 112 Harv. L. Rev. 1, 366 (1998).

[15] See *Cass County* v. *Leech Lake Band of Chippewa Indians*, 118 S.Ct. 1904 (1998); *Kiowa Tribe* v. *Manufacturing Technologies*, 118 S.Ct. 1700 (1998); *Montana* v. *Crow Tribe*, 118 S.Ct. 1650 (1998); *Alaska* v. *Native Village of Venetie Tribal Government*, 118 S.Ct. 948 (1998); *South Dakota* v. *Yankton Sioux Tribe*, 118 S.Ct. 789 (1998).

that take place in Indian country may have spillover effects outside the region that create concerns for the states.[16] Although contemporary federal policy supports tribal sovereignty on the surface,[17] Congress has recently considered measures that would undermine tribal authority.[18] The role of the Supreme Court has evolved as well. From perhaps 1959 to the mid-1970s, tribes often met with success in the Supreme Court.[19] The decade of the 1990s has, however, been a different story, with tribes losing a series of important cases.[20] There is a growing sense that the Court today less aggressively than in the past applies fundamental principles that provide a grounding for tribal claims to power.[21] In part because, beyond the most basic of principles, much of federal Indian law remains incoherent, and in part because the federal courts seem less receptive than in the past to tribal

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[16] See, e.g., *Rice* v. *Rehner*, 463 U.S. 713 (1983) (on-reservation sale of alcoholic beverages to nonmembers); *Washington* v. *Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) (on-reservation sale of cigarettes to nonmembers).

[17] See 25 U.S.C. § 3601 ("The Congress finds and declares that – (1) there is a government-to-government relationship between the United States and each Indian tribe; (2) the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; (3) Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes ..."). President Clinton has aggressively reaffirmed the principle of tribal sovereignty. See Executive Order No. 13084, Consultation and Coordination With Indian Tribal Governments, 63 Fed. Reg. 27655 (May 14, 1998); Memorandum from President William Clinton for the Heads of Executive Departments and Agencies entitled "Government-to-Government Relations With Native American Tribal Governments," 59 Fed. Reg. 22951 (April 29, 1994).

[18] See, e.g., 105th Cong. (1998); S.2299 (waiving tribal governments' immunity against suits for contract enforcement in federal courts); S.2301 (making certain environmental law provisions applicable to Indian tribes and waiving tribal immunity against suits for violation of those provisions); S.2302 (waiving tribal immunity against tort suits in federal courts and requiring all tribes to obtain tort liability insurance.

[19] The Court's support of tribal interests in this period is detailed in Charles F. Wilkinson, American Indians, Time, and the Law (1987).

[20] See *Cass County* v. *Leech Lake Band of Chippewa Indians*, 118 S.Ct. 1904 (1998) (county may tax land owned in fee simple by tribe on reservation); *Montana* v. *Crow Tribe*, 118 S.Ct. 1650 (1998) (tribe cannot recoup past mineral taxes paid to state); *Alaska* v. *Native Village of Venetie Tribal Government*, 118 S.Ct. 948 (1998) (Alaska Native Villages lack "Indian country" status); *South Dakota* v. *Yankton Sioux Tribe*, 118 S.Ct. 789 (1998) (reservation diminished by agreement tribe entered into with federal government many years earlier); *Strate* v. *A-1 Contractors*, 117 S.Ct. 1404 (1997) (denying jurisdiction to tribal court over lawsuit arising out of automobile accident on reservation involving nonmembers); *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996) (Congress lacks authority to authorize federal district judge to order state to negotiate with tribe); *Hagen* v. *Utah*, 510 U.S. 399 (1994) (agreement diminished reservation); *South Dakota* v. *Bourland*, 508 U.S. 679 (1993) (tribe lacked authority to regulate nonmember fishing in public recreation area on reservation); *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) (county may tax land owned in fee simple by Indians on reservation); *Duro* v. *Reina*, 495 U.S. 676 (1990) (tribal court lacked criminal jurisdiction over nonmember Indian). For a rare tribal victory, see *Kiowa Tribe* v. *Manufacturing Technologies*, 118 S.Ct. 1700 (1998) (refusing to repudiate sovereign immunity of tribe).

[21] See, e.g., Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers, 109 Yale L.J. (1999) (forthcoming); David Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Cal. L. Rev. 1573 (1996).

claims, there may be some movement toward settlement and away from litigation to resolve the competing contentions of states, the federal government, and tribes.[22]

The most logical way to understand how federal Indian law has unfolded is to trace the historical development of this body of law. The next Part provides a brief overview highlighting the basic principles of federal Indian law within their historical context. Part III then takes a more focused look at the current state of federal Indian law and briefly considers the unique rights and status of Natives in certain circumstances under American law. Part IV concludes with some speculations about the future of federal Indian law.

II. Federal Indian Law in Historical Context

The history of federal Indian law may be divided into roughly six eras. In the colonial (pre-constitutional) period, European governments unilaterally assumed the authority to colonize North America, sorting out their competing claims by the doctrine of discovery (essentially, first in time, first in right) and establishing an exclusive relationship with each tribe such that it could convey its lands only to the discovering European sovereign.[23] Under the Articles of Confederation, the first foundational charter of the United States, it was not entirely clear whether the sovereign authority to deal with tribes lay with the federal government or with the semi-autonomous states.[24] Nonetheless, it is clear that, from 1789 on, with the Constitution in place, the federal government assumed much greater authority over Indian affairs. The first Congress, in 1790,[25] passed the first of a variety of trade and intercourse acts regulating commerce with tribes. The United States entered into numerous treaties with tribes until 1871.[26] In the typical treaty, the tribe ceded lands to the United States, reserved the remainder of its lands for itself (hence the term "Indian reservation"), and bargained for some benefits to be provided by the federal government. Until fairly late in the nineteenth century, federal policy called for removing Indians westward and isolating them from European-Americans. Federal policy radically shifted toward one of assimilation in 1887, when Congress passed the General Allotment Act.[27] Under the allotment policy, many Indian reservations were carved up into "allotments" for individual

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[22] See Philip Frickey, Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law, 110 Harv. L. Rev. 1754 (1997).

[23] See generally Robert Clinton, The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs, 69 B.U. L. Rev. 329 (1989).

[24] Article IX of the Articles of Confederation provided that the Continental Congress had "the sole and exclusive right and power of ... regulating the trade and managing all affairs with the Indians, not members of any of the states, provided, that the legislative right of any state within its own limits be not infringed or violated."

[25] Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137.

[26] See text at notes 54–57, *infra*.

[27] Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, codified as amended at 25 U.S.C. §331 et seq.

tribal members – land allocated to the individual member and held in federal trust for a term of years so that the member could learn agricultural ways free from state taxation and regulation. When the trust period expired, the land became fully alienable and subject to taxation. Land left over on the reservation after the allotments were allocated became "surplus" and available for non-Indian homesteading. By the time this policy was abandoned in 1934, two-thirds of Indian lands had been lost to non-Indian settlement, purchase, and tax foreclosure sales.[28] In addition to forbidding further allotments and to extending the trust period for existing allotments into perpetuity, the Indian Reorganization Act of 1934[29] attempted to reinvigorate tribal governments, which had been devastated by the assimilationist, individualistic allotment policy. During this era many tribal governments adopted written constitutions at the behest of federal authorities. Following World War II, federal policy again shifted back toward assimilation. Congress provided a means to compensate tribes for historical grievances[30] and proposed a variety of approaches designed to push individual Indians away from tribalism and toward non-Indian ways.[31] The most drastic of these was the Termination Policy,[32] under which, on a tribe-by-tribe basis, Congress determined whether to "terminate" the tribe as a governmental entity and to convert tribal lands into more fungible commodities.[33] In the 1960s federal policy spiraled again, returning to an approach more favorably disposed to tribal autonomy.[34]

In the space available, I can find no better way to make this rather arid summary of history come alive than to examine the foundational decisions of the Supreme Court of the United States within certain of these eras. From these decisions emerge the basic principles of federal Indian law that survive today.

A. The Marshall Trilogy

In three cases decided between 1823 and 1832, the Supreme Court, through opinions by its Chief Justice, John Marshall, established the framework of federal

[28] "Indian land holdings were reduced from 138 million [acres] in 1887 to 48 million in 1934, a loss of 90 million acres", Handbook of Federal Indian Law, *supra* note 7, at 138.

[29] Indian Reorganization (Wheeler-Howard) Act of 1934, ch. 576, 48 Stat. 984, codified at 25 U.S.C. §§461–79.

[30] See Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049.

[31] For example, in the 1950s, the Bureau of Indian Affairs established a "relocation" policy, which encouraged reservation-dwelling Native Americans to move to urban centers. Additionally, in 1953 Congress passed Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified in part at 18 U.S.C. §1162 and 28 U.S.C. §1360. Public Law 280 delegated jurisdiction to five states over some or all "Indian country" found within their borders and authorized other states to assume such jurisdiction as well.

[32] Congress established this policy in House Concurrent Resolution 108, 67 Stat. B132, passed on August 1, 1953.

[33] The precise legal effects of termination remain unclear. Certainly termination ended the federal-tribal relationship of sovereignty and ended special federal programs with respect to those tribes. But just as certainly, termination could not make an ethnological group disappear. Some of the terminated tribes have obtained federal re-recognition under the process mentioned in note 9, *supra*.

[34] See generally Handbook of Federal Indian Law, *supra* note 7, at 180–206.

Indian law. The cases are often called the "Marshall trilogy." It is impossible to understand federal Indian law without a rather thorough examination of these cases.

In the first, *Johnson v. McIntosh*,[35] it was alleged that a tribe had sold some of its land to a non-Indian individual, then later ceded the same land by treaty to the United States. The case involved a land title contest between the successors to the first transaction and the successors to a land patent issued by the United States after the second transaction. Consistent with colonial practice, the Supreme Court held that the second transaction was the valid one. According to the Court, European discovery of Indian land gave the European sovereign legal title to the land. The tribe retained equitable title, a right of occupancy that was to remain undisturbed until it was obtained by the European discovering sovereign, which had "an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[36]

In many respects, *Johnson v. McIntosh* established the highly deferential American judicial approach to issues of Indian affairs. The Court essentially deferred to the basic assumptions that had been used to colonize the area that became the United States. Chief Justice Marshall's opinion was careful, however, to indicate that the Court's deference was rooted not in any necessary support for the normative attractiveness of colonization,[37] but instead was based on a sense that the judiciary could not disrupt such a fundamental "actual state of things."[38] Indeed, in a rather startling passage, he wrote that "[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."[39]

Johnson might be read as suggesting that the federal judiciary would never second-guess exercises of American governmental power over Indians. The potentially drastic implications of *Johnson* were soon softened, however, in two cases

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[35] 21 U.S.(8 Wheat.) 543 (1823).

[36] Id. at 587.

[37] Chief Justice Marshall wrote: "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits", id. at 588. Earlier in the opinion he referred to European colonial pretensions in this manner:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence", id. at 572–73. Later in the opinion, he referred to the European claims as "pompous", id. at 590, and noted that the restrictions upon Indian property rights "may be opposed to natural right", id. at 591.

[38] Id. at 591.

[39] Id. at 588.

involving the attempt by the State of Georgia to assert legislative authority over the reservation of the Cherokee Nation.

In the first, *Cherokee Nation* v. *Georgia*,[40] the tribe brought an action within the original jurisdiction of the Supreme Court seeking an injunction against the enforcement of Georgia law on the reservation. In denying relief on jurisdictional grounds, Chief Justice Marshall loaded the opinion with language establishing principles recognizing the sovereignty of tribes as well as reflecting a heightened judicial solicitude for the normative aspects of colonization.[41]

The Cherokee relied upon the constitutional provision stating that the Supreme Court has original jurisdiction in a case between a "foreign State" and a state of the United States.[42] It would have been simple enough for the Supreme Court to hold that, whether or not the Cherokee had any aspects of sovereignty, they were in no way "foreign," and thus no original jurisdiction existed. Instead, Chief Justice Marshall began by concluding that the Cherokee Nation indeed was a sovereign.[43] Using the *Johnson* rationale of deference to settled practice, but this time wielding the notion to produce a conclusion favorable to the tribe, Marshall relied upon the fact that the federal government had repeatedly assumed the sovereignty of the Cherokee by entering into numerous treaties with the tribe.[44] But tribes are

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[40] 30 U.S. (5 Pet.) 1 (1831).

[41] Chief Justice Marshall began the opinion with a blunt commentary suggesting that the Cherokee had been fundamentally mistreated by Georgia:

"This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.

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 arms, 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. at 15.

[42] See U.S. Const., art. III, §2, cl. 1 & 2.

[43] There was no majority opinion in *Cherokee Nation*; one Justice (McLean) joined Marshall's opinion, two other Justices (Thompson and Story) concluded that the Cherokee Nation was a foreign state, and the other two Justices participating (Johnson and Baldwin) thought that the tribe possessed no sovereignty at all. Marshall's opinion was something of a median point between the polar positions of the other two sets of Justices, and it is frequently relied upon today despite its lack of formal precedential value.

[44] Marshall wrote: "So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. 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", 30 U.S. (5 Pet.) at 16.

not foreign nations, Marshall acknowledged. Instead, he called them "domestic dependent nations" in a relation to the federal government that "resembles that of a ward to his guardian."[45]

The third Marshall opinion, *Worcester v. Georgia*,[46] remains the most important decision in federal Indian law.[47] The Supreme Court held that, even though the Cherokee Reservation was within the borders of Georgia, the state had no authority to regulate persons, including non-Indians, found there. The opinion relied upon two general principles: that the federal-tribal relationship was exclusive, such that any non-Indian governmental power relating to the Cherokee must be federal, not state; and that the tribe itself retained sovereignty over its reservation.[48] To apply these general principles, however, Marshall had to overcome the argument that the tribe had ceded away its sovereignty by treaty. His method of interpreting this treaty language established a fundamental precedent with wide-ranging future impact.

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[45] Id. at 17. Another fascinating aspect of the opinion was Marshall's comment, in passing, that Indians retained their right of land occupancy "until that right shall be extinguished by a voluntary cession to our government", id. at 17. This notion was, of course, inconsistent with his language in *Johnson* suggesting that Indian title could be extinguished by purchase or conquest. See text at note 36, *supra*.

[46] 31 U.S.(6 Pet.) 515 (1832).

[47] Marshall began his analysis by weaving together his *Johnson* deference to settled matters, his *Cherokee Nation* sense of original tribal sovereignty, and the qualms both opinions intimated about the normative questions concerning colonization:

"America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. 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.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.

Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions", id. at 542–43.

[48] Marshall wrote: "The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States", id. at 561.

In effect, the fourth article of the treaty provided that the United States "allotted" the reservation to the Cherokee as their "hunting ground." The plain meaning of this formulation suggests that the Cherokee had ceded all their lands and other rights to the United States, which then in turn granted to the Cherokee a license to hunt over a certain region. The language surely does not easily capture the concept that the lands were to be within the exclusive use and dominion of the Cherokee. Yet Marshall gave the words that meaning, based on two key canons of interpretation. The first is that the treaty should be understood as the Indians would have understood it.[49] The second is that the nature of an Indian treaty transaction is a cession of rights from the tribe to the United States with the tribe reserving all rights not expressly given up, not a granting of rights from the United States to the tribe.[50] The canons combined to make the focus of the inquiry what the tribe understood it was giving up, not on what the United States might have understood, or even what an objective reading of the treaty language might suggest.

The ninth article of the treaty contained language suggesting that the tribe had ceded its self-governing authority to the United States.[51] Again, Marshall defeated the thrust of the arguably objective meaning of the treaty words by relying upon what the Indians would have understood them to mean. He also boldly suggested that the political destruction of the Cherokee "would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognise the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace covertly into an act, annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed."[52] In essence, Marshall conceived of an Indian treaty as a presumptively benign instrument of shared governance that was designed to establish a framework for a sovereign-sovereign relationship. Some other use for a treaty, he intimated, would be illegitimate, at least unless the treaty plainly so provided. He took it to be the judicial role to require federal negotiators seeking to undermine Native rights to make plain their intent and to obtain knowing Indian consent.

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[49] Marshall wrote: "Is it reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word 'allotted' from the words 'marked out'. The actual subject of contract was the dividing line between the two nations, and their attention may very well be supposed to have been confined to that subject. ... So with respect to the words 'hunting grounds'. Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved", id. at 552–53.

[50] "When, in fact, they were ceding lands to the United States, and describing the extent of their cession, it may very well be supposed that they might not understand the term employed, as indicating that, instead of granting, they were receiving lands", id. at 553.

[51] It provided: "For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States, in congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs, as they think proper", id. at 553.

[52] Id. at 554.

Marshall's use of such aggressive interpretive canons stands in stark contrast to the judicial deference seemingly displayed in *Johnson*. Elsewhere I have suggested that his approach can be made consistent.[53] *Johnson* may be understood as expressing deference to the longstanding practices of colonialism, which if judicially reexamined might dash settled expectations concerning land titles and other fundamental aspects of the way the continent was colonized. In America, we have a saying for this: "the horse is out of the barn." In contrast, *Worcester* stands for a vigorous judicial role in monitoring contemporary aspects of colonization, especially in policing Congress and the executive branch concerning any efforts to deprive Natives of rights. To be sure, as the cases discussed in the next section demonstrate, Marshall was not indicating that the Supreme Court should stand ready to declare unconstitutional many aspects of new colonial policies. Instead, Marshall suggested that the political branches could have their way in Indian affairs – but only if they explicitly acknowledge their intent to invade Native interests, thereby providing Indians and their political allies the opportunity to fight out the issue in the political area. Because in many cases language in existing treaties or statutes will not rise to this level of clarity, the courts should stand ready to provide benign interpretations, leaving not the tribes, but their opponents, with the burden of going to the Congress to try to obtain relief. In effect, the method can update colonial policy, because by refusing to follow the ambiguous intent of a long-adjourned Congress (with what were probably highly colonial values), the focus shifts to whether the current Congress, which presumably is less swayed by the European "right" to colonize, can be bestirred from its busy agenda to change the status quo at the behest of interests seeking to dilute tribal prerogatives.

B. The Era of Allotment and Plenary Power

The Marshall Court's conceptions of the sovereign-sovereign, treaty-based relationship between the United States and Indian tribes remain the basis of federal Indian law to this day. As the end of the nineteenth century approached, however, Congress initiated two important changes in federal Indian policy that dramatically affected the path of federal Indian law.

The first was an abandonment of treaty-making with Indians. Perhaps surprisingly, this had much less to do with any perceived reduction in the sovereignty of Indian tribes than it did with internal congressional politics. Under the American Constitution, treaties are negotiated by the executive branch and ratified by the Senate.[54] In contrast, statutory lawmaking requires the concurrence of the Senate and the House of Representatives in identical language in a bill, which is then signed by the President.[55] Jealous of the Senate's practical superior political posi-

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[53] See Philip Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381 (1993).

[54] See U.S. Const., art. II, §2, cl. 2.

[55] See U.S. Const., art. I, §7, cl. 2–3.

tion in Indian affairs because of its unicameral treaty-ratification power, the House of Representatives in 1871 forced through a provision forbidding further treaty-making with tribes.[56] Since that time, congressional relationships with tribes have been achieved through the bicameral ratification of agreements rather than by treaty in the Senate alone. Traditionally, the courts have treated these agreements and other arrangements as "treaty substitutes" and have generally applied the Marshall Court's conceptions and canons of interpretation to them, so the difference has been more in form than substance.[57]

Much more important was the congressional adoption of the policy of allotment. In the General Allotment Act of 1887,[58] the Congress abandoned the policy of isolating Indians on reservation enclaves. Instead, Indian policy moved in a dramatically assimilationist direction. Under the allotment approach, Indian reservations were carved up into individual Indian allotments – parcels of reservation land temporarily held in trust by the United States for the benefit of individual tribal members, with eventual transfer of full legal title to the members. During the trust period, the "allottee" was to learn western agricultural ways. A basic premise was that the ownership of private property and the undertaking of agricultural capitalism would lead Indians to abandon tribal conceptions of life and, in a generation, lead to the disappearance of Indian reservations as geographical constructs. Much of the reservation land that was not allotted was declared "surplus" and made available for non-Indian homesteading. This influx of non-Indians onto reservations was designed not only to respond to the non-Indian hunger for free agricultural opportunities, but also to promote the eventual disappearance of Indian reservations from the landscape. Typically, the tribe received no compensation for the transmution of its collective land into individual parcels for its members. The tribe did typically receive some compensation for the "surplus" lands lost.

The federal government essentially imposed allotment upon many tribes. In *Lone Wolf* v. *Hitchcock*,[59] for example, it was alleged that the executive branch imposed allotment upon a tribe through an agreement to which the tribe had not consented. A prior treaty required that no further land transactions between the tribe and the United States could occur without the concurrence of three-fourths of the male members of the tribe. It was alleged that an insufficient number of members actually ratified the agreement. Moreover, when the agreement was presented to Congress, Congress unilaterally altered some terms. Following the principles of American law concerning international treaties, the Supreme Court held that Congress had the authority to engage in such unilateral abrogation of a domestic Indian treaty. The Court stated that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the

[56] See Appropriations Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566, codified as 25 U.S.C. §71.

[57] See, e.g., Frickey, *supra* note 53, at 421, 422.

[58] Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, codified as amended at 25 U.S.C. §331 et seq.

[59] 187 U.S. 553 (1903).

power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[60] This notion that the Congress, not the American states, possesses the fundamental colonial power over Indian affairs is consistent with an earlier decision that upheld a federal statute criminalizing a purely intratribal crime on an Indian reservation.[61]

The abandonment of treaty-making and the unilateral imposition of allotment might seem to result in the complete victory of the adjectives "domestic" and "dependent" over the noun "nation." Yet even in this era, the Supreme Court continued to understand Indian tribes as possessing sovereignty rooted in the pre-colonial situation. In *Talton* v. *Mayes*,[62] an Indian prosecuted by his tribe for murder contended that his indictment by the tribe had failed to comport with the requirements of the Bill of Rights of the United States Constitution. The Court refused to interfere with the tribal procedure, concluding that the Constitution does not limit tribal governmental action. Rather than exercising delegated federal authority (which would invoke constitutional limitations), tribes exercise reserved, retained, inherent sovereignty. The Court concluded that "the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution [and] are not operated upon by the Fifth Amendment, which ... had for its sole object to control the powers conferred by the Constitution on the National Government."[63]

But even though *Talton* suggests that tribes retained the forms of sovereignty during this era, allotment dealt tribal power a crushing practical blow. Of the 138 million acres of Indian land that existed at the beginning of the era, 90 million acres fell out of Indian ownership as the result of allotment.[64] The influx of non-

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[60] Id. at 565.

[61] A basic notion of American constitutional law is that the federal Congress does not have a local police power. Instead, the only legislative powers it possesses are those delegated to it in the Constitution. See *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In the Major Crimes Act of 1885, ch. 341, 23 Stat. 385, Congress for the first time made it a federal crime for one Indian to commit one of the enumerated "major crimes" (e.g., murder) victimizing another Indian in Indian country. In *United States* v. *Kagama*, 118 U.S. 375 (1886), the Supreme Court upheld the constitutionality of this statute. The Court first rejected the argument that Congress was delegated the authority to enact this statute in the Commerce Clause of Article I of the Constitution, which authorizes Congress "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 "Indian Commerce Clause" did not authorize the Major Crimes Act because a purely localized crime of this nature had nothing to do with "commerce." At that point, had the Court followed the basic notion that Congress possesses only delegated legislative powers, it would have struck down the statute as unconstitutional. Instead, the Court upheld the statute based on tortured logic: the Court assumed that there must be some sort of plenary legislative colonial power and that Congress was far better situated to possess the power than would be the many individual states, both for the coordination of policy and for the protection of the Indians. For an extended discussion of *Kagama* and its tensions with basic American constitutional law principles, as well as a broader reconceptualization of the "plenary" power over Indian affairs, see Philip Frickey, Domesticating Federal Indian Law, 81 Minn. L. Rev. 31, 52–74 (1996).

[62] 163 U.S. 376 (1896).

[63] Id. at 384.

[64] See note 28 *supra* and accompanying text. In addition to the "surplus" lands homesteaded by non-Indians, much Indian land was lost when the allotments fell out of trust status and became fully

Indians onto the reservation destroyed the territorial integrity of reservations. Moreover, Congress further transformed the relationship of tribes and their members with the United States in 1924, when by statute it unilaterally conferred American citizenship upon all Native Americans who had not yet achieved that status.[65] Thus, just as many reservations lost their status as exclusively Indian enclaves, Indians themselves were thrust into a complicated and potentially conflicting and assimilative political arrangement under which they became citizens of the United States and the state in which they resided as well as members of their tribe.

In the 1920s, the federal government came around to the proposition that allotment had been a disastrous policy. In 1934, in the Indian Reorganization Act,[66] Congress forbade the further allotment of tribal lands and extended into perpetuity the trust period for lands that remained in the allotment format. But Congress did nothing to undo the effects of the allotment policy. Today, on some Indian reservations, the vast majority of residents are non-Indian. Indian tribes suffer when courts define tribal sovereignty over the reservation by balancing it against the interests of such non-Indian residents.[67]

III. Modern Federal Indian Law

Most of the doctrines of contemporary federal Indian law flow from the legacies of the Marshall Court and of the later policy of allotment.

A. Federal Power

The Supreme Court continues to accord Congress a "plenary power" over Indian affairs.[68] The power is somewhat limited by the notion that, consistent with the canons of interpretation adopted by the Marshall Court, Congress must act clearly before its actions will be understood as invading Indian interests.[69] The Court has sometimes suggested that Congress could overstep its authority,[70] but nonetheless the Court has never struck down a federal statute on the ground that

owned individually. Many of the former allottees sold their lands to non-Indians (a process rife with fraud) or lost them due to state property tax foreclosures.

[65] See Act of June 2, 1924, ch. 233, 43 Stat. 253.

[66] See Indian Reorganization (Wheeler-Howard) Act of 1934, ch. 576, 48 Stat. 984, codified at 25 U.S.C. §§461–79.

[67] See text at notes 78–87, *infra*.

[68] See, e.g., *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs").

[69] See Frickey, *supra* note 53.

[70] In *Morton* v. *Mancari*, discussed in note 10, *supra*, the Court stated that legislation regulating Indians would be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians", 417 U.S. at 555.

it invades tribal sovereignty.[71] In tension with the notion of congressional plenary power is the theory, rooted in dictum in the *Cherokee Nation* case,[72] that tribes and the federal government have a trust relationship. As a practical matter, the idea that the federal government owes special duties to tribes may provide one justification for the canons of interpretation favoring the preservation of tribal interests and may set some limits on federal administrative discretion over Indian affairs.[73]

B. Tribal Power and State Power

Traditional Indian tribal governments, which tended to be decentralized and operated by consensus, were submerged by the colonial process, which displaced traditional tribal government with federal bureaucrats.[74] The revival of tribal sovereignty in federal policy has freed tribes to engage in self-determination, however, and tribes have constructed a wide variety of institutions of governance, including tribal courts. Today, approximately 150 tribal courts exist.[75] "Judicial forums vary from reservation to reservation as a result of many factors including differences in the sizes of the tribes, their reservations' general populations, their caseloads, their wealth and resources, their traditions, and the tribunals' longevity."[76]

As mentioned, the Marshall Court, in the *Worcester* decision, held that state law had no role in Indian country. (The states, of course, have the general police power over Indian and non-Indian alike outside Indian country.[77]) Subject to the Indian Civil Rights Act of 1968,[78] which imposes some limitations upon tribal

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[71] The most recent case striking down a federal statute involving Indian affairs, *Babbitt* v. *Youpee*, 519 U.S. 234 (1997), involved interference with individual Indian property rights. So did three earlier cases. See *Hodel* v. *Irving*, 481 U.S. 704 (1987); *Choate* v. *Trapp*, 224 U.S. 665 (1912); *Jones* v. *Meehan*, 175 U.S. 1 (1899). Cf. *United States* v. *Sioux Nation*, 448 U.S. 371 (1980) (upholding award of just compensation for taking of Indian lands). In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), the Court invalidated a federal statute on the ground that it unconstitutionally provided federal-court jurisdiction over a state. In *Muskrat* v. *United States*, 219 U.S. 346 (1911), the Court invalidated a statute because it called upon courts to issue an advisory opinion, which is prohibited by the requirement in Article III of the Constitution that federal courts may hear only "cases" or "controversies."

[72] See text at notes 40–45, *supra*.

[73] See *Morton* v. *Ruiz*, 415 U.S. 199 (1974); *Pyramid Lake Paiute Tribe* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1973).

[74] See Getches/Wilkinson/Williams, *supra* note 1, at 374–75.

[75] See id. at 390.

[76] Id. at 391 (quoting United States Commission on Civil Rights, The Indian Civil Rights Act 32 [1991]).

[77] An exception is when Congress has limited such state power or expanded tribal power outside Indian country, as has been done to some extent on issues concerning state court and tribal court jurisdiction over child custody and revocation of parental rights disputes involving Indian children. See Indian Child Welfare Act of 1978, Pub. L. 95–608, 25 U.S.C. § 1901 et seq., discussed in text at notes 103–08, *infra*.

[78] Pub. L. No. 90–284, 82 Stat. 77.

authority,[79] tribes remain empowered to regulate their own members.[80] In recent times, however, a gradual erosion of tribal power and a corresponding intrusion of state authority has occurred concerning the regulation of nonmembers found in Indian country.

The Supreme Court has held that tribes have no criminal jurisdiction over non-Indians.[81] The Court reached the same answer with respect to tribal criminal jurisdiction over nonmember Indians,[82] but Congress later enacted legislation purporting to recognize tribal criminal jurisdiction over such persons.[83] In contrast, a tribe may tax a non-Indian company that has entered into consensual dealings with it.[84] More generally, tribes lack the authority to impose civil regulation upon nonmembers found in Indian country unless they have consented or their conduct threatens to undermine fundamentally important tribal interests.[85] Tribal courts have exclusive civil jurisdiction over an action brought by a nonmember business located in Indian country against a member concerning a cause of action arising in Indian country.[86] As a prudential matter, federal courts should often decline to interfere with tribal-court jurisdiction over an action brought by a member against a nonmember concerning a cause of action arising in Indian country.[87]

A state may not tax the income earned by a tribal member on the reservation.[88] Nor may the state generally impose regulatory measures upon tribal members found there.[89] The current decisional law concerning whether a state may tax or

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[79] Primarily, the statute requires tribes to follow many of the same guarantees of individual liberty found in the Bill of Rights to the U.S. Constitution; the statute also limits tribal-court criminal sanctions to no more than a one-year term of imprisonment or a fine of $5,000 or both. See 25 U.S.C. §§1301–03.

[80] See, e.g., *United States* v. *Wheeler*, 435 U.S. 313 (1978) (upholding tribal as well as later federal criminal prosecutions of member who committed crime on reservation).

[81] See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978).

[82] See *Duro* v. *Reina*, 495 U.S. 676 (1990). As is probably self-evident, a nonmember Indian is a Native American who is a member of a tribe other than the one seeking to regulate him or her.

[83] In 1990, for only a one-year period, Congress authorized tribal courts to exercise criminal jurisdiction over nonmember Indians. It did so by amending the Indian Civil Rights Act, 25 U.S.C. §1301(2), by changing the definition of "powers of self-government" as follows: "means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians", Pub. L. No. 101–511, §8077(b)-(d) (1990). This approach was made permanent in 1991. See Act of Oct. 28, 1991, Pub. L. No. 102–137 (1991).

[84] See *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

[85] See *Montana* v. *United States*, 450 U.S. 544 (1981). Cf. *Brendale* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (without a majority opinion, the Court in effect held that a tribe may zone nonmember lands in the "closed" area of its reservation, which remained an almost exclusively Indian enclave and to which nonmembers were not generally allowed to visit, but not in the "opened" area of the reservation, which was predominantly non-Indian and in many ways indistinguishable demographically or otherwise from the surrounding off-reservation areas).

[86] See *Williams* v. *Lee*, 358 U.S. 217 (1959).

[87] See *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Co.* v. *Crow Tribe*, 471 U.S. 845 (1985). The notion that federal courts should not interfere with tribal court civil jurisdiction has been undermined by *Strate* v. *A-1 Contractors*, 117 S.Ct. 1404 (1997).

[88] See *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973).

[89] See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

regulate a nonmember engaged in an economic transaction in Indian country is complicated and, arguably, incoherent.[90]

C. Special Indian Rights and Claims

Indian treaties generally set aside Indian reservations for the exclusive use and occupancy of the tribe in question. In addition, some treaties have been understood as reserving off-reservation rights as well. In these transactions, a tribe ceded most of its interests in a large area, reserved the remainder of its territory for the reservation, and also expressly or impliedly reserved some pre-existing rights involving the ceded region. For example, when the ceded area contained the only water practically available in the region, the treaty has been understood as implicitly reserving enough of that off-reservation water to allow the reservation to function as a liveable enclave for Indians.[91] Tribes in the Pacific Northwest and Great Lakes Regions expressly reserved off-reservation hunting and fishing rights.[92] Because these rights sometimes are perceived as interfering with non-Indian hunting and fishing interests, they are controversial. Rhetorically, non-Indian opponents of these rights sometimes suggest that these are "special rights" unfairly granted to one group of American citizens defined by race. This criticism fails to recognize that these were bargained-for property rights reserved by the tribe, not granted by the federal government, for a group defined by a political (tribal membership) rather than racial classification.

Unfairness and coercion connected to the loss of indigenous lands to non-Indians have led to a variety of Indian land claims. Until 1946, American law did not generally allow a tribe to sue the United States for the taking of tribal land without sufficient compensation. In that year, Congress created the Indian Claims Commission[93] and established criteria for awarding money for historical Indian land claims.[94] Over $800 million was awarded to tribes for such

[90] Compare *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163 (1989) (state may impose mineral severance tax upon non-Indian contractor extracting oil and gas on Indian reservation) with *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980) (state may not impose fuel taxes upon non-Indian contractor doing timbering operations on Indian reservation).

[91] See *Winters* v. *United States*, 207 U.S. 564 (1908); *United States* v. *Winans*, 198 U.S. 371 (1905). In the arid western United States, conflicts between non-Indians and tribes over water are among the most common and most contentious of political and legal disputes.

[92] See *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 119 S.Ct. 1187 (1999); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979).

[93] See text at note 30, *supra*.

[94] Briefly, the Commission was authorized to hear (1) claims in law or equity arising under the Constitution, laws or treaties of the United States and Executive Orders; (2) other claims in law and equity with respect to which the claimant would be entitled to sue if the defendant were private rather than the government; (3) claims based on the theory that the treaty, contract, or agreement with the United States should be revised based on such grounds as fraud, duress, or unconscionable consideration; (4) claims based on the taking of land without the payment of agreed compensation; (5) "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity", see 25 U.S.C. §70a. The seeming generosity of these broad waivers of sovereign immunity was undercut by the holding that damages were measured only as fair market value at the time of the loss, with

claims.[95] Congress never waived the sovereign immunity of the United States for injunctive relief, however, and thus never authorized the courts to consider ordering the federal government to return land to the tribes.[96]

Sometimes aboriginal lands were lost not simply without fair compensation, but without legality under American law as well. Recall that, under *Johnson* v. *McIntosh*, Indian title could be obtained only by the colonial government and its successor following the formation of the United States, not by others.[97] In *County of Oneida v. Oneida Indian Nation*,[98] the Supreme Court confirmed that, after the formation of the United States, only the national government, not the states, had authority to acquire aboriginal lands. In that case, the Court agreed that the State of New York had unlawfully acquired Indian lands in the 1790s. This and similar decisions in the lower courts have created "clouded" land titles in certain formerly Indian areas. In some instances, Congress and the states in question have agreed to settlements with the tribes.[99]

The explosion in for-profit tribal gaming enterprises represents a special tribal opportunity for economic development, because in certain circumstances tribes are authorized to operate gambling enterprises on their reservations that the states prohibit non-Indians from operating outside Indian country. Following a Supreme Court decision holding that state law could not prohibit tribal bingo operations targeted at nonmember patrons,[100] the Congress resolved the extremely controversial conflicts between states and tribes over Indian gaming by enacting the Indian Gaming Regulatory Act of 1988.[101] In general, under this statute a tribe may engage in the most lucrative forms of gaming only if the state has so agreed in a compact with the tribe.[102] Despite a widespread assumption to the contrary, only a handful of tribes have become wealthy through gaming. Tribes also engage

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no interest awarded to bring the award to reasonable present value, unless the loss amounted to a taking of property within the confines of the just-compensation requirement of the Constitution's Fifth Amendment. See *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

95 See Getches/Wilkinson/Williams, *supra* note 1, at 282.

96 Thus, in the ironic Black Hills controversy, after the Supreme Court upheld an award of over $100 million to the Sioux Nation for the federal taking of the Black Hills region located in the State of South Dakota, see *United States* v. *Sioux Nation*, 448 U.S. 371 (1980), the tribes in question refused to take the money, insisting that they had a moral and valid right to the return of the lands themselves and viewing acceptance of the money as undermining their normative position in the controversy. See Edward Lazarus, Black Hills, White Justice: The Sioux Nation Versus the United States 1775 to the Present (1991).

97 See text at notes 35–39, *supra*.

98 470 U.S. 226 (1985).

99 See Maine Indian Claims Settlement Act of 1980, codified at 25 U.S.C. §§1721–35; Rhode Island Indian Claims Settlement Act of 1978, codified at 25 U.S.C. §§1701–16.

100 See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

101 See Indian Gaming Regulatory Act, Pub. L. No. 100–497, 102 Stat. 2467 (1988), codified at 25 U.S.C. §§2701–21.

102 The efficacy of this preference for local negotiation over nationally imposed standards is at risk following the Supreme Court decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), which effectively gutted the federal courts' ability to force states to negotiate in good faith with tribes.

in other varieties of economic development, such as the exploitation of natural resources and opening up the reservation for non-Indian recreational use.

In response to the complaint that state child-welfare officials were removing Indian children from Indian homes at such an alarming rate as to jeopardize the long-term survival of the tribes, Congress enacted the Indian Child Welfare Act of 1978.[103] The statute provides that the tribal court shall have exclusive jurisdiction over child custody proceedings involving Indian children who live on the reservation.[104] The statutory definition of "Indian child" is expansive, including children who are eligible for membership as well as those already members.[105] Accordingly, when a mother, who was a tribal member, left the reservation to give birth to twins and then consented to their adoption through state processes and the state court did not notify the tribe, the state adoption placement was illegal, and the tribal court had the final say over the adoption even though several years had passed, during which the children had lived with the putative adoptive parents.[106] Even more controversially, the statute also requires that, unless a parent objects, a state court foster-care or termination-of-parental-rights proceeding involving an Indian child who does not live on the reservation is, upon the petition of either parent or of an Indian custodian or of the child's tribe, to be transferred to tribal court unless there is good cause to the contrary.[107] In situations in which failure to comply with this requirement has threatened the adoptive placement of children, some state courts have created an "existing Indian family exception" to the Indian Child Welfare Act, such that the statute does not interfere with ordinary state adoption processes unless the child came from a family that is "Indian" in more than a purely technical definitional way.[108] This exception to the statute is extremely controversial, because it finds no support in statutory text and results in non-Indian judges deciding whether a child comes from a family that is sufficiently "Indian" to merit coverage by the Indian Child Welfare Act.

The legal status of Alaskan Natives and Hawaiian Natives is different from that of Native Americans in the continental United States. In brief, following the enactment of the Alaska Native Claims Settlement Act,[109] Alaskan Native Villages hold their lands in corporate rather than Indian trust format and, with few exceptions, their lands lack reservation status. This westernized form of landholding and organization severely limits the sovereignty of the villages.[110] Following the annexation of the Hawaiian Islands, Hawaiian Natives were never formally orga-

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[103] Pub. L. No. 95-608, 25 U.S.C. §1901 et seq.

[104] See 25 U.S.C. §1911(a).

[105] See id. §1903(4).

[106] See *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30 (1989). I have been told that ultimately the tribal court left the adoptions intact.

[107] See 25 U.S.C. §1911(b).

[108] See, e.g., *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 41 Cal. App. 4th 1483 (1996).

[109] Act of Dec. 18, 1971, Pub. L. No. 92-203, 85 Stat. 688, codified at 43 U.S.C. §§1601-29.

[110] See *Alaska* v. *Native Village of Venetie Tribal Government*, 118 S.Ct. 948 (1998) (holding that village lands are not "Indian country," thereby depriving the tribes of geographical scope to their authority).

nized into a political entity with self-governing power.[111] A lively scholarly[112] and practical[113] argument exists whether a trust relationship exists between Native Hawaiians and the United States such that federal and state programs specially treating Native Hawaiians are legally as defensible as special programs concerning Native Americans that have been upheld by the Supreme Court.

IV. Speculations about Future Developments

The trend in domestic American Indian law is toward an erosion of tribal authority and a corresponding expansion of the power of the governments of the American states.[114] In recent years, the United States Supreme Court has been unresponsive to tribal claims.[115] In addition, tribes have faced an increasingly hostile Congress, which is considering a variety of measures that would undercut tribal sovereignty.[116]

It is, perhaps, ironic that tribes are losing domestic legal ground at precisely the same time that indigenous peoples are attaining greater respect under international law.[117] Although American domestic law has been hostile to the importation of international human rights norms,[118] it should be remembered that the Marshall Court's foundational decisions essentially imported into domestic American law the European law of nations concerning the colonial process. Perhaps innovative lawyering will find ways to melt the American international-law heritage with its

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[111] In 1993, a century after the overthrow of the Kingdom of Hawaii, Congress passed a joint resolution acknowledging that the U.S. had been involved in "the illegal overthrow of the Kingdom of Hawaii" and that the Native Hawaiian people had lost 1.8 million acres of land without their consent or any compensation. See Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103–150, 107 Stat. 1510, 1512–13 (1993).

[112] For a recent discussion suggesting that special legal treatment for Hawaiian natives violates the Constitution, see Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (1996). For my rejoinder, which was focused primarily upon the relationship between Benjamin's argument and federal Indian law jurisprudence, see Frickey, *supra* note 22, at 1757–68. For a rejoinder focused on the special questions concerning Hawaii, see Jon M. Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998).

[113] The Supreme Court has agreed to review a decision upholding a special governmental program concerning Native Hawaiians. See *Rice* v. *Cayetano*, 146 F.3d 1075 (9th Cir. 1998), cert. granted, 119 S.Ct. 1248 (1999).

[114] See Getches, *supra* note 21.

[115] See note 20, *supra*.

[116] Among the proposals on the congressional agenda have been bills abolishing tribal sovereign immunity, see *supra* note 18, and diluting the tribal role specified in the Indian Child Welfare Act for the preservation of Indian families.

[117] See, e.g., S. James Anaya, Indigenous Peoples in International Law (1996).

[118] See *United States* v. *Alvarez-Machain*, 504 U.S. 655 (1992) (refusing to interfere with criminal prosecution of foreign citizen who had been kidnapped by American agents and brought to the United States for trial in violation of international law); *Stanford* v. *Kentucky*, 492 U.S. 361, 369 n.1 (1989) (treating international law as irrelevant to the constitutionality of death penalty for juveniles).

current domestic policies concerning the ongoing colonial process.[119] Innovative lawyering aside, however, whatever else might happen, it is unlikely that American Indian tribes, which have resisted five hundred years of assimilation and colonialism, will vanish any time soon.

[119] For an attempt to "domesticate" federal Indian law by internationalizing its current focus, see Frickey, *supra* note 61.