WHO OWNS THE RESERVATION: AMERICAN INDIAN SOVEREIGNTY, MYTH OR REALITY?

by

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The Great Chief in Washington sends word that he wishes to buy our land. How can you buy or sell the sky. The warmth of the land. The idea is strange to us. Yet we do not own the freshness of the air or the sparkle of the water. How can you buy them from us? Every part of this earth is sacred to my people.... There is no quiet place in the white man's cities. No place to hear the leaves of spring or the rustle of insect wings. But perhaps because I am a savage and do not understand - The clatter only seems to insult the ears. And what is there to life if a man cannot hear the lovely cry of the whippoorwill or the arguments of the frog around the pond at night. The Whites too shall pass - Perhaps sooner than other tribes. Continue to contaminate your bed and you will one night suffocate in your own waste. When the buffalo are all slaughtered, the wild horses all tamed, the secret corners of the forest heavy with the scent of many men, and the view to the ripe hills blotted by talking wires. Where is the eagle. Gone. Where is the buffalo. Gone. And what is it to say goodbye to the swift and the hunt, the end of living and the beginning of survival.

Chief Seattle to President Franklin Pierce, 1855

INTRODUCTION

On the eve Christopher Columbus' voyage to the New World, it is impossible to state with certainty just how many American Indians\(^1\) were living in what would soon come to be known as the United States. Reputable scholars and historians have debated

\(^1\) Throughout this paper, American Indians may be referred to as Native Americans or Indians, but due to the apparent preference of the term American Indian among the indigenous peoples of the United States, that term will be used as often as possible. See TIME ALMANAC 2000 369 (Borgna Brunner ed. 2000) (noting "American Indian" as the preferred term over "Native American," 49.76 percent to 37.35 percent).
the issue without arriving at any consensus. Most agree that there were, at the very least, one million American Indians residing in the present day continental United States at the time of European contact. In the five hundred or so years since the first Europeans arrived, the total population of the United States has grown to 272,878,000 while the population of Native American peoples has grown to just 2,396,000 or 0.9% of the United States total population. The sharp discrepancy between the growth of the non-Indian and American Indian population is inexorably linked to the changing attitudes of the invading Europeans.

The story actually starts out like a fairytale. The first colonists to the eastern seaboard of North America were seeking freedom from religious prosecution. They set sail for this new land with a dream of beginning a new life. Instead of finding a new life,

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2 See James S. Olson and Raymond Wilson, Native Americans in the Twentieth Century 29 (1964); see also Encyclopedia of North American Indians 500 (Frederick E. Hoxie ed., 1996) (estimating a native population of 75 million for North and South America in 1492).

3 See Olson, supra note 2 at 29 (others estimate the number to be quite larger, but one million seems to be the bottom number); see also Encyclopedia of North American Indians, supra note 2 at 500 (citing varying estimates by scholars for the population of North America, Henry Dobyns—as many as 18 million, Douglas Ubelaker—1.85 million, Frederick Hoxie—7 million with slightly over 5 million living on the U.S. mainland, and William Denevan—3.79 million).

4 The figure is from July 1999. Time Almanac, supra note 1 at 797.

5 Native American peoples includes American Indians, Eskimos, and Aleutsians.

6 Time, supra note 1.

7 Id.; see also Encyclopedia of North American Indians, supra note 2 at 501 (noting that American Indian populations declined in the U.S. each decade until the 1900's due to many factors, among them disease, war, genocide, and governmental policies).
the colonists found a harsh life—one that was filled with hunger and fear. This new land was so unlike the world they left in Europe that without the aid and guidance of the American Indian, they would have quickly perished. It was the American Indian that taught those first travelers how to farm and fish in this alien land. It was the American Indian that taught them survival. The benefits of contact with the American Indian soon spread far beyond the crystal shores of the eastern seaboard. Before they were imported from the new world, the Europeans knew nothing of tomatoes, corn, potatoes, or tobacco. Domestication of these crops changed the population and economic wealth of European nations almost overnight. Europeans were so intoxicated with tobacco that colonists soon became both wealthy and powerful beyond their wildest dreams. The American Indian also possessed a freedom over his land, person, and behavior unfathomable to the European mind. Their behavior served as an example to the colonists of how free they could be. It is no exaggeration to state that America would not have been possible without the American Indian.

What did the American Indian get in return for his hospitality? Well, this is where the fairytale turns sour. Once the colonists grew to a sufficient number and learned all they could from the Indian, they started their onslaught over the land. The drive to own more and more land forced the settlers to push the American Indian further and further west. When they would not go peacefully, the colonists went to war with, or simply slaughtered the defiant tribes. Most of us have heard about the larger battles between the American Indians and the United States (and its predecessors), but it is the smaller battles and massacres of weaker, peaceful tribes that have been lost in the pages of history that really did the most damage to the American Indian. Today, the American Indian is relegated to the reservation. A people that once roamed freely across a vast land must now survive on relatively small tracts of land, in a manner they are still unaccustomed to, surrounded on all sides by the very people who robbed them of their way of life. One would not be wrong in believing that if a "new world" were discovered tomorrow, it
would be the American Indian fleeing the United States for the very same reasons the original colonists once fled Europe--freedom to live as one chooses. The policies employed by the Europeans to relegate the American Indian to their current status have many names: removal, assimilation, reorganization, termination, and self-determination.8 All of these policies had but one goal in mind, the eventual melding of the American Indian into the mythical "melting pot" of the United States. American Indians, rather than going quietly into that great night, have valiantly attempted to hold on to their culture and their sovereignty. Unfortunately, as this paper will illustrate, it's a battle they have been losing on all fronts.

I. The United State's Varying Indian Policies

A. Discovery and Removal

Early colonists recognized the American Indian's right of occupancy in the New World, but regarded them as heathens who needed to be converted to Christianity.9 From the outset, the three major colonizing countries, Spain, France, and England; sent missionaries to accomplish the conversion.10 The idea was to convert the heathen American Indians into Christian farmers "who would till their own land, harvest and sell

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8 See generally, OLSON, supra note 2.

9 See Steven T. Newcomb, The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power, 20 N.Y.U. Rev. L. & Soc. Change 303, 305-07 (1993); see also OLSON, supra note 2 at 29. Upon first landing at San Salvador and encountering the native population, "Christopher Columbus noted in his journal: They should be good servants and of quick intelligence, since I see that they very soon say all that is said to them, and I believe that they would easily be made Christians, for it appeared to me that they had no creed." Id.

10 See OLSON, supra note 2 at 30.
their own crops, and attend church services on Sunday.\textsuperscript{11} When the American Indian refused to convert to the European "civilized" way of life, the Europeans simply took the land they wanted with little regard for the former inhabitants.\textsuperscript{12} Using the church, the bible, and proclamations from the crown as a basis for their relentless onslaught over the continent, the English colonists soon became the first significant threat to tribal sovereignty.\textsuperscript{13}

The English colonists are singled out because the Spanish and the French are generally perceived as treating the American Indian more favorably than the English.\textsuperscript{14} The reason for this perception is threefold: the Spanish and the French had more experience dealing with "colored" peoples,\textsuperscript{15} the Europeans generally moved their families to the New World while the French and Spanish primarily sent men,\textsuperscript{16} and the English

\textsuperscript{11} \textit{Id.}
\textsuperscript{12} \textit{See id.}
\textsuperscript{13} The papal edicts granted the discovering nation the right to overthrow, subdue, and conquer all non-Christian people. The Cabot charter, granted by King Henry VII to John Cabot and his sons, permitted Cabot to do much the same. He was to discover, subdue, and possess all lands held by infidels or heathens. The biblical passage construed as authority for superiority over non-Christians is found in Psalms 2:8, "I shall give to thee the heathen for thine inheritance, and the uttermost parts of the earth for thy possession." Newcomb, \textit{supra} note 11 at 310-11.
\textsuperscript{14} The French, since they were involved principally in the fur trade, needed the American Indian as an ally and their relations with the American Indians were generally harmonious. See Olson, \textit{supra} note 2 at 31.
\textsuperscript{15} Because of their locations on the Mediterranean Sea, both Spain and France had contact and dealings with the indigenous people of North Africa. \textit{See id.}
\textsuperscript{16} Once again, the English generally frowned upon any interracial sexual contact, the French
wanted to farm the land which required an ownership not originally sought by the French and Spanish.\textsuperscript{17} Once it became clear that the American Indians would be a serious problem to the English idea of settlement, the English crown adopted a policy of removal.\textsuperscript{18} English colonists would either purchase or seize American Indian lands and then simply remove the tribes westward.\textsuperscript{19} What resulted was a western boundary line that separated the American Indian from the colonists. The land west of the resulting demarcation line was termed "Indian Country."\textsuperscript{20}

At the time, the idea of an Indian Country seemed like the perfect compromise between the Indians and the colonists, but England based the concept on a faulty premise; they believed there was more than enough land in the west to satisfy everyone's settlement needs.\textsuperscript{21} This was true for a short time, but after the Revolutionary War\textsuperscript{22} the pioneering

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\textsuperscript{17} See id.
\textsuperscript{19} See id.
\textsuperscript{20} See id. The term "Indian country" first originated in a proclamation from King George in 1763. It was the crown's first attempt to stabilize relations with the American Indian. The French and Indian War had shown England the potential threat of Indian alliances with foreign nations. All of the land west of the boundary line established by the Proclamation (even that land claimed by England) was sovereign Indian territory. Any settler that crossed the line was outside the protection of the crown. See id. at 289-90.
\textsuperscript{21} See Raymond Cross, Sovereign Bargains, Indian Takings, and the Preservation of Indian
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drive of the American people began to push the boundary line further and further west.\textsuperscript{23} While the removal policy was never completely abandoned,\textsuperscript{24} the American notion of "manifest destiny"\textsuperscript{25} forced the government to establish an entirely new Indian policy.


\textsuperscript{22} Interestingly enough, most of the Indian tribes sided with, and fought for the British during the Revolutionary War. Those that didn't, like the Tuscarora and the Oneida, two tribes of the Iroquois Confederacy, were told by the English that they would forfeit their land for disloyalty. At the conclusion of the War, Congress granted the Tuscarora a reservation along the Niagara River. George Washington went so far as to tell the Iroquois that the land granted to them was theirs forever, without restriction. The Tuscarora Reservation remained in tact, despite federal land-allotment policies, until 1959 when the New York State Power Authority decided they needed the land for a power station. The Tuscarora fought the State through rallies, protests, and the courts. In the end, the Supreme Court ruled for the state of New York. In dissent, Justice Hugo Black felt the ruling was ridiculous, "and that 'great nations, like great men, should keep their word.'" \textit{See IAN FRAZIER, ON THE REZ} 77-78 (2000).

\textsuperscript{23} The very first U.S. statutory definition of "Indian Country" appears in the Indian Intercourse Act of 1796. "At that time, the line demarcating Indian country ran from present-day Cleveland down to and along the Ohio River to the mouth of the Tennessee River, and behind the Carolinas and through Georgia to the sea." Malal, \textit{supra} note 20 at 290. Because of settler encroachment, this definition soon became obsolete. The government attempted to define Indian Country once again with a new Indian Intercourse Act in 1834. This time the definition was:

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all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished.
\end{quote}

\textit{Id.} History has taught us that this definition did not last very long either. In fact, by 1874 the
B. Marshall's Trilogy

It is important to remember that Indian nations were sovereign nations that pre-dated the Constitution. They had their own systems of governments, their own statutory definition was entirely deleted from the U.S. Code, although the term is still utilized in a few statutes. See id. at 291.

24 The policy of removal reached its infamous nadir in 1838 and 1839 with the "Trail of Tears," the forced removal of the Cherokee people from Georgia. The Cherokee had probably adapted to non-Indian customs better than any other tribe. They had a constitution, a written language, and a newspaper; they even had a ruling from the Supreme Court claiming that removal was unconstitutional (Worcester v. Georgia). In spite of all this, President Andrew Jackson ordered the removal of the Cherokee people. When questioned on his flagrant disregard for a ruling from the Supreme Court, President Jackson's answer was, "[h]e [Chief Justice Marshall] has made his law. Now let him enforce it." FRAZIER, supra note 24 at 74. The tribe was rounded up and forced into camps in Tennessee and then forced to march during the winter from Tennessee to Oklahoma—a total distance of over 1,000 miles. Over 4,000 Cherokee, or a third of the tribe, perished on the journey. Today the trail is a national monument and the remaining Cherokee commemorate the march every year. See id. at 75; see also THE READER'S COMPANION TO AMERICAN HISTORY 1081 (Eric Foner & John A. Garraty eds., 1991).

25 The phrase "manifest destiny" was first used in an 1845 article on the annexation of Texas by John O'Sullivan. Expressing the view of the time, he claimed it was "our manifest destiny to overspread the continent allotted by Providence for the free development of our yearly multiplying millions." THE READER'S COMPANION TO AMERICAN HISTORY, supra note 26 at 697.

26 The Iroquois had a rather advanced system of government and attended meetings at which they advised the colonists to form a government similar to theirs. The Iroquois had a confederacy made up of five different tribes (the Cayuga, Oneida, Mohawk, Senaca, and
punishments for violating tribal laws, and their own requirements for tribal membership. They even had diplomatic alliances with other tribes and went to war with tribes they disagreed with. The only major philosophical differences between the American Indian and the European invaders came in the areas of religion and land ownership. While religion was important to the American Indians, it was vastly different than the Anglo-Saxon religious model. Furthermore, the American Indians were a nomadic people whose idea of sovereignty was tied to family links and associations, not to a particular piece of land.27 Three Supreme Court decisions, all authored by Chief Justice Marshall (and

Onondaga). Domestic matters of the confederacy were left up to individual tribes, but on larger matters such as war or interaction with other governments, leaders from each tribe came together to form policy. This system helped the Iroquois to conquer most of their neighbors—if European colonization had never taken place, the whole of North America might have been ruled by the Iroquois confederacy. See Frazier, supra note 24 at 76. Benjamin Franklin admired the Iroquois and their system of government for he said:

> It would be a strange thing if six nations of ignorant savages should be capable of forming a scheme for such a union and be able to execute it in such a manner as that it has subsisted for ages and appears indissoluble, and yet that a like union should be impracticable for ten or a dozen English colonies.

Id. at 8-9. Thomas Jefferson was also enamored with the unique system of the Iroquois. He wrote:

> were it made a question, whether no law, as among the savage Americans, or too much law, as among the civilized Europeans, submits a man to the greatest evil, one who has seen both conditions of existence would pronounce it to be the last... It will be said, that great societies cannot exist without government. The savages, therefore, break them into small ones.

Id. at 9.

27 The American Indian had a communal aspect to the land upon which they lived and all that naturally sprang from it. One American Indian described land ownership in this manner:
commonly referred to as the "Marshall Trilogy"), 28 recognized the unique sovereign status of the American Indian, yet, in the end, paved the way for the eventual erosion of the very same thing. 29

1. Johnson v. M'Intosh

The first case was Johnson v. M'Intosh 30 and the Court did its best to try to settle some of the questions that naturally arose from the gradual encroachment west into Indian Country. Marshall started his analysis with the doctrine of discovery, claiming that the United States was the successor in interest to the title obtained under the doctrine by Spain, France, and England. 31 The American Indians held "aboriginal title," a designation

My friend, it seems you lay claim to the grass my horses have eaten, because you have enclosed it with a fence: now tell me, who caused the grass to grow? Can you make the grass grow? I think not, and no body can except the great Man in to. He it is who causes it to grow for both my horses and for yours! See, friend! The grass which grows out of the earth is common to all, the game in the woods is common to all. Say did you ever eat venison and bear's meat? . . . Well, and did you ever hear me or any other Indian complain about that? No; then be not disturbed at my horses having eaten only once, of what you call your grass, though the grass my horses did eat, in like manner as the meat you did eat, was given to the Indians by the Great Spirit. Besides, if you will but consider, you will find that my horses did not eat all your grass.

CLSON, supra note 2 at 22.


29 According to historical scholars, Chief Justice Marshall robbed the American Indians of complete sovereignty by basing his decisions on the discovery doctrine which gives title to the sovereign that makes it. See Cross, supra note 23 at n. 62.

30 21 U.S. (8 Wheat.) 543 (1823) (prohibiting the tribes from transferring title to private parties absent federal consent).

31 See Cross, supra note 23 at 438.
which granted them exclusive use and occupancy rights, but not true ownership.\textsuperscript{32} The federal government retained the absolute preemptive authority to acquire Indian lands, and while payment to the American Indians was the preferred method to transfer ownership, it was not a prerequisite.\textsuperscript{33}

The decision really set forth three different legal principles. First, "the federal government possesse[d] the exclusive authority to prescribe the terms and conditions for future non-Indian settlement of western lands."\textsuperscript{34} Second, the decision abrogated the rights of American Indians to transfer "their aboriginal land title to anyone but the federal government."\textsuperscript{35} Finally, the doctrine of discovery served as the basis for the federal governments inherent power over the ultimate disposition of Indian land.\textsuperscript{36}

2. Cherokee Nation v. Georgia

The second case, \textit{Cherokee Nation v. Georgia},\textsuperscript{37} addressed the definitional status of an Indian tribe. The Cherokee tribe attempted to sue the state of Georgia in federal court based on diversity jurisdiction, a move that would only work if the Court determined that the Cherokee Nation was a "foreign state."\textsuperscript{38} In a crushing blow to the Cherokee Nation, Chief Justice Marshall ruled that tribes were not foreign nations, but rather

\textsuperscript{32} See id.
\textsuperscript{33} See id.
\textsuperscript{34} Id. at 439.
\textsuperscript{35} Id.
\textsuperscript{36} See id.
\textsuperscript{37} 30 U.S. (5 Pet.) 1 (1831).
\textsuperscript{38} See Prygoski, supra note 30.
"domestic dependent nations' existing 'in a state of pupilage.' Their relation to the United States resemble[d] that of a ward to his guardian." 39

The holding of this case highlights two principles of the limits on American Indian sovereignty. First, because the tribes are located within the borders of the United States, their sovereignty is restricted as to the will of the overriding sovereign--the United States. 40 Second, the label of "domestic dependent nation" implies a weakness or incompetency in the tribes to handle their own affairs. 41 This perception established the trust relationship between the two parties--further eroding tribal sovereignty. 42

3. Worcester v. Georgia

The last case, Worcester v. Georgia, 43 contained stronger language which seemed to confirm the sovereign status of tribes. For instance, Chief Justice Marshall claimed that within the boundaries of Indian Country, Indian nations were "distinct, independent political communities." 44 He further stated that they were separate sovereigns, completely...

39 Id.

40 See id. For example, if Indian tribes were truly foreign nations then they could cede their land to or enter into allegiances with other foreign nations. This could potentially result in a foreign nation having enclaves in the middle of a state. See id.

41 See id.


43 31 U.S. (6 Pet.) 515 (1832) (refusing to allow the state of Georgia to exercise criminal jurisdiction within the Cherokee reservation).

44 Worcester, 31 U.S. at 559.
separated from the states in which they sat, "having territorial boundaries, within which their authority is exclusive." The ruling set "the principle that states are excluded from exercising their regulatory or taxing jurisdiction in Indian country." While these statements seem to give great deference to Indian sovereignty, the legacy of the decision has not been quite so broad. In fact, the three decisions set the groundwork for Congress' extensive and all-encompassing plenary power over the American Indian.

The trilogy firmly solidified three tenets of federal American Indian law:

(1) by virtue of aboriginal political and territorial status, Indian tribes possessed certain incidents of preexisting sovereignty; (2) such sovereignty was subject to diminution or elimination by the United States, but not by the individual states; and (3) the tribes' inherent sovereignty and their corresponding dependency on the United States for protection imposed on the latter a trust responsibility.

With some federal concepts about the nature and extent of American Indian sovereignty now in place, the country was ready to move forward and reexamine its Indian "problem," because by the time Chief Justice Marshall had completed his trilogy, the idea of a separate Indian Country had become effectively bankrupt.

C. The Establishment of Reservations Through Treaties

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45 Id. at 557. He continued, "[T]he Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter[.] . . ." Prygoski, supra note 30.

46 Prygoski, supra note 30.

47 The plenary power that Congress enjoys over the American Indians was entrenched by the Court's decision in Lone Wolf which will be discussed in greater detail infra notes 62-70 and accompanying text.

48 Prygoski, supra note 30.
The federal government, in search of a new American Indian policy, focused almost exclusively on treaties to establish Indian reservations.\footnote{The Indian reservation concept was actually nothing new. Two reservations were set up in 1638—one was 1200 acres in Connecticut for the Quinnipiac tribe and the other 800 acres in Massachusetts for the Nonantum tribe. By the year 1675, many American Indians resided on established reservations in New England. The reservations were designed to try and convert the Indians to Christianity and a more European way of life. Because of these goals, the conditions and rules were often harsh, leading to an eventual uprising in 1675 by a Wampanoag leader named King Phillip. Before King Phillips’ War was squelched, over 600 settlers were killed and over a dozen towns destroyed, thereby putting an end to the reservations in New England. See Olson, supra note 2 at 35. An early attempt at a reservation in Virginia met with a similar fate. In 1648, the Virginia settlers and the American Indians living among them agreed on an Indian Reservation to be placed north of the York River. The Indians were promised permanent tenure and protection from encroachment by the Virginia courts. In return, the Indians agreed to serve in the Virginia militia. In the early 1670s, tension mounted between the two groups and many settlers began to push into the reservation land. The Governor of Virginia, to his credit, attempted to protect the Indians, but his doing so precipitated another war, Bacon’s Rebellion. By the time the Rebellion was crushed, there were only 1,000 out of an original 30,000 American Indians in Virginia. See id. at 32-33.} The power for the federal government to make treaties with the American Indian tribes rested in two clauses of the Constitution, the Indian Commerce Clause\footnote{U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have power... to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.").} and the Treaty Clause.\footnote{U.S. Const. art. II, § 2, cl. 2.} Utilizing this new approach, by 1871 the United States had entered into over 371 treaties with many
different Indian tribes.\textsuperscript{52} Unfortunately, during this time, the United States seems to have abandoned its trust responsibility because it often forced duplicitous treaties on the tribes and changed the terms (or disregarded them altogether) literally at will. It is practically impossible to document all of the treaty promises that were broken by the federal government,\textsuperscript{53} but the American Indians fought for their treaties, both on the battlefield and in the courts.\textsuperscript{54} In spite of the fact that treaties were often broken, the treaty process did confer some benefits on the Indian tribes. For one, it forced the United States to treat the Indian tribes as sovereign nations--after all, a government doesn't make treaties with entities it can control at will.\textsuperscript{55} This served as an acknowledgment by the United States

\textsuperscript{52} See Larry B. Leventhal, \textit{Indian Tribal Sovereignty: It's Alive}, (visited March 4, 2000) <http://www.airpi.org/leventh1.html>; see also United States v. Winans, 198 U.S. 371 (1905) (explaining that tribal treaties served as a relinquishment of some tribal rights to the U.S. in return for land; the tribes retained all rights not granted under the terms of the treaty--treaties did not result in a granting of rights from the U.S. to the tribes).

\textsuperscript{53} One member of the district court, clearly disgusted by the indignities perpetrated against the American Indian throughout history noted:

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It cannot be denied that official policy of the United States until at least the late 19th century was impelled by a resolute will to control substantial territory for its westward-moving people. Whatever obstructed the movement, including the Indians, was to be--and was--shoved aside, dominated, or destroyed. Wars, disease, treaties pock’d by duplicity, and decimation of the buffalo by whites drove the Sioux to reservations, shrivelled their population and disembodyed their corporate body. They were left a people unwillingly dependent in fact upon the United States. It is an ugly history. White Americans may retch at the recollection of it.
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\textsuperscript{54} See Leventhal, \textit{supra} note 54.

\textsuperscript{55} The treaty making period of federal Indian policy serves as an acknowledgment by the federal
that it could not unilaterally impose policies upon an Indian tribe. Another benefit came in
the form of land acquisition. Most of the treaties entered into by the Indian tribes
contained a clause which would not permit transfer of Indian land to the federal
government unless three-fourths of the tribal members agreed to the land cession. It was a
high burden for the government to meet and served as the basis for the next big
encroachment upon American Indian sovereignty.

D. Congress Exercises Plenary Authority Over the Indian Tribes and the Supreme
Court Legitimizes the Practice Once Again

In 1871, the United States Congress, without consulting the Indian tribes,
rescinded the power of the federal government to enter into treaties with any Indian
tribe. It was a simple declaration tied to the annual Indian Appropriation Bill that stated:
"[h]ereafter no Indian nation or tribe within the territory of the United States shall be
acknowledged or recognized as an independent nation, tribe, or power with whom the

government that an Indian nation is something more than a "state" since states are specifically
prohibited from entering into treaties. See U.S. Const. art. 1, § 10, cl. 1.

56 The land granted to the American Indians normally had little to no value to the non-Indian
world which was utilizing the western lands for farming, mining, and railroad expansion. If the
settlers had looked at the potential of the land they were shunning, the American Indian might
have been left with no land at all. Today, even though reservations constitute only four percent
of the nation's land, they contain sixteen percent of the coal reserves and four percent of the oil
and gas reserves. See Frazier, supra note 24 at 88. Even more remarkable is the percentage
of uranium reserves. Over half of the nation's natural supply of uranium is imbedded under
reservation lands. Many tribes receive revenue from leases on these natural resources. See id.

57 See Olson, supra note 2 at 62.
United States may contract by treaty."  While the proclamation did not nullify any treaty already in existence, it did severely undermine any argument that the individual Indian tribes remained sovereign nations.

The second, and even more damaging assault on tribal sovereignty occurred in the case of *Lone Wolf v. Hitchcock*. Several tribes had a valid treaty with the federal government which contained a land cession clause stating that three-fourths of the adult males of the tribe must acquiesce to any land cession. The United States sought to open up some of the land owned by the tribes to non-Indian settlement. The government obtained the signatures of 456 adult males out of a possible 562 for the cession of 2,150,000 acres of reservation land. On its face, the agreement was valid, but the tribes involved claimed that the signatures were obtained fraudulently because of severe misrepresentations by interpreters. They sought to have the agreement invalidated because the government did not legally obtain the consent of three-fourths of the adult males as was required by their treaty. Justice White denied the tribes' plea. He based his

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58 Id.

59 To illustrate this point, the Pamunkey and Mattaponi tribes in eastern Virginia renew their treaty with the governor of Virginia every year by bringing gifts "of turkey, fish, and deer."

FRAZIER, supra note 24 at 78.

60 187 U.S. 553 (1903)

61 The principle tribes involved in the litigation were the Kiowas, Comanche, and the Apaches.

See generally *Lone Wolf*, 187 U.S. 553.

62 See id. at 554.

63 The tribes were to receive $2,000,000 as compensation. See id. at 554-55.

64 See id. at 556.

65 See id.
authority solely on the plenary power Congress exercised over the Indians, a power first enunciated by Chief Justice Marshall back in the 1830s.66

Plenary authority over tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. . . . Of course, a moral obligation rested upon Congress to act in good faith in performing stipulations entered into on its behalf. But, as with treaties made with foreign nations, the legislative power might pass laws in conflict with treaties made with Indians. The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.67

It isn't difficult to see the devastating effect this ruling had to the sovereignty of the American Indian people. The Court basically said that Congress' plenary power gave it the right to legislate on Indian affairs, even if the legislation would violate an existing Indian treaty. Not only did Congress have this all encompassing power, but the power was unable to be checked by the judicial branch of government—the only restriction upon the power was a good faith requirement.68 Not a difficult legal hurdle for Congress to overcome.

E. Assimilation Policies

With the attitude toward American Indian sovereignty changing, and the ever increasing pressure from settlers on the government to open up reservation lands for non-Indian use, the United States adopted a new policy towards the American Indians and their lands—assimilation and allotment. Allotment is actually a component of the

66 See supra notes 28-50 and accompanying text.
67 Lone Wolf, 187 U.S. at 565-66 (citations omitted).
68 See id. at 566.
assimilation process, but since a specific act was passed to further the allotment policy, with severe repercussions for the American Indian, they will be discussed separately.

Assimilation was basically a code word for civilization. Due to the rapid growth and expansion of the United States, there was heavy demand for reservation lands among non-Indians. In an effort to open up these lands, the government tried to force the American Indian to adopt the ways of mainstream America—calling the process assimilation. This new attack on tribal sovereignty arrived on three fronts: education, citizenship, and allotment. The education prong called for the government to establish a national school system for all American Indian children. By educating American Indian children in the ways of America at an early age, the belief was that they would abandon their barbaric lifestyle and be ready for immediate assimilation. Thousands of American Indian children were taught in boarding schools that stressed "science, mathematics, and

71 See id.
72 See OLSON, supra note 2 at 60.
73 See id. One of the ways in which the schooling of American Indians was accomplished was through boarding schools. The most famous of the boarding schools was the Carlisle Indian Industrial School in Pennsylvania. It was here that Jim Thorpe was educated and played sports.
74 See ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, supra note 2 at 177.
75 See OLSON, supra note 2 at 61.
working skills."75 As a further indignity, not only were the students required to learn how to speak English, they were strictly forbidden from speaking in their native tongue.76

The second prong involved the granting of citizenship to American Indians, which was not a new idea.77 The American Indian was stuck in an unenviable legal position—they weren't individuals in the eyes of the Constitution and they were not members of an independent nation either, subsequently, the courts were not kind to them.78 If American Indians were granted citizenship they could seek redress in the courts and, as an added benefit, the federal government could exercise criminal jurisdiction over the Indian lands.79 Full American Indian citizenship would not occur until 1924,80 but criminal jurisdiction

75 id.

76 American history and American government were also taught to try and distance the students from tribal laws and customs. See id. at 62. Today, while most tribes are struggling to keep their languages alive, the Navajo language is thriving. On the Navajo reservation there are people who speak nothing else and children are so fluent in the language that they must be taught English before entering school. See FRAZIER, supra note 24 at 80; but see Robert B. Porter, The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples, 15 HARV. BLACKLETTER L.J. 107, 109 (1999) (claiming that because most American Indians accept Christianity, go to public school, and own their own land, the assimilation policy was largely successful).

77 Congress had granted citizenship to different tribes throughout history. For example, the Wyandots received citizenship in 1855, the Potawatomis in 1861, and the Kickapoos in 1862. See OLSON, supra note 2 at 63.

78 See id.

79 See id.

80 See 8 U.S.C. § 1401(b) (1924); see also OLSON, supra note 2 at 72 (by 1905 over half of the
was extended to all reservation lands during this period,\textsuperscript{81} further eroding the sovereignty of the American Indian.

Allotment was the cornerstone of the government's assimilation policy. It was viewed as the quickest and easiest way to do away with the troublesome reservation system.\textsuperscript{82} Congress' grand idea was to grant allotments of reservation lands to individual Indians--forcing land ownership upon them.\textsuperscript{83} The United States would hold the allotted land in trust for a period of 25 years, at the conclusion of the trust period, the Indians

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American Indians had become citizens of the United States, either through land allotment or marriage to an American citizen); \textit{but see} Frazier, supra note 24 at 77 (noting that the Iroquois Indians flat out refused citizenship saying "they were citizens of their own nation and didn't need to belong to another.").

\textsuperscript{81} Criminal jurisdiction was extended to the Indian Country for the first time in 1885 in response to the Court's decision in \textit{Ex Parte Crow Dog}, 109 U.S. 556 (1883). An American Indian murdered another American Indian on tribal land. The federal government prosecuted and convicted the murderer. The Supreme Court overturned the conviction because it felt criminal jurisdiction in this instance had vested only in the tribe as an aspect of tribal sovereignty. Not content with this ruling, Congress passed the Major Crimes Act 18 U.S.C. \S\ 1153 (1885); granting exclusive jurisdiction to the federal courts over seven major crimes. The Act was a serious dilution of tribal sovereignty. \textit{See} Prygoski, supra note 30.

\textsuperscript{82} \textit{See} Olson, supra note 2 at 65. In reality, the idea of allotment was nothing new either. The first allotment program was started in 1835 on the Brotherton reservation, with many other reservations added before the official passage of the Dawes Act. \textit{See} id. at 64.

\textsuperscript{83} Under the Dawes Act and its predecessors, "each [American Indian] adult head of family received 160 acres[,] single adults over eighteen years old and orphans under eighteen got 80 acres[,] and other single youths under eighteen received 40 acres." \textit{Id.} at 67.
would own the land in fee simple and be free to alienate the land to non-Indians as they sought it. All surplus land not allotted would then become the property of the federal government who would immediately open it up to development by non-Indians. The system was meant to serve several purposes: it would teach the American Indian about land ownership (a tenent at the heart of American government), it was hoped that the Indian would learn to farm their tract of land, and it would destroy the centralized control of the land by the tribe which was a major barrier to acquisition by non-Indians. Once the Dawes Act was passed in 1887, tribal communal land holdings were decimated. The American Indians lost over 90 million acres and over 80 percent of the value of their land during the allotment period. Other atrocities were committed against the American

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84 See id. at 54-55.
85 See Petoskey, supra note 72 at 439.
86 See generally OLSON, supra note 2 at 65-69; see also Hodel v. Irving, 481 U.S. 704, 706 (1987) (explaining the purpose behind the Dawes Act, Justice O'Connor remarked that the Act "seem[ed] in part animated by a desire to force Indians to abandon their nomadic ways . . . to 'speed assimilation' . . . and to free new lands for further white settlement.").
88 See Petoskey, supra note 72 at 439; see also Judith Resnik, Multiple sovereignties: Indian tribes, states, and the federal government, (visited Dec. 13, 1999) <http://www.tribal-institute.org/_articles/resnick_full.htm> (noting that allotment policies had diminished tribal land holdings from 138 million acres to 48 million acres by the 1930s) and OLSON, supra note 2 at 127 (noting that most of the land retained by the tribes after the allotment period was of little to no value).
Indian during this harsh period of assimilation, but the allotment policy was by far the cruelest and caused the greatest assault on Indian sovereignty.\textsuperscript{89}

F. The Indian Reorganization Act of 1934

The next big movement in terms of tribal sovereignty was the Indian Reorganization Act of 1934 ("IRA").\textsuperscript{90} The government, recognizing the harm it had perpetrated against the American Indian people, "attempt[ed] to encourage economic development, self-determination, cultural plurality, and the revival of tribal government."\textsuperscript{91} The Act, on its face, seemed to promote tribal sovereignty. It contained an outright prohibition on any further allotment, it authorized the federal government to purchase land and establish new reservations, and allowed for tribes to "reorganize" as constitutional governments.\textsuperscript{92} The deceptive part of the Act was the requirement of a tribal constitution. The Bureau of Indian Affairs ("BIA") was required to approve all of the new constitutions.\textsuperscript{93} Instead of seeing this as an opportunity to relinquish control over the

\textsuperscript{89} The area superintendents of the Indian Affairs Commission were referred to as "csars" by the American Indian because of their dictatorship like control. See James A. Bransky, The Political Status of Indian Tribes in Michigan, Mich. Bar J., May 1966, at 446. It is also important to remember that the legitimacy of all the legislation passed during this period was eventually upheld by the Court in the Lone Wolf case which was previously discussed. See supra notes 62-70 and accompanying text.

\textsuperscript{90} 25 U.S.C. §§ 461-479 (1934). The Act was also known as the "Indian New Deal." See Olson, supra note 1 at 127.

\textsuperscript{91} See Petoskey, supra note 72 at 439.

\textsuperscript{92} See Bransky, supra note 91 at 446.

\textsuperscript{93} See id.
tribes, the BIA used the approval process to retain control. As the BIA read the Act, in order for a tribe to receive benefits from the Act, it must subject itself to the jurisdiction of the BIA. As a consequence, American Indian tribes today are either "federally recognized" or "non-federally recognized" by the BIA according to their compliance with the Indian Reorganization Act. The Act was constructed by congressional members friendly to the tribal cause and was a noble attempt to give some aspects of sovereignty back to the American Indian but,

[a]s had occurred so often in the past, European American attitudes and [American Indian] factionalism had stalled reform movements, and the 'Indian New Deal' had been no exception. Although it had many shortcomings, it was an unprecedented effort to protect [American Indian] heritage and provide political and economic assistance. [The government] expected all [American Indians] to accept political and economic institutions created along European American rules of individual aggrandizement and majority rule. The 'Indian New Deal' had been a noble, albeit flawed, attempt to reverse the trends of the past. A viable but mutually accommodating policy had yet to be formulated.

G. The Policy of Termination

Instead of working to establish a "mutually accommodating policy," termination became the new official attitude toward the tribes throughout the 1940s and the 1950s. Termination was really a reinvention of assimilation with the added benefit of

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94 See id.

95 See id. This is still true today. If a tribe is not federally recognized it generally cannot "avail itself of the government-to-government relationship with the United States. It must substantiate its existence to the satisfaction of the BIA through the federal acknowledgment process." Id. at 447.

96 There are a few exceptions to the rule. Especially large and powerful tribes, like the Navajo, have never reorganized under the Act, yet they are federally recognized by the BIA. See id.

97 OLSON, supra note 2 at 128.
compensation for federally seized lands. The goal was to eliminate all vestiges of tribal sovereignty by taking away tribal governments, eliminating federal assistance, and once again transferring ownership from the tribe to individual tribal members. In essence, the United States was attempting to dissolve the trust status of the American Indian. The policy proved to be disastrous for all of the parties involved. Tribes who were given compensation for land often gave small allotments of money to all the members of the tribe—the money rarely lasted long. Tribal members, now land and home owners found themselves having to pay bills and property taxes for the first time—the situation left many in abject poverty.

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98 See id. at 148.
99 See Petoskey, supra note 72 at 440.
100 See Brief History of U.S.—Tribal relations (visited March 4, 2000) <http://www.airpi.org/history.html> (citing Public Law 280 which extended state criminal and civil jurisdiction to Indian reservations in five states—Alaska, California, Minnesota, Nebraska, and Oregon).
101 See OLSON, supra note 2 at 147-49. The Menominee tribe serves as a perfect example. Each member of the tribe received a 4 percent negotiable bond worth $3,000 and 100 shares of stock in a tribal corporation that ran a lumber mill and forest on what was left of the old reservation lands. Instead of being incorporated into a county in Wisconsin, the tribe established their own county. The county immediately faced severe welfare and health service debts to name a few and to pay off these debts, required the tribal members to buy the land they were living on. In order to purchase the land, most of the members had to sell the bonds they received and were soon penniless. Unemployment and disease rose to rampant levels. In the year before termination, the federal government had spent $144,000 on the tribe, but because of welfare and health care, the federal government had to spend almost $3 million on the tribal members between 1961 and 1968. See id. at 149.
H. Self-Determination

With the rise of the civil rights movement in the 1960s, the federal government adopted yet another policy towards the American Indian--self-determination. This was driven largely by the American Indians themselves. They had always clamored to control the medical, educational, and economic programs which affected them, but now the federal government was listening. American Indians were increasingly allowed to foster

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102 As a result of the Civil Rights movement, the Indian Civil Rights Act was passed. Based loosely on the Bill of Rights, the Act reads:

No Indian tribe in exercising powers of self-government shall--
(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
(3) subject any person for the same offense to be twice put in jeopardy;
(4) compel any person in any criminal case to be a witness against himself;
(5) take any private property for a public use without just compensation;
(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;
(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
(9) pass any bill of attainder or ex post facto law; or
(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302 (1998). On its surface, the law seems benign, but it actually preempts tribal sovereignty on the subjects it covers, thereby serving to further dilute tribal sovereignty. See OLSON, supra note 2 at 183.

103 See Petoskey, supra note 72 at 440.

104 See OLSON, supra note 2 at 162.
their tribal beliefs within the confines of their reservations without outside interference.\textsuperscript{105} At the core of the self-determination movement was a belief that at first glance seems counter-intuitive—maintaining the trust status between the United States and the American Indian tribes.\textsuperscript{106} The special trust relationship needed to be maintained because in its absence the state and local governments would attempt to exercise far greater control over the American Indian residing within its borders.\textsuperscript{107} The key to true tribal independence was to develop the reservation as a self-sustaining economic entity.\textsuperscript{108} If a tribe could achieve this goal, it would no longer need the assistance of the federal government and could finally claim full sovereignty.\textsuperscript{109} Well, the belief was an idealistic one, one the government would never really allow to happen. While self-determination still lives on today,\textsuperscript{110} there are many other reasons why the American Indian will never truly be free of the overriding sovereignty of the United States.

\section*{II. Full Faith & Credit and the Exclusion of Judgments from Tribal Courts}

\textsuperscript{105} See id.
\textsuperscript{106} See id.
\textsuperscript{107} See id.
\textsuperscript{108} See id. at 163.
\textsuperscript{109} See id.
\textsuperscript{110} Self-determination reached its zenith with the American Indian Movement's forced occupation of the village of Wounded Knee in 1973. The occupation lasted 71 days and was the final stage of a series of armed seizures by the American Indian Movement. Unfortunately, like most American Indian attempts to have their voices heard, the occupation ended without much concession to the group's demands. See Frazier, supra note 24 at 60-61.
One reason the American Indian will never enjoy full sovereignty flows from the special relationship that states share with other states. The Full Faith and Credit Clause\textsuperscript{111} recognizes individual state sovereignty, yet limits it in a dual system of government.\textsuperscript{112} The Constitution mandates that a state must honor and give legal force to the judicial decisions of a sister state.\textsuperscript{113} As long as the court issuing the decision has both personal and subject matter jurisdiction to hear the case, a state must respect the decision like it was its own.\textsuperscript{114} By eliminating the discretionary power of a state to invalidate judgments from sister states, laws and the union became stronger.\textsuperscript{115} Although Indians and Indian nations are mentioned elsewhere in the Constitution, the Full Faith and Credit Clause speaks only of states—judgments from tribal courts are not included in its scope.\textsuperscript{116} Not only does the Clause not mention Indian nations, but it does not make any mention of the judgments from territories or possessions of the United States.\textsuperscript{117} However, the Constitution allows Congress to implement legislation to give full effect to the Clause—

\textsuperscript{111} U.S. CONST. art. IV, § 1

\textsuperscript{112} See Deina B. Garonzik, Full Reciprocity for Tribal Courts From a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act, 45 EMORY L.J. 723, 738 (1996).

\textsuperscript{113} See James M. Jannetta, Reciprocity Between State and Tribal Legal Systems, MICH. BAR J., May 1992, at 402.

\textsuperscript{114} See id.

\textsuperscript{115} See Garonzik, supra note 114 at 739.

\textsuperscript{116} See id.

\textsuperscript{117} See U.S. CONST. art. III, § 1.
noticing this deficiency, Congress enacted the Full Faith and Credit Act in 1790. The current version of the Act reads:

[s]uch Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Curiously enough, there is no mention of Indian nations or tribes in the statute. Some courts have likened judgments from tribal courts to those from sister states, some have likened them to territories, and still others have not granted decisions from tribal courts any measure of full faith and credit, opting instead to only apply the principles of comity to the judgments. Was the exclusion of tribal courts from the language of

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118 See Garonzik, supra note 114 at n 6.
122 Comity is a jurisdictional concept which allows a court to give deference to and enforce the judgments of foreign courts. If the foreign court had both subject-matter jurisdiction and provided due process protections, the judgments are normally respected. In the area of comity and tribal judgments, "one state supreme court claimed '[w]e consider an 'Indian nation' as equivalent to a 'foreign nation' to encourage reciprocal action by the Indian tribes in this state and, ultimately, to better relations between the tribes and the State." Barbara Ann Atwood, Identity and Assimilation: Changing Definitions of Tribal Power Over Children, 83 MINN. L. REV. 927, 946-47 (1999) (quoting Fredericks v. Eide-Kirschmann Ford, 462 N.W.2d 164, 168 (N.D. 1990)).
124 For an extensive discussion on the problems inherent in the tribal court system, see

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the Act intentional? Did Congress just assume that Indian tribes would be considered territories for purposes of the statute? Before 1978 a credible argument could have been made that an Congress intended judgments from tribal courts to be treated the same as a judgment from a territorial court, but with the passage of the Indian Child Welfare Act\textsuperscript{125} the argument loses some merit. The Act reads:

\begin{quote}
[\textit{t}he United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.\textsuperscript{126}
\end{quote}

Not only does Congress explicitly mention Indian tribes in the statute, it distinguishes them from territories by mentioning them as a separate entity.\textsuperscript{127} It seems that Congress is carving out a special exception granting judgments from tribal courts full faith and credit only in this limited instance.\textsuperscript{128} In fact, Congress has carved out the same

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\textsuperscript{126} 25 U.S.C. § 1911(d) (Italics added).

\textsuperscript{127} See Garonzik, supra note 114 at 743.

\textsuperscript{128} One of the reasons put forth for the special exception is the importance of the statute for preserving tribal identity. Congress felt too many American Indian children were being removed from their homes unjustly by state courts and placed into non-Indian environments. This resulted in a great deal of harm to both the child and the tribe which would lose one of its most valuable resources. See Barry L. Levine, \textit{The Indian Child Welfare Act: Federal Indian Law in State Probate Court Proceedings}, Mich. Bar J., May 1986, at 453. For a more complete discussion on the Indian Child Welfare Act and the problems inherent in adoption policies of American Indian children prior to the Act, see generally, Atwood, supra note 124.
exception in only three other statutes, one of which only applies if the case "arise[s] in tribal country and involve[s] Native Americans." 129 It would be rather simple for Congress to amend the Full Faith and Credit Act to include Indian tribes, the resulting statute would not read much different from the Indian Child Welfare Act, but it has chosen not to do so. 130 This is evidence of a clear intention by Congress not to treat judgments from tribal courts on par with those from state and territorial courts. The reasons for this are not entirely clear, 131 but the message is--American Indian tribes are not to be treated as states or territories for purposes of full faith and credit.

III. Dual Sovereignty and its Application in Federal Courts to Tribal Court Adjudications

A. United States v. Wheeler

Curiously enough, the federal government has taken a stand that seems to contradict the representations of Congress. In United States v. Wheeler, 132 the Supreme Court had occasion to rule on a rather unique aspect of federalism, "dual sovereignty" 133

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130 See generally id.

131 See id. at 744-48 (suggesting that tribal courts are not granted full faith and credit because some of them do not adhere to all the procedural and substantive standards of the federal courts and some tribal courts are reluctant to grant full faith and credit to judgments of the states for fear of losing some aspects of sovereignty); see also Jannetta, supra note 115 (noting that many states are enacting their own laws to grant full faith and credit or comity to tribal court judgments).


133 See United States v. Enas, 204 F.3d 915, 917 (9th Cir. 2000) (explaining the dual
and how it related to a judgment from a tribal court. A member of the Navajo tribe was convicted in a tribal court for contributing to the delinquency of a minor. After that conviction, he was indicted for the crime of statutory rape in federal court based on conduct arising out of the same incident he was convicted for in tribal court. He argued that the statutory rape charge was a violation of the Double Jeopardy Clause of the Constitution. The crux of his argument was that the tribal court derived its power from the federal government and was operating as an arm of the federal government; therefore, any subsequent prosecution based on conduct underlying his conviction in the tribal court violated double jeopardy. The government countered that the tribal court was acting as an independent sovereign and, as such, the concept of "dual sovereignty" did not bar the sovereignty doctrine as allowing "two independent sovereign entities to prosecute an offender separately for the same offense.").

134 See generally Wheeler, 435 U.S. 313.

135 See id. at 315.

136 See id. at 316 (alleging the crime of contributing to the delinquency of a minor was a lesser included offense of statutory rape— that contention was never challenged by the government).

137 U.S. Const. amend. V.

138 Wheeler's complaint alleged that because Congress has the power to legislate on all Indian matters, the "tribes are merely 'arms of the federal government' which . . . 'owe their existence and vitality solely to the political department of the federal government.'" Wheeler, 435 U.S. at 319. In refuting his argument, the Court was careful to distinguish an Indian nation from a federal territory because within "a federal Territory and the Nation, as in a city and a State, 'there is but one system of government, or of laws operating within [its] limits.'" Id. at 321 (quoting Benner v. Porter, 13 L.Ed. 119) (alterations in the original).
second prosecution.\textsuperscript{139} The Court began its analysis by stating that ""Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory[.] . . .""\textsuperscript{140} However, as the Court points out, this sovereignty is not absolute:

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.\textsuperscript{141}

Had Indian tribes lost the sovereign power to punish a member under tribal law by virtue of their dependent status? The Court felt that Indian tribes retained this inherent power and that the doctrine of dual sovereignty permitted the federal prosecution.\textsuperscript{142} By extending the doctrine of dual sovereignty to prosecutions in tribal courts, the Court

\textsuperscript{139} See \textit{id.} at 318.

\textsuperscript{140} \textit{id.} at 323 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1972)).

\textsuperscript{141} \textit{id.} (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

\textsuperscript{142} Not only had Congress never deprived the tribes of this power, according to the Court Congress had noticeably declined to disturb it:

'Their right of self government, and to administer justice among themselves, after their rude fashion, even to the extent of inflicting the death penalty, has never been questioned; and ... the Government has carefully abstained from attempting to regulate their domestic affairs, and from punishing crimes committed by one Indian against another in the Indian country.'

analogized Indian tribal courts to state courts. The language the Court uses to explain its holding is particularly relevant:

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. . . . [For example], [t]hey cannot enter into direct commercial or governmental relations with foreign nations. . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations.\(^{143}\)

As the Court states, Indian tribes no longer retain jurisdiction over relations between Indians and non-Indians.\(^{144}\) The jurisdiction of such external relations lies solely with the federal government.\(^{145}\) But the tribe, as an aspect of its sovereign status\(^{146}\) retains an absolute right, analogous to that of a state, to try its members in a tribal court.\(^{147}\)

\(^{143}\) *Wheeler*, 435 U.S. at 328.


\(^{145}\) If a crime is committed by an American Indian against a non-Indian and that crime goes unpunished by a tribal court, the United States retains jurisdiction. See 18 U.S.C. § 1152 (1949).

\(^{146}\) The Court specifically declines to decide whether its holding would extend to a situation where a tribal member is tried by a Court of Indian Offenses established under 25 C.F.R. § 11.1(b) or by a tribe which had once lost its power to prosecute criminals and that power was later restored to the tribe by act of Congress. See *Wheeler*, 435 U.S. at 328 n. 26, 28.

\(^{147}\) The Indian Civil Rights Act limits the maximum sentence available in a criminal prosecution in a tribal court to one year imprisonment and a $5,000 fine (at the time *Wheeler* was decided it was six months and $500). See 25 U.S.C. 1302(7). The Court uses this limitation as justification for the dual prosecution claiming that many crimes would go without proper punishment if only
B. United States v. Weaselhead

Another double jeopardy case, United States v. Weaselhead,148 tackled many of the same issues presented by Wheeler. In this case, the circuit court decided that there was a Double Jeopardy violation when the federal government sought to prosecute an individual after his conviction in a tribal court.149 As in Wheeler, the conduct in question was sexual contact with a minor.150 The main difference between the two cases stemmed from the identity of the parties concerned. Wheeler involved a crime by a member of a tribe against another member of the same tribe, Weaselhead involved a crime between two American Indians who were members of different tribes.151 The problem was not whether the tribal court had jurisdiction to hear the case, since Congress had already legislated on this issue and determined that Indian tribes retained criminal jurisdiction over all Indians, member or non-member.152 In the court’s opinion, the question was, "whether the

tried by a tribal court. Even though states have no such restrictions maximum restrictions, the Court felt that "[f]ederal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests." Wheeler, 435 U.S. at 332.

148 156 F.3d 818 (8th Cir. 1998) (opinion and judgment vacated).

149 See Weaselhead, 156 F.3d at 824.

150 See id. at 819.

151 Weaselhead was an adult male enrolled as a member of the Blackfoot Indian Tribe, his victim was a 14 year old member of the Winnebago Tribe. He was tried in a Winnebago tribal court. See id.

152 This was not always the case. In the wake of a Supreme Court decision claiming tribes only had jurisdiction over its members, Congress amended the powers of tribal government to include
amendment's authorization of criminal jurisdiction over nonmember Indians is, as Congress asserted, simply a non-substantive 'recognition' of inherent rights . . . or whether it constitutes an affirmative delegation of power." 153 Reading the statute as a granting of power to the tribes that they did not originally have as part of their inherent sovereignty, the court invalidated the second prosecution. 154

According to the dissenting opinion the court's view of tribal sovereignty was erroneous because it based its holding on the belief that Indian sovereignty was defined by the parameters of the Constitution. 155 In reality, the dissent argued, the scope of inherent tribal authority has always been defined by reference to federal common law, not the Constitution. 156 Because Congress has the power to legislate on all Indian affairs, it also "has the power to expand and contract the inherent sovereignty that Indian tribes possess[]." 157 The dissenting opinion's perception of Congress' power to define the scope of inherent Indian authority apparently swayed some other members of the Eighth Circuit because the majority's ruling was eventually vacated, but the language used to explain the

"the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2); see also Duro v. Reina, 495 U.S. 676 (1990) (superseded by statute).

153 Weaselhead, 156 F.3d at 823.

154 See id. at 824 (explaining its holding, the court said, "[b]ecause the power of the . . . [I]n the power to punish those who are not its members emanates solely from congressionally delegated authority, the tribal court . . . and the federal court . . . do not 'draw their authority to punish the offender from distinct sources of power' but from the identical source.")

155 See id. at 825.

156 See id.

157 Id.
status and power of an Indian tribe in the original ruling is still relevant.\textsuperscript{158} When examining the sovereign aspects of the Indian nations, the court stated:

\begin{quote}
Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. [T]heir rights to complete sovereignty as independent nations, [are] necessarily diminished.\textsuperscript{159}
\end{quote}

Member or nonmember, being an American Indian subjects one to the additional sovereignty of any Indian tribe but, in all circumstances, the American Indians, "like all other citizens share allegiance to the overriding sovereign, the United States."\textsuperscript{160}

The fundamental concept of these holdings is that the federal courts tend to treat Indian reservations like states. Indian tribes are permitted to exercise jurisdiction over cases involving American Indians, but once a non-Indian becomes involved, jurisdiction switches to the federal government.\textsuperscript{161} Once again, American Indian tribes do not enjoy

\textsuperscript{158} Other circuits that have addressed the question have agreed with the eventual holding in \textit{Weaselhead} that the scope of inherent tribal authority is defined under federal common law by Congress. \textit{See United States v. Enas,} 204 F.3d 915 (9th Cir. 2000).

\textsuperscript{159} \textit{Weaselhead,} 156 F.3d. at 822 (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978)) (italics added) (alterations in the original).

\textsuperscript{160} \textit{Id.} at 822-23.

\textsuperscript{161} This is true only in the case of criminal jurisdiction. In civil cases, when an action in court is based upon the activities of non-Indians on tribal land or when the action involves an Indian but occurs off of tribal land, the courts are required to invoke the "tribal exhaustion rule." This rule generally forces the parties to exhaust their tribal court remedies before proceeding to federal court based on diversity jurisdiction. \textit{See, e.g.,} Navajo Nation v. Intermountain Steel
full sovereignty; they are, at all times, subject to the overriding sovereign, the United States. The intrinsic irony between state and federal treatment of tribal decisions should be apparent. The federal courts treat tribal court judgments like it would treat a state judgment because it allows them to exercise co-criminal jurisdiction. State courts treat tribal court judgments like it would a judgment from a foreign court (and Congress seems to acquiesce to this treatment) because it allows them to disregard a tribal court judgment when it sees fit. Once again, the tribes are in the unenviable position of uncertainty when it comes to decisions from their courts. Instead of having a definable status, the states and the federal government simply meld the status of a judgment from a tribal court to promote its own interests.

IV. Tribal Gaming

A. Early Cases that Paved the Way

Today, American Indian tribes are most prominently noticed by non-Indians for their foray into the world of casino gaming. The fact that tribes are permitted to operate high-stakes casino gambling within reservation lands might seem to be a shining beacon of tribal sovereignty, but the reality is much different. Tribal gaming began rather inauspiciously in 1979 when the Seminole Tribe opened a bingo parlor on their reservation.\textsuperscript{162} The State of Florida, not thrilled with having unregulated gambling occurring within its borders, immediately turned to the federal courts to have the operation shut down.\textsuperscript{163} The case, *Seminole Tribe v. Butterworth*,\textsuperscript{164} recognized a

\begin{footnotesize}

\textsuperscript{163} See id.

\textsuperscript{164} 858 F.2d 310 (5th Cir. 1981).
\end{footnotesize}
distinction between state civil and criminal regulation of Indian tribes.\textsuperscript{165} Because the State of Florida did not proscribe criminal penalties for the operation of bingo games (they simply regulated them by way of civil statutes), the court felt tribal sovereignty prohibited Florida from imposing any restrictions on tribal bingo gaming.\textsuperscript{166} This ruling set off a boom in the tribal gaming industry as tribes saw gambling as a way to vastly improve their poor economic situations.\textsuperscript{167}

For the next several years, the legality of tribal gaming went unchecked by the Supreme Court. All of that came to an end in 1987 with the case of California v. Cabazon Band of Mission Indians.\textsuperscript{168} The Supreme Court acknowledged the same civil/criminal distinction noted by the Fifth Circuit in Seminole Tribe, but took the holding even further.\textsuperscript{169} The Court held that if a state simply regulated, but did not prohibit, "some form of gambling within its borders, even if only for charitable purposes, then the state could not regulate gaming on a reservation."\textsuperscript{170} Only an absolute criminal

\textsuperscript{165} See Seminole Tribe, 658 F.2d at 312.

\textsuperscript{166} If Florida had a criminal statute in place, then under Public Law 83-280 (which provided for state criminal jurisdiction over Indian tribes in certain circumstances), Florida would have been able to have the bingo game shut down. See id. at 313; see also Rosenberg, supra note 164 at n. 15.

\textsuperscript{167} See Rosenberg, supra note 164 at 287; see also Paul H. Brietzke & Teresa L. Kline, The Law and Economics of Native American Casinos, 78 Neb. L. Rev. 263, 289-90 (1999) (explaining the beneficial effects of tribal gaming in the form of revenue and jobs).

\textsuperscript{168} 480 U.S. 202 (1987); see also Brietzke, supra note 169 at 291 (calling the reservation casino a "new buffalo" providing the tribes with a new form of self-sufficiency).

\textsuperscript{169} See Cabazon 480 U.S. at 207.

\textsuperscript{170} Rosenberg, supra note 164 at 287.
prohibition of gaming within a state's borders could prevent a tribe from establishing a casino on a reservation. In the Court's opinion, state regulation within a reservation's borders on a civil matter such as gaming would be an impermissible infringement on tribes whose "sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." California argued that tribal casinos needed to be regulated by the states to prevent infiltration by organized crime, but the Court felt this state interest was outweighed by the fact that "[s]elf determination and economic development are not within reach if the Tribes cannot raise revenue and provide employment for their members[.]"

B. The Indian Gaming Regulatory Act

In the wake of this decision, the states pressed Congress for a remedy and Congress was quick to act. Fearing that the Supreme Court had paved the way "for rapid and uncontrolled expansion of unregulated casino-type gambling on Indian lands[.]" Congress used its plenary power to enact the Indian Gaming Regulatory Act of 1988 ("IGRA"). The IGRA made it much more difficult for a tribe to establish gaming on a reservation. First, the Act established the National Indian Gaming Commission

171 See Cabazon, 460 U.S. at 224; see also Brietzke, supra note 169 at 302 (noting that the rights granted by the Cabazon decision were actually a superior property right subject only to federal consent which was easily obtained); and Rosenberg, supra note 164 at n. 17 (pointing out that only two states, Hawaii and Utah retain an absolute criminal ban on all forms of gambling).
172 Cabazon, 460 U.S. at 221.
173 See id. at 221-22.
174 Brietzke, supra note 169 at 303.
("NIGC")\textsuperscript{176} to regulate all tribal gaming. Second, the Act set heightened regulations for Class III type gaming.\textsuperscript{177} Under the provisions of the IGRA, class III gaming may be conducted on a reservation only if:

(1) the state in which the tribe is located permits such gaming for any purpose, by any person, organization, or entity; (2) the tribe adopts a gaming ordinance that has been approved by the NIGC Chairman; and (3) the tribe and state have negotiated a 'compact' that has been approved by the Secretary of the Interior.\textsuperscript{178}

The "compact" is the most significant portion of the Act.\textsuperscript{179} It requires the tribe to sacrifice a measure of sovereignty to the state in order to operate high-stakes gambling establishments. In order to protect tribal interests from state infringement, the permissive scope of a compact is limited to matters "directly related to the operation of gaming activities."\textsuperscript{180} Unfortunately for the tribe, the resulting compact normally "cuts the state in" on the profits. This payment of revenue to the state results in an indirect tax of gaming

\textsuperscript{176} See Brietzke, supra note 169 at 309 (explaining that the National Indian Gaming Commission was never given any real power and was almost shut down at various points due to a lack of funds).

\textsuperscript{177} Class III gaming includes blackjack, slot machines, craps, and other types of high-stakes games. The only type of gambling exempt from this provision is Class I gaming which includes traditional tribal games played for minimal prizes. Games of this type are under the exclusive jurisdiction of the tribes. Class II gaming, which includes bingo and similar games, is subject to tribal and federal regulation, but no state regulation. See 25 U.S.C. § 2703(6), (8); see also Rosenberg, supra note 164 at 288.

\textsuperscript{178} Rosenberg, supra note 164 at 289.

\textsuperscript{179} See Brietzke, supra note 169 at 307 (claiming that the compact serves as a "treaty-substitute" between the states and the tribes).

activities on a reservation by a state. Another aspect of the IGRA that has worked against the American Indian is the "good faith" duty imposed upon the states in the bargaining process. When the Act was first passed, it required the states to bargain in good faith with a tribe over gaming rights—the good faith provision was necessary to prevent states from just ignoring a tribe's pleas. After a tribe made a formal request to a state to enter into compact negotiations, the good faith period lasted for 180 days. If, at the end of that period, the parties did not agree on a compact, the court would order a 60 day deadline for a compact to be reached. From that point, the parties were required to do everything possible to avoid litigation—including using a mediator and arbitration. The tribe was to seek relief in the courts only if all other measures had failed. It was on this final point that the tribes were dealt another crushing blow.

The IGRA granted tribes the right to sue states that did not comply with the negotiation provisions of the Act. States, sighting their sovereign immunity from being sued in federal court under the Eleventh Amendment, believed the statute to be unconstitutional. The issue came to a head in the 1997 case, *Seminole Tribe of Florida v.*

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181 The compacts also divide criminal and civil authority between the parties and cover the actual operation of the games. This results in a tribe giving authority to an entity that would otherwise have no power to tax or regulate them. See Brietzke, *supra* note 169 at 306.
182 See Rosenberg, *supra* note 164 at 290.
184 See Rosenberg, *supra* note 164 at 290.
185 See *id.*
186 See *id.*; see also Brietzke, *supra* note 169 at 306 (noting that in 1997 there were 37 reservation casinos operating without a compact in place).
187 U.S. CONST. amend. XI.
Florida (hereinafter Seminole Tribe II). In a 5-4 decision, the Supreme Court ruled that the Indian Commerce Clause did not give Congress the authority to usurp a state's Eleventh Amendment immunity. In essence, the Court treated tribes like it would a private individual seeking redress against a state without recognizing a tribe's right to sovereign status. The practical effect of this ruling was to make enforcement of the Act impossible. States who did not wish to relent to tribal overtures for gaming rights could simply turn a deaf ear, while states who were willing to allow gaming on a reservation no longer needed to bargain in good faith and could hold out for a significantly larger piece of the pie. The Court left Indian nations legally impotent—states get to be free riders, gaining a new source of revenue from the acts of what is supposed to be an independent sovereign, without having to perform any duties for the added revenue. After Seminole II, the states have the upper hand in negotiations with the tribes, it's a hand the Indian Commerce Clause was designed to prevent and one that poses a serious threat to all measures of American Indian sovereignty.


189 U.S. CONST. art. I, § 8, cl. 3.

190 Congress can only abrogate a state's immunity when it gives a clear indication of its intent to do so, and when it operates under legitimate constitutional power. The Court found the intention, but not the power. See Seminole Tribe II, 517 U.S. at 62.

191 See Brietzke, supra note 169 at 312.

192 See id. at 313.

193 Since the Seminole II decision, there has been a marked decrease in the number of compacts states have agreed to. See Brietzke, supra note 169 at 313. In fact, the lack of legal recourse available to the tribes has prompted some tribes to simply open casinos without a compact in place. See Rosenberg, supra note 164 at 302. For a detailed discussion of the first
It would be easy to overlook the importance of this decision. Congress tried to
craft a statute that granted the states a measure of regulatory control over a distinct
political entity within its borders while allowing that entity to keep much of its inherent
sovereignty. Before the Seminole II decision, it appeared that Congress had succeeded in
its attempt, now the future is not so clear. Tribes are faced with a lengthy, frustrating
process if they seek to enter into the gaming arena. Since the decision, Congress has
considered various new bills which would further restrict or even eliminate tribal
gaming. It is important to remember that tribal gaming was not a panacea for all the

compact entered into post Seminole II, see generally, Id.

134 To have their claim against a state heard in federal court, a tribe must now bring suit in state
court (where states do not enjoy an Eleventh Amendment immunity), exhaust all their procedural
appeals in the state arena, and then appeal the final decision to the federal courts (federal
appellate review is not barred by the Eleventh Amendment). The process would be frustratingly
long and expensive. Congress could alleviate this burden on the tribes in several ways: (1)
amend the IGRA to allow state officials to be sued under the Ex Parte Young doctrine; (2) pass
the IGRA pursuant to the Fourteenth Amendment--any failure to negotiate in good faith would
then result in discrimination against a protected class; (3) condition the receiving of federal funds
on a waiver of Eleventh Amendment immunity; or (4) condition regulatory authority over the
Indian tribe on waiver of Eleventh Amendment immunity. See Gary W. Donchue, The Eleventh
Amendment: The Supreme Court’s Frustrating Impediment to Sensible Regulation of Indian

135 Bills have been introduced in the House to both amend and replace the IGRA. Some of the
proposals would shift the burden of proof to the tribes, transfer oversight to the state governor,
allow extensive taxing of tribal gaming by the states, and require local community approval of
tribal gaming activities. See Contemporary Threats to Tribal Sovereignty From Congress (visited
evils and wrongs that have been perpetrated against the American Indian. In fact, as of the year 2000, only 184 of the 557 recognized American Indian tribes conduct gaming on their reservation. Of that number, many are limited to bingo type activities, and precious few have been economically successful. The barriers tribes face in running a


See id. It is true that certain tribes have become exceedingly wealthy due to reservation casinos. The best example is the Mashantucket Pequot, a small tribe in Ledyard, Connecticut that has turned their Foxwoods Casino into one of the largest in the world. "The tribe has become one of the leading employers in the state; it builds museums, funds ballets, builds its own high-speed ferryboats to haul customers from along the seaboard." Frazier, supra note 24 at 83. As part of their compact with the state of Connecticut, the tribe gives 25 percent of its slot machine revenue back to the state. In a recent month, that amount totaled over $14 million. See id. Unfortunately, this unbelievable success story is the exception, not the rule. Under a dozen tribal casinos take in over half of the gambling dollars spent on reservations--most tribes are simply breaking even. See id. at 84; see also Nicholas S. Goldin, Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming, 84 Cornell L. Rev. 798, 852 (1999) (noting that "tribal gaming supports just one percent of the nation's Indians," and as much as eighty-five percent of tribal revenues ends up in the pockets of non-Indians).
successful casino may not be readily apparent, but they do exist. First, since most reservation land was given to the Indians because it was once deemed worthless by the federal government, most reservations are located in remote, isolated areas of the states in which they sit—thereby making it difficult for people to travel there.\(^{198}\) Second, many tribes refuse to introduce gambling operations on their reservations, no matter how lucrative it may be, because it forces them to relinquish aspects of sovereignty to the states.\(^{199}\) While media hype has made the reservation casino seem like a windfall for the tribe, the reality is much different—tribes are rarely allowed to conduct high-stakes gaming, those that do rarely turn a profit, and those that do must once again compromise their sovereign status.

V. Title to Reservation Lands

One of the most important aspects of freedom or sovereignty (although it's a concept totally foreign to the American Indian) is the ownership of the land which one calls home. Can it fairly be said that the tribe "owns" the reservation on which it sits? While the answer is not entirely clear cut, it would have to be answered with a resounding no. To illustrate this point, a rather unique comparison can be drawn between a foreign embassy and an Indian reservation.

\(^{198}\) See Frazier, supra note 24 at 84.

\(^{199}\) The Navajo Reservation, with 17.5 million acres of land in Arizona, New Mexico, and Utah is the largest reservation. With over 250,000 enrolled members (200,000 of which live on the reservation), it also has the largest membership. Despite an unemployment rate over 30 percent and a homeless problem, the Navajo people have twice voted against building a tribal casino. Viewing any outside oversight of tribal gaming as an encroachment upon sovereignty, a Navajo leader has remarked, "The sovereignty of the Navajo Nation and the Navajo people is not and should never be for sale." Id. at 85.
Suppose, for purposes of the comparison, that a "captive" insurance company is looking for a place to hold their board meetings. The insurance company wants to hold their meeting either at a reservation or at a foreign embassy. Now, captive insurance companies enjoy favorable tax status under the U.S. Tax Code as long as they do not conduct a "trade or business in the U.S."200 The Tax Code also discusses the ramifications of conducting trade in the United States, but the statute does not define what constitutes trade in the United States.201 Because no general definition for "within the United States" is given, no statutory authority defines the status of an Indian reservation. Would holding the meeting at either location harm the tax status of a captive insurance company? As this paper has already pointed out, both case and statutory law are duplicitous as to the Indian reservation—changing the definition to suit each particular purpose. How would the U.S. Tax Code regard the American Indian reservation if a foreign corporation were to hold meetings on its soil? What follows is a series of cases and statutes that, taken individually, do not present a definitive answer to the Indian reservation question, but, taken in the aggregate, suggest that an Indian reservation is a unique entity, but, under the U.S. Tax Code, just as much a part of the United States as any individual state—quite unlike a foreign embassy.

A. **Statutory Sections Dealing with American Indian Nations**

1. Citizenship

One of the most obvious places to start the analysis is with the citizenship statute. This statute states the persons that are citizens of the United States at birth. Subsection (b) of the statute grants citizenship status to:

[A] person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe:


Provided, that the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property.202

Under this statute, not only are Indians granted citizenship at birth, but they are granted citizenship on the basis of having been born in the United States.203 While this is obviously not directly relevant to interpreting a provision under the tax code, it is clear that Indian reservations are deemed to be part and parcel of the United States for the purposes of this statute.

2. Jurisdiction

Another important statute is the jurisdiction statute. 18 U.S.C. § 1152 grants Indian tribal courts exclusive jurisdiction over all offenses committed by an Indian against another Indian and over all Indians that commit an offense in Indian country (provided they are punished in the tribal courts). As to all other offenses:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.204

The United States retains exclusive jurisdiction over all acts between an Indian and a non-Indian. This is true even if the non-Indian commits the offense within Indian country.205 In contrast, under 28 U.S.C. § 1604, the United States cannot exercise jurisdiction over foreign states (like a foreign embassy on U.S. soil) except in limited

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202 8 U.S.C. § 1401(b) (1952) (italics in the original).

203 See id.


commercial circumstances. Under 18 U.S.C. § 1152, if the captive insurance company were to hold its meeting on an Indian reservation and commit a crime, the United States federal courts would have exclusive jurisdiction over the case, but if the same meeting were held at a foreign embassy, the United States could not exercise jurisdiction. If the U.S. retains jurisdiction with respect to crimes committed on Indian reservations by non-Indians, it would seem logical that they also would retain taxing jurisdiction over a corporation were it to hold a meeting on an Indian reservation.

3. Title to Lands

Important to this discussion is the ownership of reservation lands. Who owns them, the Indian nations or the United States? Section 465 provides an answer:

Title to any lands or rights acquired [for Indian reservations] . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land was acquired, and such lands or rights shall be exempt from State and local taxation.

The land is held by the United States in trust for the Indians. This implies that full title is never vested in an Indian tribe, but the more important part of this statute is the tax exemption. Indian reservation lands are exempt from State and local taxation, but are not exempt from federal taxation. If the lands are not exempt from federal taxation, it

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205 See 28 U.S.C. § 1604 (1976). A foreign state is not immune from U.S. jurisdiction in any case in which the action is based: (1) upon a commercial activity carried on in the U.S. by a foreign state; (2) or upon an act performed in the U.S. in connection with a commercial activity of the foreign state elsewhere; or (3) upon an act outside the territory of the U.S. in connection with a commercial activity of the foreign state elsewhere and that causes a direct effect in the U.S.


208 See United States v. Anderson, 625 F.2d 910 (9th Cir. 1980).
would seem to follow that activities conducted upon such lands would not be exempt either. Not only are reservation lands subject to federal taxation, but, in certain instances, the Secretary of the Interior has a preferential right of first refusal when any Indian lands are being offered for sale.\textsuperscript{209} This restriction on alienability linked with the trust status and taxing power illustrates the substantial control the United States government exercises over Indian lands.

4. Code of Federal Regulations

Further compounding the issue, the Tax Code treats Indian tribal governments as States for certain purposes.\textsuperscript{210} The Code of Federal Regulations contains a provision which reads:

\begin{quote}
In general. An Indian tribal government, \ldots shall be treated as a State, and a subdivision of an Indian tribal government, \ldots shall be treated as a political subdivision of a State, under the following sections and regulations thereunder[].\textsuperscript{211}
\end{quote}

The list of sections under which an Indian government is considered a state is long, and it is clear from this list that Indian nations will be treated as states for most tax purposes.\textsuperscript{212} If the government on an Indian reservation is considered to be an instrumentality of a state, it logically follows that the land where that government sits will be treated as a state also. If this conclusion holds true, then any activity on an Indian reservation will amount to contact with the United States.

\textsuperscript{209} 25 U.S.C., § 502 (1938) (the Secretary of the Interior retains a preferential right to purchase any American Indian lands offered for sale in Oklahoma).


\textsuperscript{211} 26 C.F.R. § 305.7871-1(a).

\textsuperscript{212} See 26 C.F.R. § 305.7871.
One of the more damaging code provisions for the argument that an Indian reservation is a sovereign country is 26 C.F.R. § 301.7701-2. This portion of the code defines corporations that are subject to federal taxation. The code defines the term "corporation" as: "A business entity organized under a Federal or State statute, or under a statute of a federally recognized Indian tribe." This language equates a business formed under tribal law with a business formed under state or federal law. Furthermore, the statute goes on to list certain "foreign entities" that are also subject to federal taxation. The code lists corporations formed in America Samoa, Northern Mariana Islands, Puerto Rico, and the United States Virgin Islands as being foreign corporations. All of these countries listed are under the control of the United States, yet corporations formed under their laws are deemed "foreign entities" by the code. In contrast, corporations formed under Indian law are deemed domestic corporations on par with corporations formed under state or federal law. If a corporation formed under Indian law is a domestic corporation for tax purposes, the implication is strong that a foreign corporation conducting business on Indian land would, in effect, be conducting business domestically.

B. State Efforts to Extend Taxing Jurisdiction to American Indian Lands

The power to levy taxes is an inherent power of sovereignty. Only strong, independent political communities can compel a person or a business to sacrifice a portion of its revenue as the price of doing business. As was stated earlier, Indian lands are exempt from state and local taxation. Were this rule true in every situation, it would

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214 See id.
215 See id.
serve as strong evidence of tribal sovereignty, at least with respect to the states, but this general rule has been modified by case law.

1. **County of Yakima v. Tribes of the Yakima Indian Nation**

One example of the modification can be seen in *County of Yakima v. Tribes of the Yakima Indian Nation*.\(^{217}\) The county of Yakima sought to impose an ad valorem tax on reservation lands and an excise tax on the sale of such land.\(^{218}\) The Supreme Court allowed the county to impose the ad valorem tax, but denied the imposition of the excise tax.\(^{216}\) The Court spoke of the idea that an Indian reservation was an entity entirely independent of the state in which it is located, but ultimately rejected the notion. It stated, "more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands."\(^{220}\) In fact, state jurisdiction is permitted over relations between Indians and non-Indians unless state law "would interfere with reservation self-government or impair a right granted or reserved by federal law."\(^{221}\) In the area of taxation, the Court held that absent a clear intention by Congress to allow state taxation of an Indian reservation, the practice was disfavored.\(^{222}\) The Court ultimately found this

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\(^{218}\) See *County of Yakima*, 502 U.S. at 255.

\(^{216}\) See generally *id*.

\(^{220}\) *Id.* at 257-58.

\(^{221}\) *Id.* at 258 (quoting *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962)).

\(^{222}\) Ever cognizant of the special relationship between the Indian tribes and the United States, the court noted that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *See id.* at 269 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).
"clear intention," at least with respect to the ad valorem tax, in the Indian General Allotment Act.\textsuperscript{223}

2. Cass County v. Leech Lake

\textit{County of Yakima} was not an isolated case, another case that permitted state taxation of Indian lands under the premise of the Indian General Allotment Act was \textit{Cass County v. Leech Lake}.\textsuperscript{224} In this particular case, Indian lands had been obtained in fee simple by both Indians and non-Indians.\textsuperscript{225} The Indian tribe reacquired the lands that had

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{223} The Indian General Allotment Act or the Dawes Act is the Act which transferred ownership of lands into the hands of individual Indians. Almost as an afterthought, it also authorized the state taxation of such land. In the strictest sense, the excise tax was a tax on the sale of the land and was therefore void. The Court was clearly concerned about expanding the state's power of taxation over tribes because it pointed out that validating the excise tax might lead to the validation of other types of state taxation on reservation activities. See id. at 269-71; see also 25 U.S.C., § 349.
\item \textsuperscript{224} 524 U.S. 103 (1998).
\item \textsuperscript{225} See \textit{Leech Lake}, 524 U.S. at 106; but see Thompson v. County of Franklin, 987 F.Supp. 111 (N.D.N.Y. 1997). \textit{Thompson} also deals with an ad valorem tax, but, in contrast to \textit{Yakima} and \textit{Leech Lake}, the district court held that the state could not impose the tax on tribal land. The court started its analysis by saying, "absent cession of jurisdiction or other federal statutes permitting,' . . . a State is without power to tax reservation lands and reservation Indians." \textit{Thompson}, 987 F.Supp. at 126. At issue in the case, was the boundary of the reservation and whether the reservation had been diminished by subsequent treaties with the State of New York. The Court held that Thompson's land remained part of the reservation, the reservation's boundary had not been diminished by any treaties, and the fact that Thompson owned the land in question in fee simple had no bearing on the outcome of the case. See id.
\end{itemize}
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been held in fee simple and claimed that because the lands were no longer alienable and were now part of the reservation, the state could not tax it. 226 While initially noting that states cannot tax Indian lands absent Congressional authorization, the Court found authorization once the land became alienable. 227 The mere fact that the Indian tribe reacquired the lands could not revive the original inalienability of the lands. 228


The taxation of land is not the only taxation issue that has been litigated between the Indian tribes and the states. For example, in Central Mach. Co. v. Arizona State Tax Comm'n, 229 Arizona attempted to tax a sale transaction occurring on a reservation, conducted by a corporation that was not licensed as an Indian trader under the Indian Trader statutes. 230 The Supreme Court chose to invalidate the tax finding that the all inclusive Indian Trader statutes are, "in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 231 The regulatory scheme of the statute, providing that the Commissioner of Indian Affairs has the power to regulate all

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226 See Leech Lake, 524 U.S. at 106. (noting that by 1977, the Leech Lake tribe owned only 27,000 acres out of 588,684 acres of the reservation—prompting them to begin buying back the land).

227 See id.

228 The Court did note that if the land was restored to federal trust status under 25 U.S.C. § 485 it's inalienability might be restored and the tax might be invalid. See id.


aspects of Indian trading, has authority over all persons seeking to trade with the Indians, and that the President has the authority to ban any article from Indian land, led to the conclusion that federal law preempted the state taxation scheme.\textsuperscript{232} The Court did not go so far as to say that the tax should not be levied on the transaction, it simply said that until Congress gives a clear, unequivocal statement allowing the taxation (like repealing the Indian trader statute) it would remain prohibited.\textsuperscript{233} The holding of this case provides another example of the extensive control the federal government exercises over Indians.

Underlying all of these decisions is the proposition that taxing authority over Indian lands is vested in the federal government. States obtain the ability to tax Indian reservations only when Congress expressly grants the authority to do so. It is apparent from these cases that the federal government retains extensive regulatory authority over Indian lands. Not only does the federal government have taxing authority, but, in limited circumstances, the federal government also grants this authority to the states. The regulatory authority the federal government asserts over Indian land probably would extend to situations in which a corporation conducts business on a reservation—including the holding of a board of director's meeting. The simple fact that the government can control who can conduct business with an Indian government necessitates this conclusion.

C. \textit{Reservations as Part of the United States}

\textsuperscript{232} See \textit{id.} at 164

\textsuperscript{233} The Court, perhaps providing a hint to Congress with its language, said, "[i]t may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals the Indian trader statutes, however, we must give them 'a sweep as broad as [their] language."' \textit{id.} at 166 (quoting United States v. Price, 383 U.S. 787, 801 (1966)) (alterations in original).
While the preceding cases are suggestive, the question still looms, is an Indian reservation a "foreign country" wholly independent of the United States, yet residing within its borders? The "United States Supreme Court has cautioned, the words 'foreign country' have no definitive meaning outside the statutory context within which they are construed[.]..." Most trust territories of the United States enjoy a type of "quasi-sovereignty" that is subject to the will of Congress and similar to that of a state. This status in no way exempts the territory from any statute enacted by Congress. The problem with trying to establish a bright line rule for the status of an Indian reservation is that they are not entirely treated as states and not entirely treated as territories. True, reservation land is held in trust by the United States for the Indians and the Indians get occupancy and use rights under that trustee relationship, but who ultimately owns the land? For more guidance, one must go back to the Supreme Court's decision in Cherokee Nation v. Georgia, which explains:

The Indian territory is admitted to compose a part of the United States. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those same restraints which are imposed upon our own citizens. [I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory which we assert


236 See id. at 141.

237 30 U.S. 1 (5 Pat.) (1831).
a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to guardian. . . . They and their country are considered by foreign nations, as well as ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.238

The language is as persuasive today as it was then. It clearly stands for the proposition that ultimate title to the Indian land rests in the United States and, for all intents and purposes, such land is the United States. This is far different from the way that foreign embassies are treated by the United States. Under the Foreign Sovereign Immunities Act ("FSIA"), a "foreign state" is deemed to be immune from the jurisdiction of U.S. courts.239 A foreign state is statutorily defined to include an agency or instrumentality of a foreign state.240 Case law has expressly held that a consulate is a separate legal person and qualifies as a foreign state under the FSIA.241 This grants an embassy, as a consular organ of a foreign state, the same sovereign immunity accorded to a foreign state. In contrast, an American Indian tribe is not deemed a foreign state under the FSIA.242 For all intents and purposes, a captive insurance company could hold their

238 Cherokee Nation, 30 U.S. at 17-18.
241 See Gerritsen v. De La Madrid Hurtado, 819 F.2d 1511 (9th Cir. 1987); Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018 (9th Cir. 1987); Gerritsen v. Consulado general de Mexico, 989 F.2d 340 (9th Cir. 1993).
242 Although no court has directly ruled on this issue, it has been addressed in dicta. For example, in Bank of Oklahoma v. Muscogee Nation, 972 F.2d 1166 (10th Cir. 1992), a tribe tried
board meetings in a foreign embassy without changing their tax status, but the same meeting held on an Indian reservation, in light of the case law and statutory sections previously cited, would result in business with the United States and effectively change the company's tax status.

One last case, *Holt v. Comm'r of Internal Revenue*,\(^{243}\) will help to illustrate how correct the above assumption is. Holt was a noncompetent member of the Sioux tribe. He obtained a grazing permit and operated a cattle business on tribal land held in trust for the tribe by the United States.\(^{244}\) Holt argued that the government should not be allowed to tax his income derived from ranching and farming operations that occurred on trust lands.\(^{245}\) The court rejected his argument, saying that the imposition of the tax presented no "burden or encumbrance upon the tribe's interest in such land."\(^{246}\) Of particular note is the court's belief that a non-Indian could have obtained a similar permit and "[u]nquestionably, income derived from land held under a grazing permit by a non-Indian would be taxable."\(^{247}\) *Holt's* essential holding is that land held in trust for use by Indians remained subject to the taxing jurisdiction of the federal government when it is used by a non-Indian for a business purpose. Analogies are never perfect, but this seems to be strong evidence that a foreign corporation would be subject to United States taxing
authority were it to hold a meeting on tribal land. It also serves as further proof of how limited the sovereignty of the American Indian really is.

CONCLUSION

The status of an American Indian nation has been described as "quasi-sovereign tribal entities,"248 "quasi-sovereign nations,"249 "dependent nations,"250 and "semi-sovereign existence."251 The phrases above evidence a strong reluctance on the part of the courts to acknowledge Indian nations as independent sovereigns. It is true that no direct authority exists for the proposition that Indian land is part of, and belongs to, the United States, but the totality of the circumstances suggests that result. When the issue is looked at in the aggregate, Congress' intent to treat the Indians as part and parcel of the United States is clear. Why is Congress, the federal government, and the judicial system so afraid to recognize tribes as independent sovereigns? The reluctance must flow, at least in part, from outdated notions of non-Indian superiority over the American Indian. The American Indian is a minority in the United States, just as oppressed and overlooked as other minorities. They struggle to have their causes heard, their grievances redressed, and their sovereignty recognized. The American Indian saga is an extraordinary blemish on the face of democracy. As one American Indian scholar has noted, "[i]ike the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of minorities, reflects the rise and fall in our democratic faith . . . ."252 His analysis of the history of federal Indian policy

249 Iron Crow, et. al. v. Oglala Sioux Tribe, 231 F.2d 89, 92 (8th Cir. 1956).
250 Colliiflower v. Garland, 342 F.2d 369, 376 (9th Cir. 1965).
251 Quechan Tribe of Indians v. Rowe, et. al., 531 F.2d 408, 411 n.4 (9th Cir. 1976).
252 John Fredericks III, America's First Nations: The Origins, History and Future of American
is both poignant and correct. The federal government should be returning aspects of sovereignty instead of eroding them slowly and meticulously. Some may argue that the American Indian has become too dependent on the financial support of the United States to take that tract, but that argument is without merit. The United States provides millions of dollars of support to foreign countries without attempting to subvert the foreign nation's sovereignty—the federal government can do the same with the Indian tribes. If a tribe finds it cannot exist without federal assistance, then it can make the independent decision to render itself subject to the jurisdictional control of the United States. However, if the tribe can stand on its own as an independent sovereign, the government should respect and honor that sovereignty.

*Indian Sovereignty, 7 J. L. & Pol'y 347, 350 (1999).*
QUICK REFERENCE

The following reasons all militate against a finding that an Indian reservation is a sovereign entity separate from the United States:

- Indians are granted full citizenship rights on the basis of being born in the United States;
- The United States retains jurisdiction over all transactions between Indians and non-Indians, even if the transaction occurs on tribal land;
- Indians are subject to federal taxation and, in some instances, state taxation;
- States can exercise criminal and civil jurisdiction over Indian reservations as long as the exercise of such power does not conflict with a fundamental right of Indian self-government or with a federal statute;
- Congress has exclusive and complete plenary power over the tribes;
- The concepts of full faith and credit and dual sovereignty with respect to tribal court judgments have been muddled by differential treatment from the federal and state governments;
- Tribal gaming forces tribes to sacrifice measures of their sovereignty to the states;
- Business entities formed under Indian law are domestic corporations;
- For most taxation purposes, Indian reservations and governments are treated like states;
- Indians retain only limited sovereignty, they exercise exclusive jurisdiction over their own members, but, in all other actions and dealings, their rights are subject to the overriding sovereignty of the United States;
- The United States government regulates a substantial amount of commercial activity between Indians and the business community;
- 28 U.S.C. § 1604 (Foreign Sovereign Immunities Act), which prohibits the United States from exercising jurisdiction over a "foreign state" (like a foreign embassy), is wholly inapplicable to Indian reservations. The statute applies only to entities that lie outside the jurisdiction of the U.S. Indian reservations are subject to U.S. jurisdiction in most instances and, therefore, the statute does not apply;
- The land comprising an Indian reservation is held in trust for the Indians by the United States, the Indians obtain use and occupancy rights only, ultimate title to the land rests in the United States; and

- Whatever rights the Indians have, they are always subject to complete defeasance by act of Congress.