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One of the persistent themes that has tormented tribal governments throughout Indian history relates to the aggressive attempts by state governments to extend their laws into Indian country. With the extension of state legislation comes the assumption of state jurisdiction over Indian affairs on reservations, and this has been of no small concern to tribal authorities. In the early 1950s, the states played a role in successfully convincing Congress to pass Public Law 280,[1] which imposed both state civil and criminal jurisdiction onto reservations in several states. On the whole, however, tribal governments have been able to maintain a protective shield against this threat of encroachment. Still, pressure from state governments has not subsided in recent years, especially in view of the fact that Indian country holds so much in the nature of mineral wealth. The importance of this continuing Indian-state struggle requires careful examination.

This article will explore the role the Supreme Court has played in providing Indian nations with protection against attempted state intrusions into Indian country. Initially, the Court erected a firm barrier providing tribes with almost complete immunity. Internal tribal sovereignty was the justification underlying this cloak of immunity. Although recent decisions have shown a drift in a direction that affords tribes less protection than they would like, analysis of the cases involved reveals that the erosion has not been significant. What has occurred is a change in the criteria used to determine when state encroachments are permissible and when they are not.

Roots of Tribal Sovereignty

The turmoil that persisted between the Indian and non-Indian communities during the embryonic days of the nation's development demanded that some kind of action be taken to define the status of Indian nations. Clearly this was a responsibility to be shouldered by the federal government. Some political institution or personality, however, had to assume the role of delineating the relationship between the Indian nations and the fledgling

1. 18 U.S.C.A. § 1162.

American government. The Supreme Court stepped forward to assume the responsibility. The political personality thrust into the limelight was Chief Justice of the Supreme Court John Marshall.

The first serious attempt by the Court to define the federal government's relationship to Indian nations was *Johnson v. McIntosh* in 1823.[2] Chief Justice Marshall used his opinion in this decision to develop a theory of Indian subservience to the federal government. While paying lip service to the notion of continued Indian autonomy, Marshall reasoned that conquest gave the white man ownership and title to Indian lands. This was subject, however, to the continued right of Indian occupancy and use. Thus, while the Indians' interest in their lands was not completely extinguished, it was altered significantly in that the federal government became the owner of the soil.

Land obviously was (and continues to be) the Indians' most precious resource. And while the right to occupancy and use is an important interest retained by the Indians, ownership in the hands of the federal government relegated the tribes to a dependent status.

Johnson v. McIntosh created a landlord-tenant relationship between the government and Indian tribes. The federal government, as landlord, possessed not only the power to terminate the "tenancy" of its Indian occupants, but it could materially affect the lives of the Indians through its control and regulation of land use. With the exercise of power comes responsibility, and *Johnson* constituted the first instance in which a judicially recognized federal responsibility over Indian affairs was articulated. Indeed, much of the power the federal government exercises over Indian affairs today emanates from the concept of federal ownership of Indian land and its sovereignty over it. This notion, as a matter of fact, constitutes the basis upon which the Court in the *Cherokee Nation Cases*[3] developed its theory of federal guardianship over Indian affairs.

The first three decades of the nineteenth century were fragile ones in the history of American government. The national government was far from strong, and it was continuously faced with recalcitrant states challenging its authority. It was during this period of political turmoil that the *Cherokee Nation Cases*

2. 21 U.S. (8 Wheat.) 543 (1823).

3. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

arose. The state of Georgia was intent on removing the Creek and Cherokee Indians out of the western portion of the state. State authorities openly flouted the terms of federal treaties and threatened to use force against both the Indians and American troops if that proved necessary to accomplish the removal. While the federal government did initiate a policy by which to move the Indians, both the Creeks and the Cherokees were intent upon staying in their homelands and thus the government's attempts at evacuation went slowly. The discovery of gold on the Indians' land made the state even more determined to expedite the exodus of the two tribes. At one point the governor of Georgia, having issued orders to conduct surveys in the area, threatened civil war if the state's efforts were hindered by the federal government. President Adams answered this with a threat of his own; he would send in federal troops. The pending conflict was averted when at the last minute the Creeks capitulated and moved west of the Mississippi River.

The Cherokees were somewhat more stubborn than the Creeks. In 1827 the Cherokee Nation adopted a written constitution and proclaimed itself to be an "independent" state. The Georgia legislature responded to this with a series of laws that extended state jurisdiction over all Indian territory, annulled the Cherokee laws, and directed the seizure of all Cherokee lands. An opportunity to demonstrate just how serious the state of Georgia was in the matter developed in 1830. A Cherokee Indian named George Tassel was arrested and tried for a murder that had been committed within the Cherokee territory. Normally this offense would have fallen within the jurisdiction of the Cherokee Nation, but the state prosecuted the case claiming that it had jurisdiction over all Indian lands within its boundaries. Tassel was convicted, and this was upheld by the Georgia Supreme Court as properly within the jurisdiction of the state. The Cherokee Tribe appealed to President Jackson to uphold the tribal treaty rights, but unlike President Adams, Jackson refused to take action in defense of the tribe. Tassel then appealed to the United States Supreme Court under its original jurisdiction, asking the Supreme Court to issue an injunction preventing the state of Georgia from extending its criminal law into Indian country in violation of the tribe's treaty rights. The Cherokees petitioned the Supreme Court in the capacity of an independent nation. Under Article III, section 2 of the Constitution, foreign states are permitted to bring a cause of action to the Supreme Court under its original jurisdiction. The Cherokees felt that they qualified under this provision.

In *Cherokee Nation v. Georgia*,[4] the United States Supreme Court dismissed the Cherokee petition. The Court concluded that an Indian tribe was neither a state nor a foreign nation within the meaning of the Constitution, and hence, the Cherokees could not invoke the original jurisdiction of the United States Supreme Court. If it was true that the Indian tribe had a legal grievance to pursue, the Supreme Court was not the appropriate forum in which to prosecute that right. The Court simply did not have the jurisdiction. At this point the issue could have been closed with nothing more said. That was not the style of Chief Justice Marshall, however. Marshall seized the occasion to clarify not only the relationship of Indian tribes to the government but to spell out a basis for the federal government's assumption of responsibility over Indian affairs.

Marshall proceeded to reason that the condition of Indian people was unlike that of any other people in existence. Using the federally owned land theory discussed in *Johnson v. McIntosh*, Marshall noted that while the Indians possessed an unquestionable right to occupy the land, the lands were still within a territory to which the United States asserted a title independent of the Indians' will. This led to Marshall's characterization of Indian tribes as "domestic dependent nations." Indians resided in a state of pupilage. Their relation to the United States resembled that of a ward to his guardian.

> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.[5]

Marshall's views in *Cherokee Nation v. Georgia* laid a foundation upon which much of the idea of federal responsibility over Indian affairs is predicated. Unfortunately, only one other justice, MacLean, joined the Chief Justice in his opinion. Two justices disagreed entirely with Marhsall's reasoning. While concluding that Marshall was correct in rejecting jurisdiction in the

4. 30 U.S. (5 Pet.) 1 (1831).
5. *Id.* at 16.

case, Justices Baldwin and Johnson argued that Indian nations possessed no sovereignty whatsoever. Justices Thompson and Story both dissented, concluding that the Cherokees did qualify as a state under the Constitution so as to bring a cause of action. They defined a state as a body of men united together to procure their mutual safety and advantage by means of their union. They governed themselves by their own authority and laws. The fact that a weak state, in order to provide for its safety, placed itself under the protection of a stronger state, did not strip the former of its sovereignty.[6] Clearly the Cherokees qualified under these circumstances.

The Court's decision in the *Cherokee Nation* case is perplexing. The justices split three ways in their views[7]:

Marshall-MacLean: Tribes are domestic dependent nations.
Thompson-Story: Tribes are sovereign nations.
Baldwin-Johnson: Tribes have no sovereignty.

Although the justices divided 2-2-2 in their perspectives of Indian sovereignty, there did emerge a clear four-justice bloc that supported *some* notion of tribal sovereignty. Interestingly, Justices Thompson and Story had not written their opinion at the time the decision was initially announced. The critical response to the case was so anti-Indian that Chief Justice Marshall persuaded Thompson and Story to pen their thoughts into a separate opinion so as to broaden the base of legal support for the Indian cause. The Cherokees, of course, lost the case, but the federal guardianship philosophy of Marshall was to prove an enduring benefit to the Indians in the future.

Chief Justice Marshall was a consummate politician. He was convinced that had he ruled in favor of the Indians, President Jackson would have refused to enforce the Court's order. Marshall thus avoided a confrontation with the President by concluding that the Court had no jurisdiction over the case. In the true art of Marshallian activism, the Chief Justice inserted his "domestic dependent nation" and "guardianship" theories into the Court's opinion. These ideas may have been nothing more than dicta, but it was dicta that has been both persuasive and enduring over the years.

While Marshall's ideas in the *Cherokee Nation* case may have persisted for decades, they were not of great comfort to the

6. *Id.* at 52-53.
7. Justice Duvall did not participate in the decision.

Cherokee Indians who lost the case. The tribe needed to seek out another case by which to restrain the state of Georgia from destroying the tribal government and confiscating Indian lands. The opportunity to challenge Georgia came when the state arrested Samuel A. Worcester in the Cherokee territory in 1831. Worcester was one of several missionaries working on the Indian reservation who were arrested for violating Georgia law. The law required all non-Indian residents of the Cherokee territory to obtain a license from the governor of the state. The missionaries were convicted of failure to obtain a license and sentenced to four years of hard labor. While all of the defendants were extended pardons, Samuel Worcester and Elizur Butler refused to accept the offer. They decided to test the constitutionality of the state law and the United States Supreme Court agreed to hear the case. As in the *Cherokee Nation* case, the state of Georgia refused to appear.

Chief Justice Marshall used *Worcester v. Georgia*[8] to reaffirm his notions of Indian sovereignty that were enunciated in the first *Cherokee Nation* case. Laying the foundation with a historical overview, Marshall emphasized that the Indians had their own political institutions and were engaged in self-government. The British never attempted to interfere with domestic internal affairs of the Indians. The Indians were considered to be capable of self-government and were permitted this prerogative. The colonies followed a similar approach in dealing with the Indians. In analyzing the Treaty of Hopewell[9] between the United States and the Cherokee Nation, Marshall concluded that the treaty explicitly recognized the national character of the Cherokees and their right to self-government. There was nothing in the treaty to indicate that the Cherokees were to be stripped of their national character. "The treaties and laws of the United States [then], contemplate the Indian territory as completely separated from that of the states. . . ."[10] All intercourse with the Indians was to be carried on exclusively by the government of the Union.

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves. . . . The whole intercourse between the United States and this nation, is, by our

8. 31 U.S. (6 Pet.) 515 (1832).
9. 7 Stat. 20.
10. 31 U.S. (6 Pet.) 515, 557 (1832).

constitution and laws, vested in the government of the United States.[11]

In the first *Cherokee Nation* case, Marshall defined the relationship between the federal government and Indian nations. While conceding that the Indians possessed a degree of internal sovereignty as "domestic dependent nations," they still were to be subordinate to the overriding will of the federal government. This power of the white man over the Indians, however, was tempered by the fact that the federal government had to treat Indian tribes as a "guardian" would treat his "ward."

The sovereignty of Indian nations reached full fruition in the second case, *Worcester v. Georgia*. Here Marshall defined the relationship between Indian nations and the various states. Focusing heavily on the right of Indians to govern themselves *internally*, Marshall created a shield of sovereignty by which to protect Indian tribes from state encroachments. Indian sovereignty then became multifaceted. On one hand, it was a formidable barrier to state encroachment into its affairs; on the other hand, it was a fragile legality capable of extinguishment if and when the federal government felt so inclined.

Unlike *Cherokee Nation v. Georgia*, the Indians won their case in *Worcester*. The victory, however, was more illusory than real. The state of Georgia announced that it had no intention of complying with the Court's order. Politics clouded the whole affair. It was in response to this case that President Jackson allegedly stated, "John Marshall has made his decision: now let him enforce it." Jackson, indeed, took no steps to implement the Court's opinion. For years Jackson sided with the state of Georgia in its attempt to remove the Cherokees and he was not about to take up the cause of the Indians now, regardless of how embarrassing the *Worcester* case may have been. Ultimately, Jackson was able to persuade the governor of Georgia to pardon Worcester and Butler, who by this time were willing to accept it. Political compromise averted a constitutional crisis between the Executive and the Supreme Court.

What happened to the Cherokees? Their legal victory in *Worcester* was short-lived. President Jackson was finally able to move the Cherokees out of Georgia to a home in the west. Their journey westward came to be known as the "Trail of Tears." Even the legal victory the Indians won in *Worcester* was tempered

11. *Id.* at 560-61.

for a period of time. Mr. Justice MacLean, in a concurring opinion in *Worcester*, raised the question as to whether there were not some circumstances by which states could exercise power in Indian country. Previewing a policy of assimilation, MacLean reasoned that Indian self-government was undoubtedly contemplated to be of a temporary nature. If and when Indians became incapable of self-government, or their numbers were reduced so low as to lose the power of self-government, then the states could extend their laws into Indian country.[12] MacLean's concurring opinion provided lower courts with an avenue by which to continue to review cases to determine whether the Indian tribes had lost their capacity to survive. In the long run, however, it was Marshall's ideas and not those of MacLean that prevailed.

The Erosion of Tribal Sovereignty: The Rise of Federal Preemption

Over the years the "domestic dependent" Indian nations under the shield of tribal sovereignty became exempt from state taxation,[13] political regulation,[14] and administrative intrusion,[15] to name but a few areas of concern. The Supreme Court thus initially erected a protective barrier insulating Indian nations from hostile state governments.

The difficulties confronting Indian-state relations, however, have grown, not evaporated, with time. Tribal fears of state intrusion have been real and not merely figments of the Indian imagination. The quest for Indian land, the lack of understanding by both whites and Indians of one another's cultural differences, jealousies over Indian exemptions from state laws and regulations, racial discrimination, economic competition—all contributed to a troubled relationship between the reservations and white settlements.

Recent history has witnessed a drift away from the protective shield the Marshall Court bestowed upon tribal governments. The initial erosion of the doctrine of internal sovereignty appeared in 1958 in an important decision, *Williams v. Lee*.[16] A superior

12. *Id.* at 593.

13. The Kansas Indians, 72 U.S. (5 Wall) 737 (1866).

14. Red Lake Band of Chippewa Indians v. Minnesota, 248 N.W.2d 722 (1976).

15. Confederated Tribes of Colville Reservation v. Washington, 412 F. Supp. 651 (E.D. Wash. 1976).

16. 358 U.S. 217 (1958).

court in the state of Arizona attempted to exercise civil jurisdiction over a case in which a non-Indian sought to collect an overdue debt for goods he had sold to an Indian couple on the Navajo Reservation. Since the Navajo tribe had its own tribal court system in operation, the Supreme Court held that the state of Arizona could not extend its jurisdiction onto the Indian reservation. "There can be no doubt," the Court reasoned, "that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservations' affairs and hence would infringe on the right of the Indians to govern themselves."[17] The key question here is whether in the absence of congressional legislation, the state intrusion would infringe upon the right of the tribe to govern itself (self-government). If it does, the protective shield remains in place. But if it does not, it may be permissible for the state to extend its laws onto the reservation.

Williams v. Lee was a departure from the *Worcester* decision; under the *Worcester* decision, the protective buffer was high and almost impregnable. Under *Williams*, however, if the state intrusion did not infringe upon tribal self-government, the state might be able to extend its jurisdiction onto the reservation. A few years later the Supreme Court formally conceded that its approach to tribal sovereignty was changing. Justice Frankfurter announced that the general notion of John Marshall in *Worcester* that state law cannot extend onto the reservation had yielded under closer analysis.[18]

In 1973 the Court went a step farther in its erosion of tribal sovereignty. In *McClanahan v. Arizona Tax Commission*,[19] Arizona attempted to apply its state income tax to the wages of a Navajo Indian whose entire income was derived from within the Navajo Reservation. In resolving this issue in favor of the Indian complainant, the Supreme Court indicated that there was a clear trend away from the idea of Indian sovereignty. The concept of sovereignty was to be used only as a "backdrop" against which applicable treaties and statutes must be read.[20] The Court then proceeded to talk in terms of "federal preemption." The question was not so much one of tribal sovereignty but whether the treaties, statutes, and tribal laws had given rise to a "preemption" of the field so as to preclude state intrusions into Indian country. Today

17. *Id.* at 223.
18. Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962).
19. 411 U.S. 164 (1973).
20. *Id.* at 172.

the past doctrine of internal tribal sovereignty has been relegated to a subordinate position to a more flexible criteria—federal preemption of Indian affairs. The preemption is determined by the Court's examination of past treaties, statutes, and tribal laws. As a backdrop, Indian sovereignty assumes a role, but only in helping to measure the meaning of these treaties and statutes.

There is little doubt that *McClanahan* and its principle of federal preemption have displaced *Worcester* as the primary consideration in determining when states may extend their laws onto the reservation. As important as *McClanahan* is, however, the opinion fails to bring much understanding to just how tribal sovereignty as a backdrop of analysis should be used. Clearly, the Court was not about to abandon the concept of sovereignty completely. But did the justices mean to place the doctrine on a back shelf in hopes that it would be lost in the dust of time?

In 1980 the Court provided an answer to this question. The state of Arizona had applied a motor carrier license tax and a use fuel tax on the operations of a non-Indian logging company that had contracted with the White Mountain Apaches to sell, load, and transport timber on the White Mountain Apache Reservation. The Indian tribe and the timber company joined forces in an attempt to have the taxes declared invalid. When the issue reached the Supreme Court in *White Mountain Apache Tribe v. Bracker*,[21] the Court held the taxes to be inapplicable to the reservation activity on the ground that the federal government, having undertaken a comprehensive regulation of the harvesting and sale of tribal timber, had preempted the field. This precluded the state of Arizona from imposing its taxes on the reservation.

The *White Mountain Apache Tribe* case is extremely important in view of Justice Thurgood Marshall's discussion of the tests to be used in such disputes and the role of tribal sovereignty in making these determinations. Marshall reasons that the "semi-independent position" of Indian tribes has given rise to two independent but related barriers to the assertion of state authority over tribal reservations. The first of these is that the federal government may have preempted the field.[22] The second barrier is that state encroachment may unlawfully infringe on the right of tribal self-government.[23] Either of these barriers standing alone may be sufficient to invalidate the state intrusions. If there was

21. 100 S.Ct. 2578 (1980).
22. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973).
23. Williams v. Lee, 358 U.S. 217 (1958).

any doubt as to how the Court was going to approach these problems prior to the *White Mountain Apache Tribe* case, it is clearly resolved by this decision.

In addition to delineating the role of the *McClanahan* and *Williams* doctrines, Justice Marshall proceeds to elaborate further on the concept of tribal sovereignty. "[T]raditional notions of Indian self-government are so deeply engrained in our jurisprudence," Marshall reasons, "that they have provided an important backdrop . . . against which vague or ambiguous federal enactments must always be measured."[24] It is not helpful in cases involving American Indians to use the general laws of federal preemption that have emerged in other non-Indian areas of the law. The tradition of Indian sovereignty "must inform the determination whether the exercise of state authority has been preempted by operation of federal law."[25] What Marshall is saying here is that tribal sovereignty as a backdrop for interpreting statutes assumes a meaningful role in judicial decision making. Indian sovereignty is not to be relegated to a pleasant doctrine slowly vanishing into antiquity. The backdrop requirement demands that treaties and federal statutes be interpreted "generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."[26] Under such an interpretation, federal preemption is more easily attained in the area of Indian affairs than in other areas of the law.

As the law stands today, then, a court determining the validity of an attempt by a state to extend its jurisdiction into Indian country must first examine the relevant treaties and statutes against a *meaningful* backdrop of tribal sovereignty to determine if federal preemption has occurred. If it has, then the states are foreclosed from intruding. If the court finds that federal preemption has not taken place, then the court turns to the *Williams* test to see if the state laws or activity conflict with tribal self-government. If they do, then the state intrusion again is invalidated. Only if there is no conflict can a state extend its civil laws and resultant assumption of jurisdiction onto the reservation.

The Impact on Indian Country

Until now the Supreme Court has permitted state incursions in-

24. White Mt. Apache Tribe v. Bracker, 100 S.Ct. 2578 (1980).
25. *Id.*
26. *Id.* at 2584.

to Indian country in only two instances. Both cases, interestingly, deal with state attempts to extend their tax laws to cover the sale of cigarettes in Indian territory. In 1976 the Supreme Court in *Moe v. Confederated Salish & Kootenai Tribes*[27] held that the state of Montana could validly require Indian sellers on the reservation to collect a cigarette tax from *non*-Indian consumers. This was thought to be but a minimal burden on the Indian seller and as a minimal burden, it hardly interfered with tribal self-government. The tax, however, was only valid as collected from *non*-Indian consumers. The state could not extend its taxing power to Indian consumers for this would conflict with federal statutes that had preempted the field and thus has been barred by *McClanahan*.

In 1980 the Supreme Court was faced with a similar situation. The state of Washington had imposed a tax on cigarettes sold by Colville Indians to both non-Indians and Indians who were not members of the Colville Tribe. Since the cigarette sales took place on the reservation, this was viewed as another attempt by a state to extend its laws into Indian country. The Supreme Court resolved the issue in a manner similar to the way in which it handled the *Moe* decision. The Court upheld the validity of the state tax on both the white purchasers and the nontribal Indians.[28] Unfortunately, Mr. Justice White, who delivered the opinion, does not spell out concisely the tests to be used in deciding issues such as these.

A careful reading of the opinion, however, reveals that both the *McClanahan* test and the *Williams* doctrine are used. White notes that: "The federal statutes cited to us, even when given the broadest reading to which they are fairly susceptible, cannot be said to preempt Washington's sales and cigarette taxes."[29] This clearly is an application of the *McClanahan* preemption test. Later in the opinion the Justice also alludes to the *Williams* doctrine: "Washington does not infringe the right of reservation Indians to 'make their own laws and be ruled by them'. . . ."[30]

The Court in the *Colville* case thus permitted the state of Washington to extend its civil law onto the reservation. It is important to note, though, that the extension of state jurisdiction

27. 425 U.S. 463 (1976).

28. Washington v. Confederated Tribes of Colville Reservation, 100 S.Ct. 2069 (1980).

29. *Id.* at 2082.

30. *Id.* at 2083.

is extremely limited. The thrust of the statute was designed to reach (1) non-Indians, and (2) Indians who were not members of the Colville Tribe. Indeed, the only burden that the Colville Tribe had to assume was in the collection of the state tax and this was felt to be a minimal imposition on the tribe. While the Colville traders did argue that they were being denied a competitive marketing advantage by having to collect the state tax from non-tribal consumers, the Court refused to accept this argument. The denial of an artificial competitive market advantage was viewed as not contravening the right of reservation Indians to make their own laws and to be ruled by them.

While Indian tribes will view the *Colville* case as important in that it permits the incursion of a state taxing law into Indian country, upon reflection they might conclude that the infringement is one of little significance. Since the objective of the state law pertains to non-Indians and nontribal members, the sanctity of the reservation is preserved. The only blow the reservation receives is in the loss of its competitive market advantage.

There is no doubt that the flow of Supreme Court decisions has been away from the firm stance of immunity afforded the Indian tribes by *Worcester v. Georgia*. The trend of decisions, however, may be a reflection of the changing relationship between Indian reservations and white communities. Tribes are not becoming more isolated from white society; rather, their activities are becoming more interconnected with it. As the contact between Indians and whites increases, particularly in the economic field where competition may be present, the more states are going to attempt to extend their laws and jurisdiction into the affairs of the reservations. The decisions of the Supreme Court are a mirror of these changing conditions. In responding to the intricacies of this closer Indian-state contact, there is every indication that the Court will continue to preserve the sanctity of Indian affairs on the reservation from state encroachment in most respects.